No. 16-6496

IN THE

Supreme Court of the United States

STACEY JOHNSON, ET AL.,

Petitioners,

v.

WENDY KELLEY, IN HER OFFICIAL CAPACITY AS DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, AND ARKANSAS DEPARTMENT OF CORRECTION,

Respondents.

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

BRIEF FOR THE LOUIS STEIN CENTER FOR LAW AND ETHICS AT FORDHAM UNIVERSITY SCHOOL OF LAW AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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November 21, 2016

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INTEREST OF AMICUS CURIAE[1]

The Louis Stein Center for Law and Ethics is based at Fordham University School of Law and sponsors programs, develops publications, supports scholarship on contemporary issues of law and ethics, and encourages professional and public institutions to integrate moral perspectives into their work. Over the past decade, the Stein Center and affiliated Fordham Law faculty have examined the ethical dimensions of the administration of criminal justice, including the ethical and historical dimensions of the death penalty and execution methods. The Stein Center has submitted amicus briefs in three prior cases in which this Court has been asked to examine methods of execution: *Bryan v. Moore*, 528 U.S. 960 (1999), *cert. dismissed as improvidently granted*, 528 U.S. 1133 (2000), which the Court had granted to consider whether electrocution violated the Eighth Amendment's Cruel and Unusual Punishments Clause; *Baze v. Rees*, 553 U.S. 35 (2008), in which this Court examined the constitutionality of lethal injection as implemented in Kentucky and in which this Court cited the Stein Center brief; and *Glossip v. Gross*,

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[1] Pursuant to Rule 37.3, the parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

135 S. Ct. 2726 (2015), in which this Court examined Oklahoma's implementation of lethal injection.

Implementation of lethal injection as a method of execution implicates ethical questions important to the Stein Center. The evolution of execution methods in the United States generally suggests a public consensus opposed to the infliction of severe pain and suffering in the course of executing individuals sentenced to death. At the same time, it is doubtful whether in practice execution methods achieve that goal. In the context of lethal injection, there are serious concerns whether prison officials, legislators, and courts have responded to the risks associated with the implementation of lethal injection in an ethical manner.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In recent years, this Court has been asked to review the constitutionality of lethal injection protocols on numerous occasions. Such review has resulted in necessary judicial scrutiny of the most severe punishment a State may inflict. This case concerns the ability of courts to continue to perform this essential judicial function. Arkansas (and separately, the U.S. Court of Appeals for the Eleventh Circuit, *Arthur v. Comm'r, Ala. Dep't of Corr.*, No. 16-15549, 2016 WL 6500595 (11th Cir. Nov. 2, 2016), *cert. pet. filed* No. 16-602) wrongly understood this Court's decisions in *Baze* and *Glossip* to foreclose judicial review of the constitutionality of a State's chosen execution method and protocol unless the State already

authorizes another method to which the inmate may point as a feasible and readily available alternative. This Court should reject this impermissible narrowing of the scope of judicial review of the constitutionality of execution methods.

(1) State legislatures repeatedly have demonstrated a willingness to adopt and retain methods of executions that violate the Eighth Amendment's prohibition on cruel and unusual punishment. For this reason, this Court has long recognized a right to meaningful judicial review of the constitutionality of execution methods.

(2) The Arkansas legislature initially delegated every detail for carrying out lethal injection executions to the state department of corrections. Decades later, the Arkansas Supreme Court determined that this delegation of authority violated the separation of powers doctrine, and the legislature subsequently narrowed the method-of-execution statute. Now, only four years after requiring the legislature to identify with specificity the State's execution method, the Arkansas Supreme Court has interpreted this Court's decisions in *Baze* and *Glossip* to limit the alternate execution methods on which an inmate may rely to show a constitutional violation to those methods already identified in the statute. The Arkansas Supreme Court reached this result notwithstanding the lower court's finding that the State's midazolam protocol may have posed a substantial risk of intolerable pain. By interpreting *Baze* and *Glossip* in this manner, Arkansas has insulated its execution method statute from judicial review.

(3) This Court's decisions foreclose such an approach. *Baze* and *Glossip* nowhere require a *statutory* alternative but require only that such an alternative be feasible. The need for uniform application of federal constitutional law precludes such an approach, which would fracture Eighth Amendment jurisprudence by allowing an inmate to succeed in challenging an unnecessarily painful method of execution in one State but not another. If the Arkansas Supreme Court's interpretation is not reversed, a State legislature will not only be permitted to select the most painful and barbaric method of execution, but it also will be able to prevent constitutional review by limiting the available options to those selected by the legislature.

This Court should grant the Petition and summarily reverse.

ARGUMENT

I. THIS COURT CONSISTENTLY HAS RECOGNIZED A RIGHT TO JUDICIAL REVIEW TO ENSURE THAT EXECUTION METHODS COMPORT WITH THE EIGHTH AMENDMENT

Historically, State legislatures have moved toward the adoption of new execution methods as a result of a growing consensus that the prior methods posed a risk of unnecessary cruelty or lingering death. Judicial review has played an important role, serving as a catalyst for movement toward more humane methods of execution. Given the importance of judicial review to ensuring the

constitutionality of execution methods, this Court has long recognized the right to meaningful Eighth Amendment review.

A. Historically, State Legislatures Have Approved Painful And Barbaric Methods Of Execution

Today, all States that provide for capital punishment use lethal injection as their exclusive or primary means of execution. *See Baze v. Rees*, 553 U.S. 35, 42 (2008). Before lethal injection became the preferred method of execution, States employed a number of methods ultimately deemed inhumane. But each time a State moved toward a method of execution thought more humane, experience showed the new method resulted in intolerable pain and suffering.

Hanging. In the mid-nineteenth century, hanging was the "nearly universal" method of execution in the United States. *Campbell v. Wood*, 511 U.S. 1119, 144 S. Ct. 2125, 2125 (1994) (Blackmun, J., dissenting from denial of *certiorari*). Although hanging initially was perceived as humane, it proved in practice to result in deaths through slow strangulation or decapitation. *Id.* at 2127 (Blackmun, J., dissenting) ("Hanging . . . is a crude and imprecise practice . . . ."). By the late 1800s, hanging had fallen out of favor after the public observed brutally botched hangings involving decapitations, strangulations, and in some instances, a failure to kill. *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 172–75 (2003). As a result, State legislatures sought a "less barbarous"

manner of execution. *In re Kemmler*, 136 U.S. 436, 444 (1890).

Electrocution. By the early twentieth century, numerous States had replaced hanging with electrocution as their primary means of execution, driven by the "well grounded belief that electrocution is less painful and more humane than hanging." *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915). Beginning with the first electrocution, however, State-sanctioned electrocutions routinely resulted in unnecessary pain and lingering death. *See* BANNER, *supra*, at 186; Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 73–74 & n.55 (2002) (describing the first person to be executed by electrocution as burning and bleeding during the procedure). After years of increased public awareness of the pain and gore resulting from botched electrocutions,[2] the Georgia Supreme Court held electrocution violated its State constitution. *See Dawson v. State*, 554 S.E.2d 137, 139 (Ga. 2001) (recognizing that whether a particular punishment is cruel and unusual hinges on "evolving standards

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[2] *See* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 62–63 (2007) (describing 1999 botched execution of Allen Lee Davis, who suffered deep burns, bleeding, and partial asphyxiation from a mouth strap installed in the electric chair).

of decency" (citation omitted)).[3] The Nebraska Supreme Court followed suit, reasoning that "[e]lectrocution's proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man." *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008).

After a particularly grisly execution in the 1990s, this Court granted *certiorari* to assess the constitutionality of electrocution in Florida. *See generally Bryan*, 528 U.S. at 960. Soon after, however, the Florida legislature amended the State's method of execution, permitting a prisoner to choose to be executed by lethal injection instead of by electrocution. *See* FLA. STAT. ANN. § 922.105 (2000); 2000 Fla. Sess. Law Serv. Ch. 2000-2 (West). This Court therefore dismissed the writ in light of the statutory amendments. *See generally Bryan v. Moore*, 528 U.S. 1133 (2000).

Lethal Gas. In 1921, the Nevada legislature became the first State to authorize lethal gas as the State's method of execution, explaining that the State "sought to provide a method of inflicting the death penalty in the most humane manner known to modern science." *State v. Gee Jon*, 211 P. 676, 682 (Nev. 1923).[4] A prisoner executed by this method

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[3] The Georgia legislature already had abolished electrocution as a means of execution for offenses committed after May 1, 2000. *Dawson*, 554 S.E.2d at 144.

[4] Ten other States adopted lethal gas as a means of execution by 1955. *See* Denno, *supra*, 63 OHIO ST. L.J. at 83.

would sit in an enclosed chamber to be filled with lethal gas and remain in the chamber until death occurred. *See Gray v. Lucas*, 710 F.2d 1048, 1058 (5th Cir. 1983). In practice, prisoners did not always die peacefully; often they moaned, gasped for air, and convulsed for periods longer than ten minutes before dying. *See id.* at 1058–59 (describing eyewitness accounts of gas chamber executions); Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, app. 2.B at 424–28 (1997) (similar).

In 1996, the Ninth Circuit held that lethal gas executions, as authorized by California's method of execution statute, were unconstitutional. *See Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir. 1996) (citing the district court's findings that lethal gas executions would result in extreme pain), *vacated on other grounds*, 519 U.S. 918 (1996). This Court did not address the constitutionality of lethal gas execution; instead, it vacated the judgment and remanded the case in light of an amendment to California's statute, which made lethal injection the default method of execution unless the prisoner chose lethal gas. *See generally Gomez v. Fierro*, 519 U.S. 918 (1996). On remand, the Ninth Circuit agreed the inmate no longer had standing to challenge the constitutionality of the lethal gas method of execution. *See Fierro v. Terhune*, 147 F.3d 1158, 1160 (9th Cir. 1998). Subsequently, this Court held that a prisoner had waived a challenge to the constitutionality of lethal gas as an execution method by declining the newly adopted option of execution by lethal injection. *See Stewart v. LaGrand*, 526 U.S. 115, 119 (1999).

Lethal Injection. Although certain States moved toward lethal gas, other States transitioned to lethal injection. In the 1970s, following the end of a nine-year execution hiatus while this Court considered the constitutionality of the death penalty, Oklahoma became the first State to adopt lethal injection as a method of execution. *Baze*, 553 U.S. at 41–42. Certain States quickly followed suit with Texas adopting lethal injection a day after Oklahoma. *Baze*, 553 U.S. at 75 (Stevens, J., concurring in the judgment); Denno, *supra*, 76 FORDHAM L. REV. at 78. Nebraska finally abandoned electrocution in favor of lethal injection only in 2009 after the Nebraska Supreme Court held electrocution unconstitutional under the State constitution. Deborah W. Denno, *Lethal Injection Chaos Post*-Baze, 102 GEO. L.J. 1331, 1341 cht.1, 1342 (2014).

From the start, lethal injection proved unlike the tranquil form of execution many envisioned. Early observers reported "violent[] gagg[ing]," collapsing veins, convulsing, and, in one particularly gruesome instance, "after a lengthy search for an adequate vein, the syringe came out of [the prisoner's] vein, spewing deadly chemicals toward startled witnesses." *See* Denno, *supra*, 63 OHIO ST. L.J. at app. 1 at 139–41 tbl.9 (citation omitted).

The problems with lethal injection executions persisted over the years. Inmates challenged protocols implementing lethal injection, with limited success. *See, e.g.*, *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1040 (N.D. Cal. 2006), *aff'd*, 438 F.3d 926 (9th Cir. 2006) (holding undue risk existed that an

inmate would remain conscious during the administration of the latter two drugs in the protocol, which neither side disputed would result in him suffering intense pain); *State v. Rivera*, No. 04CR065940, 2008 WL 2784679, slip op. at 1, 9 (Ohio Ct. Com. Pl. June 10, 2008) (emphasizing that "the use of two drugs in the lethal injection protocol (pancuronium bromide and potassium chloride) creates an unnecessary and arbitrary risk that the condemned will experience an agonizing and painful death"). In 2014, it took Oklahoma prison officials almost an hour to establish intravenous access in the execution of Clayton Lockett and Lockett began to speak and move after officials thought he had been rendered unconscious. *See Glossip*, 135. S. Ct. at 2734.

States specifically have experienced problems implementing protocols using midazolam as the first drug in a lethal injection procedure. In Ohio's execution of Dennis McGuire, McGuire "gasped and convulsed for ten to thirteen minutes and took twenty-four minutes to die." *See* Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C.L. REV. 1367, 1387 (2014). Arizona conducted a two-hour execution using midazolam in which the inmate, Joseph Wood, gasped 600 times before dying. *Id.* Oklahoma's execution of inmate Michael Lee Wilson using a midazolam protocol resulted in witnesses describing how Wilson cried out during his execution, "I feel my whole body burning!" *Id.* at 1385.

Despite the well-documented problems with methods of execution that cause unconstitutional

degrees of pain and suffering—and explicit findings of unconstitutionality as to such methods by a variety of courts—many States still sanction these methods. Despite the holding that electrocution has a "proven history of burning and charring bodies," *Mata*, 745 N.W.2d at 278, seven States still permit execution by electrocution in certain circumstances. Cert. Pet. 12 n.7. Despite the Ninth Circuit affirming a district court's conclusion that lethal gas causes an "inmate [to] suffer intense, visceral pain, primarily as a result of lack of oxygen," *Fierro*, 77 F.3d at 308, four States authorize lethal gas as an alternate method of execution. *Id.* Thus, States have indicated a willingness to permit by law the implementation of the death penalty through painful and barbaric methods of execution.

B. This Court Recognizes A Prisoner's Right To Meaningful Judicial Review Of The Constitutionality Of Execution Methods

Although State legislatures historically have adopted painful and barbaric execution methods, this Court established long ago the ability of courts to review the constitutionality of the implementation of the death penalty. Litigation in recent years has served only to confirm this constitutional responsibility, as this Court has affirmed an individual's right to judicial review of the method of his impending execution.

In 1890, this Court first reviewed execution by electrocution, allowing New York to conduct the first electrocution based in part on New York's

articulated motivation of finding a more humane method of execution. *See Kemmler*, 136 U.S. at 447–49. A century later, as discussed *supra*, this Court agreed to examine the constitutionality of electrocution after a particularly gruesome execution in Florida. *See Bryan*, 528 U.S. 960, *writ dismissed as improvidently granted*, 528 U.S. 1133 (2000).

Five years after *Bryan*, this Court permitted a prisoner in *Nelson v. Campbell*, 541 U.S. 637 (2004), to challenge the planned use of a cut-down procedure—a painful and invasive way to establish intravenous access—in advance of his lethal injection execution. *Id.* at 642–46. Two years later, this Court held that prisoners could challenge State lethal injection protocols under Section 1983. *See Hill v. McDonough*, 547 U.S. 573 (2006). Both *Nelson* and *Hill* confirmed that an individual has the right to challenge the constitutionality of his method of execution.

In 2008, this Court decided *Baze*, which involved a challenge to Kentucky's lethal injection protocol. Kentucky's protocol mandated that a prisoner be injected with a three-drug sequence: a barbiturate intended to induce unconsciousness, followed by a paralytic agent and then a drug designed to cause cardiac arrest. *Baze*, 553 U.S. at 45. The petitioner in *Baze* asserted that the latter two drugs would result in serious pain if the first, sodium thiopental, were improperly administered, causing the inmate to remain conscious during the execution. *Id.* at 49. As an alternative, the petitioner proposed that Kentucky adopt a one-drug protocol consisting of only sodium thiopental. *Id.* at 51. This Court held

the petitioner had not shown that the risk of serious harm was "substantial" because it was unlikely that the executioner would administer an inadequate dose of sodium thiopental given the safeguards in Kentucky's protocol. *Id.* at 56. In that regard, the risk of harm was not "objectively intolerable" because no State had ever used the one-drug alternative offered by the prisoner, and the inmate did not offer a study showing a one-drug protocol would be equally effective. *Id.* at 53, 57. This Court further held that Kentucky's failure to remove the paralytic agent from its protocol was not cruel and unusual. *Id.* at 57–58 (noting that the State has an interest in preserving the dignity of the procedure).

In *Baze*, this Court outlined for the first time a "feasible" and "readily implemented" standard for execution alternatives. This Court held that, although "the Constitution does not demand the avoidance of all risk of pain in carrying out executions," *id.* at 47, challengers will prevail if there is a "substantial risk of serious harm" or an "objectively intolerable risk of harm" that "prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment," *id.* at 50. In such cases, the alternative procedure must be "feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain." *Id.* at 52. The *Baze* Court placed no restrictions on the types of execution alternatives that a claimant may plead, nor did it limit possible alternatives to those that the State has statutorily approved. Rather, this Court concluded that, if a State "refuses to adopt such an alternative in the face of these documented advantages, without

a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." *Id.* at 52.

Glossip reaffirmed *Baze*'s "feasible" and "readily implemented" standard, reiterating that prisoners must establish that the method is very likely to cause needless suffering to successfully challenge a method of execution. *Glossip*, 135 S. Ct. at 2737. The *Glossip* Court considered an Eighth Amendment challenge to Oklahoma's three-drug lethal injection protocol. The Oklahoma protocol at issue called for the administration of (1) midazolam, a sedative, followed by (2) a paralytic agent, and (3) potassium chloride. *See id.* at 2734. The petitioner in *Glossip* specifically challenged the use of midazolam, asserting that there was a substantial risk that the required 500-milligram dose would not prevent him from feeling the painful effects of the potassium chloride and paralytic agent. *Id.* at 2740. Experts testified that midazolam has a "ceiling effect" after which point any marginal increase in dosage would prove ineffective in inducing unconsciousness, subjecting the prisoner to severe pain when prison officials administered the latter two drugs. *Id.* at 2743.

Nonetheless, this Court held that the petitioner had not made an adequate showing of a substantial risk of pain because he had failed to put forth testimony that the "ceiling effect" occurs below the 500-milligram dose required by the protocol. *Id.* This Court further held that the alternative

sedatives proposed, sodium thiopental and pentobarbital, were unavailable to the State because they had been removed entirely from the market. *Id.* at 2733–34, 2738. Just as in *Baze*, the *Glossip* Court never limited prisoners challenging the method to certain categories of alternatives or to state-approved alternatives. Instead, this Court noted that a claimant is required only "to plead and prove a known and available alternative." *Id.* at 2739.

Under *Baze* and *Glossip*, and consistent with this Court's long-standing precedent permitting review of the constitutionality of execution methods, a prisoner is entitled to relief from any unconstitutional method of execution authorized by a State legislature.

II. THE ARKANSAS SUPREME COURT'S DECISION LIMITS FEASIBLE ALTERNATIVES TO THOSE ALREADY DELINEATED BY STATE STATUTE

Like all States with the death penalty, Arkansas's execution statute provides for execution by lethal injection. In 2012, the Arkansas Supreme Court ruled that Arkansas's vague lethal injection statute violated the separation of powers doctrine, which led to the current statute that identifies specific types of execution drugs. Following this Court's decision in *Glossip*, an Arkansas court determined that Petitioners here plausibly had alleged that the State's use of a certain drug combination could cause extreme suffering. Nonetheless, the Arkansas Supreme Court held that

Petitioners had failed to propose alternative protocols that were "feasible" and "readily implemented" because such alternatives were not already written into the State statute. In combination, the Arkansas Supreme Court decisions have served to insulate the State's execution method from judicial review.

A. Arkansas's Adoption And Implementation Of Lethal Injection

Arkansas first adopted lethal injection as its primary method of execution in 1983. *See* Lauren E. Murphy, *Third Time's a Charm: Whether* Hobbs v. Jones *Inspired a Durable Change to Arkansas's Method of Execution Act*, 66 ARK. L. REV. 813, 813 (2013). The move to lethal injection followed a twenty-three year suspension on executions, which began with Governor Winthrop Rockefeller's moratorium in 1967, his grant of clemency to all fifteen men on death row in 1970, and this Court's holding in *Furman v. Georgia*, 408 U.S. 238 (1972). *See* Murphy, *supra*, 66 ARK. L. REV. at 813.[5]

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[5] Arkansas's history of executions also has faced public scrutiny. Shortly after the moratorium was lifted, Arkansas executed Ricky Ray Rector, who shot himself in the head prior to trial and suffered severe brain damage as a consequence. *See* Roberta M. Harding, *"Endgame": Competency and the Execution of Condemned Inmates—A Proposal to Satisfy the Eighth Amendment's Prohibition Against the Infliction of Cruel and Unusual Punishment*, 14 ST. LOUIS U. PUB. L. REV. 105 (1994). This controversial execution led to public backlash because many considered it contrary to both State and federal law

Prior to 2013, Arkansas's method-of-execution statute delegated discretion to the Director of the Department of Corrections to "determine the substances to be uniformly administered and the procedures to be used in any execution." *See* ARK. CODE ANN. § 5-4-617 (2009). In 2012, the Arkansas Supreme Court decided *Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012), which held the existing method-of-execution statute unconstitutional on its face as violating separation of powers. *Id.* at 854 ("[T]he legislature has abdicated its responsibility and passed to the executive branch, in this case the [corrections department], the unfettered discretion to determine all protocol and procedures, most notably the chemicals to be used, for a state execution.").

Subsequently, the Arkansas legislature amended the statute twice, once to address the separation of powers concerns and a second time to alter the drug cocktail to be used in executions. *See* ARK. CODE ANN. § 5-4-617 (2015); ARK. CODE ANN. § 5-4-617 (2013). The current Arkansas statute requires that a prisoner be executed with an intravenous injection of a barbiturate or a sequence of midazolam, vecuronium bromide, and potassium chloride. ARK. CODE ANN. § 5-4-617 (2015). The statute provides for an alternative of electrocution, but only if

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prohibiting the execution of prisoners with severe mental deficiencies. *See* Peter Applebome, *Arkansas Execution Raises Questions on Governor's Politics*, N.Y. TIMES, Jan. 25, 1992, http://www.nytimes.com/1992/01/25/us/1992-campaign-death-penalty-arkansas-execution-raises-questions-governor-s.html.

"execution by lethal injection under this section is invalidated by a final and unappealable court order." *Id.* § 5-4-617 (k).

B. The Arkansas Supreme Court's Decision Relies Exclusively On *Glossip's* Known And Available Alternative Standard To Hold That An Alternative Is Available Only If It Is Included In The State Statute

Petitioners here have challenged the sequence of drugs that the legislature has developed. The method, known as the "Midazolam Protocol," is a three-drug lethal injection consisting of 500 milligrams of midazolam, 100 milligrams of vecuronium bromide, and 240 milligrams of potassium chloride. Petitioners argued that the Midazolam Protocol is likely to cause extreme pain and that five safer means of execution were feasible and readily available.

The Arkansas trial court found evidence that the Midazolam Protocol would cause a constitutionally unacceptable level of pain. Cert. Pet. App. 57a. Petitioners submitted an affidavit from a doctor of pharmacology who detailed the "ceiling effect" for midazolam that occurs below the 500 milligram dose with which Arkansas indicated it intends to inject Petitioners. *Id.* at 71a; Cert. Pet. 5. In other words, the midazolam injection would fail to render inmates unconscious before injection with the other two drugs, which undisputedly cause torturous pain. Cert. Pet. App. 71a (noting that "a prisoner sedated only with midazolam would experience intense pain

and suffering from the administration of vecuronium bromide and potassium chloride, but be unable to communicate his distress"). The trial court found that Petitioners sufficiently pleaded that midazolam may not completely render an individual unconscious, making him prone to a substantial risk of intolerable pain. *Id.* at 71a–72a ("[T]he authority to execute Plaintiffs' death sentences . . . does not render Plaintiffs helpless to protect themselves from being put to death with lethal injection drugs and using a protocol that will subject them to a substantial risk of pain.").

Ignoring the finding regarding a substantial risk of intolerable pain, the Arkansas Supreme Court dismissed Petitioners' constitutional challenge in a 4-3 vote. In doing so, the Arkansas Supreme Court held that Petitioners had failed to satisfy their Eighth Amendment burden to plead alternatives under *Baze* and *Glossip*. *Id.* at 15a. The court first analyzed Petitioners' identification of alternate drugs for use in the protocol, determining that an allegation that such drugs are "generally available on the open market" was irrelevant as to whether the Arkansas Department of Corrections could obtain the drugs. *Id.* at 19a. Without such a showing, the proposed drug protocols could not be considered "feasible" or "readily implemented" under *Baze* and *Glossip*. *Id.*

Next, the court examined Petitioners' identification of execution by firing squad as a feasible alternative. While the Arkansas Supreme Court purported to adopt this Court's "standards enunciated in both *Baze* and *Glossip*," *id.* at 13a–

14a, the Arkansas Supreme Court imposed the additional requirement that an alternative qualifies as "available" for Eighth Amendment purposes only if it is already written into the State statute, *id.* at 20a. On this ground, the court rejected Petitioners' identification of the firing squad as an alternative method, which Petitioners' alleged would result in instantaneous and painless death and for which Petitioners pleaded that the Arkansas Department of Corrections had the firearms, bullets, and personnel available to carry out an execution. *Id.* at 19a. The court suggested that, because this method "is not identified in the statute as an approved means of carrying out a sentence of death," it is therefore not "a readily implemented and available option to the present method of execution." *Id.* at 20a; *see also id.* (holding that, absent statutory authorization, "it cannot be said that the use of a firing squad is a readily implemented and available option to the present method of execution"). The Arkansas Supreme Court concluded that the Petitioners failed to satisfy the "known and available alternative" requirement under *Glossip*, resulting in dismissal of the Petitioners' challenge. *Id.*

III. MEANINGFUL JUDICIAL REVIEW OF EXECUTION METHODS REQUIRES CONSIDERATION OF NON-STATUTORY ALTERNATIVES

The requirement that a prisoner identify a feasible and readily available alternate execution method already in the State statute effectively precludes Eighth Amendment review. Such an approach directly conflicts with this Court's prior

execution method cases. Allowing each State to determine the available methods of execution, regardless of their constitutionality, would fracture Eighth Amendment jurisprudence, leading to varying outcomes based solely on geography. While judicial review historically has served as a catalyst for States to adopt more humane methods of execution, the Arkansas Supreme Court's approach would thwart the development of more humane methods of execution.

A. The Arkansas Supreme Court's Decision Conflicts With This Court's Precedents

The Arkansas Supreme Court's decision directly conflicts with this Court's precedents. Although neither *Baze* nor *Glossip* holds that an execution alternative must be State-authorized, the Arkansas Supreme Court has imposed such a requirement. But a State's refusal to adopt a constitutional execution method is, in fact, the very conduct that leads to an Eighth Amendment violation under *Baze* and *Glossip*. *See Baze*, 553 U.S. at 50; *Glossip*, 135 S. Ct. at 2737. To require that the "feasible and readily implemented" inquiry take into account a State legislature's approval of an execution alternative would eviscerate judicial review for execution method challenges.

This Court has reaffirmed that a State violates the Eighth Amendment when there exists a "substantial risk of serious harm" or an "objectively intolerable risk of harm" to an inmate through use of a particular execution method. *Baze*, 553 U.S. at 50;

Glossip, 135 S. Ct. at 2737. A court addressing such a challenge may analyze whether the risk of harm is "substantial when compared to a known and available alternative method of execution." *Glossip*, 135 S. Ct. at 2738. That comparison is not limited to statutory alternatives. *See Baze*, 553 U.S. at 52, 61. If it were so limited, then this Court's framework for analysis would allow a State to skew the comparison through its selection—or elimination—of statutory alternatives.

This Court's decisions in *Baze* and *Glossip* plainly prevent States from limiting the scope of constitutional review in this manner. This Court explicitly held in *Baze* that "[i]f a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." *Baze*, 553 U.S. at 52. Under *Baze* and *Glossip*, whether a method of execution is feasible and readily implemented is a separate issue from whether a State legislature considered, put to a vote, and passed a statute enabling the State to employ the alternative. *See Arthur*, 2016 WL 6500595, at *45 (Wilson, J., dissenting). The Arkansas Supreme Court, however, conflated these two distinct aspects of *Baze* by determining that an alternative is "unavailable" if it does not appear in the State's statute, despite "documented advantages." *See Arthur*, 2016 WL 6500595, at *50 (Wilson, J., dissenting) ("Those are clearly distinct inquiries. An alternative can have the documented advantages of being feasible and

readily implemented even though a state refuses to adopt the alternative.").

Because this Court's decisions hold that the relevant inquiry is the State's "refus[al] to adopt" an alternative, *Baze*, 553 U.S. at 52, the Arkansas Supreme Court's decision prohibiting inmates from relying on non-statutory alternatives directly conflicts with *Baze* and *Glossip*.

B. The Arkansas Supreme Court's Decision Fractures Eighth Amendment Jurisprudence

Accepting the Arkansas Supreme Court's construction of *Baze* and *Glossip* also would lead to inconsistent outcomes, allowing prisoners in some States to challenge their method of execution under the Eighth Amendment, but eliminating this right for others. Under this approach, an inmate could be executed in one State by use of an unduly painful method ruled unconstitutional in another State simply because the first State's statute provided for a feasible alternate method while the second State's statute did not. Mere geography should not dictate the contours of the Eighth Amendment.

This Court has made clear that "there is an important need for uniformity in federal law." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983); *Vacco v. Quill*, 521 U.S. 793, 799 (1997) ("States must treat like cases alike."). Forcing prisoners to point to a preexisting method of execution in a State's statute would lead to varying outcomes based on the State in which the prisoner was convicted. In fifteen States,

lethal injection is the only statutory method of execution. Cert. Pet. 12 n.6. Five of these States—Colorado, Mississippi, Montana, Oregon, and Pennsylvania—provide a specific combination of drugs that should be used. *Id.* at 12 n.7. In these five States, plaintiffs would be barred from advancing any alternative execution method under the rule the Arkansas Supreme Court advanced, as the respective State statutes provide only one option. The remaining ten State statutes do not specify the drugs to be used and instead delegate the exact lethal injection protocol to department of corrections personnel. Prisoners in these States may continue to challenge lethal injection protocols, but may be restricted in such challenges by the types of drugs (e.g., a "paralytic agent") required by the statute.

Of the remaining sixteen States that have method-of-execution statutes, fifteen provide only one other option in the statute. *Id.* Seven of these fifteen States provide the only alternative as electrocution. *Id.* Three of these States include the only alternative as hanging. *Id.* Both of these methods of execution have been basically abandoned in recent years due to their barbaric and inhumane nature. *See supra* Section I. Yet the Arkansas Supreme Court's interpretation would restrict prisoners to precisely these alternatives.

Effectively, if the State statute restricts the scope of Eighth Amendment review, then the Eighth Amendment will have different meanings in different States. This Court could not have intended its decisions in *Glossip* and *Baze* to result in such a patchwork application of the Eighth Amendment.

C. The Arkansas Supreme Court's Decision Creates Perverse Incentives For State Legislatures

The Arkansas Supreme Court's approach also has the potential to—and, indeed, foreshadows the likelihood that it will—inhibit the development of more humane methods of execution.

Not only would the Arkansas Supreme Court's construction of *Glossip* and *Baze* leave Eighth Amendment jurisprudence inconsistent and incoherent, it also would prevent prisoners from proposing more humane methods of execution. Under the Arkansas Supreme Court's approach, a State may pass legislation severely limiting alternative methods to render it impossible for an inmate to meet the comparative analysis. If a State statute only provides for one excruciatingly painful method of execution, a prisoner could not plead an Eighth Amendment violation because no alternative method would be "feasible and readily available." As a result, prisoners could never challenge the State's execution protocol.

The detrimental consequences of such an interpretation are easily identifiable. The threat of judicial review of a particular method of execution prompts legislatures to move toward less barbaric methods. Legislatures will lack incentives to enact more humane methods of execution because prisoners would be left with no recourse to challenge the manner in which they are put to death absent an existing statutory alternative. State statutes could remain completely stagnant in a deliberate effort to

insulate States from constitutional challenges. And, in fact, instead of encouraging States to adopt more humane methods of execution—as prior judicial review of execution methods has done—the Arkansas Supreme Court's interpretation of *Baze* and *Glossip* would permit States to adopt more restrictive and barbarous method-of-execution statutes with the specific intent of thwarting judicial review. In effect, the Arkansas Supreme Court's opinion converts this Court's test set forth in *Baze* and *Glossip*—a test designed to protect the constitutional rights of those facing the death penalty—into a means of avoiding judicial review of potential violations of those rights. The *Baze* and *Glossip* Courts did not intend such a result.

CONCLUSION

This Court should grant the petition for certiorari and summarily reverse the Arkansas Supreme Court's decision.

Respectfully submitted,

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November 21, 2016

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