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THIS IS A CAPITAL CASE

No. 16-6496

In the Supreme Court of the United States

STACEY JOHNS[illegible] BRUCE WARD,
TERRICK NO[illegible] [illegible]EL WILLIAMS,
KENNETH [illegible] [illegible]DELL LEE

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Respondents

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SUPREME COURT, U.S.
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[illegible] for a Writ of Certiorari to the
[illegible]upreme Court of Arkansas

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Contrary to Respondents' argument, the Court has jurisdiction over this case. The Arkansas Supreme Court explicitly applied federal law. Well-established precedent acknowledges the Court's jurisdiction in these circumstances. Additionally, the opinion below is neither fact-bound nor based on state law. The Arkansas Supreme Court limited itself to determining whether the complaint was adequately pled and determined it was not because, as to Petitioners' firing-squad alternative, "this proposal does not comply with the current statutory scheme." App. 20a. Whether a condemned inmate's proposed alternative must appear in a state statute is a pure question of law—one that is ripe for this Court to answer.

The Court has recently acknowledged the importance of Petitioners' questions by staying the execution of Thomas D. Arthur. The petition for a writ of certiorari in Arthur's case asks the Court to answer the following: (1) "Whether, to satisfy his *Glossip* burden, a condemned prisoner is limited to selecting an alternative method of execution from those already permitted by state statute"; and (2) "Whether *Glossip* requires a prisoner proposing an alternative lethal injection drug to provide a specific willing supplier for the alternative drug." Petition for a Writ of Certiorari, *Arthur v. Dunn*, No. 16-602 (U.S. Nov. 3, 2016). These questions track Questions 1 and 3 in this case. Given the acknowledged importance of the questions presented, the Court should grant the Petition.

I. THE PETITION SHOULD BE GRANTED IN LIGHT OF RECENT DEVELOPMENTS

On November 3, 2016, the Court stayed the execution of Thomas D. Arthur pending disposition of his petition for a writ of certiorari. *See* Order, *Arthur v. Dunn*, No. 16-602 (U.S. Nov. 3, 2016). Thus, at least four Justices have determined that Arthur's petition appears to have merit. *See Netherland v. Tuggle*, 515 U.S. 951, 952 (1995). The questions in the *Arthur* petition mirror the questions in Petitioners' case. And the reasons given for granting the Petition in this case—the conflict between the "statutorily available" rule and *Baze*, the effect that rule will have on the uniformity of the Eighth Amendment, the need for clarification of *Glossip*'s alternative-method prong, and the prospect of intolerably painful executions—also support a grant in *Arthur*.

Arthur's petition was initially distributed for the conference of November 22, 2016. It has since been rescheduled for a date uncertain.

If the Court considers *Arthur* first and grants the petition there, it should take one of two courses of action here: (1) grant the Petition and consolidate it with *Arthur* for plenary consideration; or (2) hold the Petition until *Arthur* is decided on the merits.

Though Petitioners do not advocate this result, perhaps the Court will deny the *Arthur* petition for one of the reasons the Chief Justice noted in his concurrence to the Court's order staying execution: because "the claims set out in the application are purely fact-specific, dependent on contested interpretations of state law, insulated from our review by alternative holdings below, or some combination of the

three." Order, *Arthur v. Dunn*, No. 16-602 (U.S. Nov. 3, 2016). If so, the Court should grant the Petition here because it presents the issues that warranted a stay of Arthur's execution—starkly and without factual or state-law complications. As further explained below, the Arkansas Supreme Court did not evaluate the facts after trial but rather assessed whether the complaint was adequately pled under the Eighth Amendment. Insofar as state pleading standards are at issue, they are inseparable from the Eighth Amendment question and would not prevent entry of a different judgment upon remand. The opinion below contains no alternative holdings. This case offers a straightforward opportunity to assess whether an alternative execution method must appear in statute and to clarify a prisoner's burden to plead an alternative execution method under the Eighth Amendment.

II. THE COURT HAS JURISDICTION

This Court has jurisdiction because the opinion below relies on federal law. The Arkansas Supreme Court did not merely find this Court's opinions in *Glossip* and *Baze* "useful," as Respondents would have it. BIO at 19. Those opinions controlled its holding. The clear rule in Arkansas is that the Eighth Amendment and the Arkansas Punishments Clause are interpreted identically. The Arkansas Supreme Court applied that rule by explicitly "adopt[ing] the standards enunciated in both *Baze* and *Glossip*." App. 15a. Because the Arkansas Supreme Court considers the Arkansas Punishments Clause to have no content independent of the Eighth Amendment, its interpretation of the state constitution here was "interwoven with the federal law," and the Court has jurisdiction under longstanding authority.

Michigan v. Long, 463 U.S. 1032, 1040 (1983); *see also Florida v. Powell*, 559 U.S. 50, 57 (2010) (jurisdiction where the "Florida Supreme Court treated state and federal law as interchangeable and interwoven" and where "the court at no point expressly asserted that state-law sources gave Powell rights distinct from, or broader than, those delineated in *Miranda*").[1]

Respondents make five arguments to the contrary. None undermines this Court's jurisdiction to review a lower court's judgment grounded solely on an interpretation of federal law.

First, Respondents argue that a state court's decision cannot be "interwoven with the federal law," and thus that *Long* does not apply, if the party seeking review did not formally raise both federal and state claims. BIO at 19–20. Respondents misunderstand *Long*. According to *Long*, the Court has jurisdiction if it "fairly

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[1] Petitioners know of no case in which the Arkansas Supreme Court has departed from its "legal course" of interpreting the Arkansas Punishments Clause and the Eighth Amendment identically. *Bunch v. State*, 43 S.W.3d 132, 138 (Ark. 2001). Of course, it could one day do so, as Respondents suggest. But the relevant question for jurisdictional purposes is not whether the state court *could* interpret its constitution differently; it is whether it *does* interpret its constitution differently. Here, the Arkansas Supreme Court firmly reiterated its commitment to interpreting the state and federal constitutional provisions indistinguishably:

> [Petitioners] assert that we should construe our provision differently because the Eighth Amendment uses the words "cruel *and* unusual punishment," whereas the Arkansas Constitution contains the disjunctive phrase "cruel *or* unusual punishment." As the Court made clear in *Glossip*, the burden of showing a known and available alternative is a substantive component of an Eighth Amendment method-of-execution claim. We are not convinced that the slight variation in phraseology between the two constitutions denotes a substantive or conceptual difference in the two provisions that would compel us to disregard any part of the test governing a challenge to a method of execution. Accordingly, we decline the [Petitioners'] invitation to depart from our practice of interpreting our constitutional provision along the same lines as federal precedent, and we hereby adopt the standards enunciated in both *Baze* and *Glossip*.

App. 15a.

appears that the state court rested its decision primarily on federal law." *Long*, 463 U.S. at 1042. That rule does not depend on the existence of parallel federal and state causes of action. The Court made this point plain when it explained there would be jurisdiction "even if we were to rest our decision on an evaluation of state law relevant to Long's claim." *Id.* at 1044 n.10. In the Court's "understanding of Michigan law," there was no independent state-law ground because, under the state constitutional provision at issue, "seizure is governed by a standard identical to that imposed by the Fourth Amendment." *Id.*; *accord Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (finding jurisdiction where "the state constitutional holding depended upon the state court's view of the reach of the [federal Constitution]"). Thus, even if Long had raised only a violation of state law, the Court would have had jurisdiction because the federal Constitution determined the scope of the state-law right. The state-law ground may have been adequate to resolve the case, but it was not independent from federal law. *Cf. South Dakota v. Neville*, 459 U.S. 553, 556 n.5 (1983). So it is here.

Second, ignoring the reality that the Arkansas Supreme Court always interprets the Arkansas Punishments Clause in lockstep with the Eighth Amendment, Respondents argue that Arkansas courts may "employ reasoning from this Court's precedents" differently than this Court and thereby reach a different decision. BIO at 18–19. Finding jurisdiction, they suggest, would "profoundly alter the Constitution's partitioning of power between the state and federal judicial systems." *Id.* at 20 (internal quotation marks omitted). These federalism concerns are

unwarranted where, as here, the state court did *not* diverge from federal law. A state court may discuss the federal Constitution and then adopt stronger state constitutional protections. It may not explicitly base its decisions on federal constitutional law and then escape this Court's review. For example, the Arkansas Supreme Court could not hold that the search-and-seizure clause of the Arkansas constitution is coterminous with the Fourth Amendment and then hold that the Arkansas constitution permits a warrantless arrest without probable cause. *See Michigan v. Summers*, 452 U.S. 692, 700 (1981). The identity of Arkansas constitutional protection with the floor of federal constitutional protection is what gives the Court authority to review the case here.

Third, Respondents contend there is no jurisdiction because the case does not "aris[e] under this [federal] Constitution." U.S. Const. art. III, § 2. Respondents' argument conflates Article III with 28 U.S.C. § 1331, which confers federal district courts with jurisdiction over claims arising under federal law. A federal district court would not have had jurisdiction here because Petitioners' well-pleaded complaint did not state a federal cause of action. *See Holmes Grp. Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, 830–31 & n.2 (2002). However, "arising under" jurisdiction pursuant to § 1331 is narrower than "arising under" jurisdiction pursuant to Article III, where the well-pleaded complaint rule does not apply. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494–95 (1983). Furthermore, a federal court's lack of jurisdiction over a civil action at its inception does not deprive this Court of jurisdiction on appeal. *See ASARCO, Inc. v. Kadish*,

490 U.S. 605, 623–24 (1989) (lack of Article III standing at outset of state-court action did not deprive this Court of jurisdiction).[2]

Fourth, Respondents say there cannot be jurisdiction "where no right is claimed under the Constitution or laws of the United States." BIO at 16. That is incorrect. Jurisdiction also arises when "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." 28 U.S.C. § 1257(a). For example, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the original complaint contained only a state-law claim concerning invasion of privacy. This Court held that the statute was "drawn into question," and the Court thus gained jurisdiction, when the defendant's motion for rehearing raised the statute's federal constitutionality and the state high court considered that issue. *Id.* at 476. Respondents here repeatedly asserted federal Eighth Amendment precedent as a defense to Petitioners' attack on the Arkansas method-of-execution statute, thus drawing its federal constitutionality into question. And, by resting its opinion on federal interpretations of the federal Constitution, the Arkansas Supreme Court addressed whether the statute violates the Eighth Amendment. This created a federal issue for this Court's review.[3]

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[2] *Kadish* is also a case where this Court's jurisdiction derived from a state-court's interpretation of state law in reliance on federal law. *See Kadish*, 490 U.S. at 624–25 (no independent state ground where state court described state constitutional provision upon which decision was based as "simply a rescript" of federal law).

[3] Even assuming that jurisdiction required Petitioners to assert a federal issue—notwithstanding the Arkansas Supreme Court's strict adherence to federal precedent in its interpretation of the Arkansas Punishments Clause, and notwithstanding the fact that a party's defense or a state court's opinion often raises the requisite federal issue for the first time—Petitioners specified their federal claim in a petition for rehearing. There, they

Fifth, contrary to Respondents' assertion, reversal here would change the outcome, which is the practical test for whether the Court has jurisdiction: "[I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, [the Court's] review could amount to nothing more than an advisory opinion." *Long*, 463 U.S. at 1042 (quoting *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)). Here, reversal would require the Arkansas Supreme Court to alter its judgment. It could no longer conclude—under federal or state constitutional law—that an alternative execution method must be codified or that Petitioners' pleading was insufficient.

In sum, longstanding precedent establishes the Court's jurisdiction. If the Court has any doubts on that score, however, it should grant the Petition and order the parties to address jurisdiction in their merits briefing. That approach is consonant with the Court's practice in cases where the respondent raises jurisdiction but where, as here, the case concerns urgent questions. *See, e.g.*, Order, *United States v. Windsor*, No. 12-307 (U.S. Dec. 7, 2012).

III. This Case Is a Good Vehicle for Review

Beyond their jurisdictional arguments, Respondents strive to portray the Arkansas Supreme Court's decision as fact-based and governed by state pleading standards. A fair reading of the opinion refutes that portrayal. The Arkansas Supreme Court determined the complaint was improperly pled, primarily because

asserted that (1) their pleading satisfies the Eighth Amendment as interpreted by *Glossip* and (2) requiring a statutory alternative violates the Eighth Amendment as interpreted by *Baze*. *See* Pet. for Rehr'g at 4, 6 (July 7, 2016).

the firing-squad alternative is not currently codified by state law. This decision required no factual determinations. And while the Arkansas Supreme Court discussed state pleading requirements, that discussion was intertwined with the federal constitutional standard articulated in *Glossip*. Such decisions are not based on state procedural law. Respondents' extreme vision of Eighth Amendment pleading requirements simply underscores the need for clarification. That is especially so here, where—as Respondents do not attempt to deny—Respondents intend to swiftly execute Petitioners with a method that the current record shows will cause them excruciating pain.

A. The Arkansas Supreme Court held that Petitioners' alternative execution method must appear in statute.

It violates *Baze* to limit alternative execution methods to those already codified. *See* Pet. at 10–12. Rather than disputing this point, Respondents contend the Arkansas Supreme Court did not adopt the offending rule, and thus the Court need not address Question 1. BIO at 21–23. That contention is inconsistent with the language of the opinion below, which makes the following points: (1) Arkansas statute calls for lethal injection, App. 19a–20a; (2) the statute permits electrocution as a backup, App. 20a; (3) the statute does not approve, nor has the General Assembly ever approved, firing squads, *id.*; and (4) "For these reasons, it cannot be said that the use of a firing squad is a readily implemented and available option to [sic] the present method of execution," *id.* This language could hardly be clearer that a firing squad is not "readily implemented" or "available" because Arkansas statute does not permit it.

To drive the point home, the opinion cites *Boyd v. Myers*, No. 14-1017, 2015 WL 5852948 (M.D. Ala. Oct. 7, 2015). In that case, the district court refused to allow prisoners to amend their method-of-execution complaint to add firing squad and hanging because "those two methods are not permitted by statute in Alabama." *Id.* at *4.[4] The Arkansas Supreme Court's reliance on *Boyd* shows the court's intention to block pleading of a firing squad unless that method is written into statute. Were another inmate to suggest the firing squad as an alternative, the opinion below would require dismissal of the case—even if the inmate's pleading met the heightened standards that, as discussed further below, Respondents erroneously believe the Eighth Amendment requires.[5]

B. The opinion below is not governed by factual determinations or state-law pleading standards.

Respondents also argue review is unwarranted because the opinion below is governed by case-specific facts and by state-specific pleading standards. By its terms, the opinion refutes Respondents' attempt to portray the case as fact-bound.

[4] *Boyd* is currently on appeal and was orally argued on September 14, 2016. Whether a prisoner must plead a codified execution method is squarely at issue in the appeal. *See* Appellant's Br. at 2, *Boyd v. Dunn*, No. 15-14971 (11th Cir. Jan. 28, 2016); Appellee's Br. at 18, *Boyd v. Dunn*, No. 15-14971 (11th Cir. Feb. 29, 2016).

[5] Respondents note the Arkansas Supreme Court addressed this reasoning to the firing squad alone. That does not undermine the urgency of review. The Arkansas Supreme Court could easily enforce the "statutorily available" rule against drug alternatives in the future, even it did not do so here. More importantly, the Court's ruling deprives Petitioners of any opportunity to propose a method that informed commentators believe is "the quickest, least painful, and most reliable method that currently exists." Deborah W. Denno, *The Firing Squad as "a Known and Available Alternative Method of Execution" Post-*Glossip, 49 U. MICH. J. L. REF. 749, 777 (2016). If the current method causes extreme pain—which Petitioners amply showed below and the Arkansas Supreme Court did not dispute—the State violates the Constitution by failing to adopt such an alternative. *Baze*, 553 U.S. at 52.

The Court held that the complaint was inadequate because Petitioners "pled only that the drugs they offered as alternatives were 'commercially available,'" then held that it must "reach the same result with respect to [Petitioners'] alternative method of a firing squad." App. 19a. Its judgment was that the complaint was insufficiently pled—not that Petitioners offered insufficient evidence.[6]

Respondents also suggest that a state-specific procedural rule—Arkansas's fact-pleading requirement—insulates the case from review. And yet Respondents also defend the lower court's discussion of alternative-method pleading as "consistent with *Glossip*." BIO at 23, 26. That defense would hardly be necessary if the Arkansas Supreme Court had rested its opinion on state procedural grounds. At bottom, the substantive Eighth Amendment question addressed below—what it takes to adequately "plead and prove" a known and available alternative execution method—is inextricable from the procedural pleading requirements the Arkansas Supreme Court cited in denying relief. It is well-established that, "when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and [this Court's] jurisdiction is not precluded." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

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[6] Though its opinion did not rely on an assessment of the evidence, the Arkansas Supreme Court outlined the content of the parties' affidavits in the trial court. App. 16a–18a. Respondents' primary affidavit came from a corrections official. Mot. Summ. J. Exh. 3 (Oct. 16, 2015). The affidavit recounts some phone calls the official made to suppliers on Oct. 13, 2015—one day before he signed the affidavit and three days before Respondents submitted it in support of summary judgment. This made-for-litigation document does not exhibit a "good-faith effort" to obtain alternative execution methods. *See Glossip*, 135 S. Ct. at 2738. Far from suggesting this case is not a "good vehicle" for litigation, *see* BIO at 25, the affidavit suggests the importance of granting review. If Petitioners' complaint satisfies the Eighth Amendment, they should have a chance to test this flimsy document at a hearing.

The Court should address Questions 2 and 3 in the Petition to provide needed clarification of what a prisoner must plead to overcome dismissal. As to drug alternatives, Respondents say a complaint that identifies a commercially available alternative and a vendor does not satisfy the Eighth Amendment. But multiple courts have held otherwise and permitted prisoners to develop the record on this point. *See First Amendment Coal. of Ariz. v. Ryan*, No. 14-1447, 2016 U.S. Dist. LEXIS 66113, at *20 (D. Ariz. May 18, 2016); *Price v. Dunn*, No. 14-472, 2015 U.S. Dist. LEXIS 152656, at *27–30 (S.D. Ala. Oct. 20, 2015).[7] The Eighth Amendment's requirement to plead an alternative does not demand slamming the courthouse door when the complaint does not say the identified vendor is willing to sell the identified execution drug to the department of corrections specifically.

As to the firing squad, Respondents say the complaint must include details about the facility where the execution should be conducted, which guns and ammunition should be used, and which individuals are available to serve as executioners (notwithstanding their insistence below that participants in executions must be kept secret). BIO at 28. They do so having already admitted the State has the equipment and personnel to execute by firing squad. Answer at 18 (Oct. 23, 2015). Respondents' demand for such details—which no Court, to Petitioners' knowledge, has ever required—is merely a distraction from Petitioners' substantial

[7] As these cases indicate, Respondents overstate the level of agreement on *Glossip*'s pleading standard. For example, they cite *Brooks v. Warden*, 810 F.3d 812 (11th Cir. 2016), as a case "consistent with" the Arkansas Supreme Court's decision. BIO at 26. But *Brooks* made clear that it was not addressing "Brooks's claim that the district court placed too high a pleading burden on him." *Id.* at 819 n.1. Instead, it was reviewing the denial of a motion to stay execution. *Id.*

pleading. The complaint attached an affidavit from an experienced trauma surgeon attesting that a firing squad will cause rapid and painless death. Am. Compl. Exh. 6 (Sept. 28, 2015). The Eighth Amendment requires no more to plead a substantial reduction in pain, *especially* where other states have used a firing squad and where the current record—undisturbed by the Arkansas Supreme Court—shows the extant method causes torture. The complaint was plainly adequate.

In sum, the Arkansas Supreme Court's opinion exhibits a distorted view of the Eighth Amendment's requirement to plead an available alternative execution method. Reversal would permit Petitioners to pursue proof of their claim. And clarification is needed to instruct other courts on whether and when they may use the alternative-method prong to end litigation at the pleading stage despite evidence that an execution protocol causes extreme pain.

C. Respondents do not refute this case's importance.

Respondents contend the absence of a conflict supports denial of review. As already explained, the requirement of a statutory alternative conflicts with this Court's precedents, and the lower courts are indeed at odds about what it means to plead an alternative under the Eighth Amendment. Those points aside, review is warranted for an additional reason: Petitioners will be lined up for excruciatingly painful executions if review is not granted. Respondents do not deny that they intend to proceed with Petitioners' executions immediately upon disposition of this case (assuming it is favorable to them). Nor do they attempt to refute, except

through some passing comments,[8] that the current record shows midazolam will not sedate Petitioners but will instead permit torture.

It is startling that Respondents think this case lacks importance given the state of the (unresolved) evidence. If Respondents believe midazolam will adequately sedate Petitioners, they should have no problem submitting that belief to the crucible of trial. Instead, they have lobbied to execute Petitioners despite proof that their method will produce excruciating pain. The Eighth Amendment prohibits Respondents from inflicting a punishment that objective indicia show to cause needless suffering. *See Baze*, 553 U.S. at 50. Respondents' willful ignorance of Petitioners' evidence simply elevates the importance of this case.

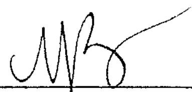
CONCLUSION

For the reasons stated herein, the Court should grant the Petition. If the Court grants the petition in *Arthur* before considering the Petition here, it should also grant this Petition and consolidate the case with *Arthur* or, barring that, hold the Petition until *Arthur* has been decided. Even if the Court denies the petition in *Arthur*, plenary review is warranted in this case.

[8] Most notably, Respondents say that, while it is "not relevant here," 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." BIO at 9. Respondents neglect to note that this "single affidavit" is thirty-six single-spaced pages, written by a doctor of pharmacology, and contains great detail about midazolam's properties—including a calculation of midazolam's ceiling effect. Am. Compl. Exh. 5. (Sept. 28, 2015). Respondents also attack the affidavit for supposed inconsistencies and conflicts with other sources. BIO at 9 n.2. They leveled the same criticisms in their appeal to the Arkansas Supreme Court. Ark. S. Ct. Br. at 8–14 (Feb. 4, 2016). The Arkansas Supreme Court ignored them. As the record stands now—and as no court has refuted—there is ample proof that the current execution protocol will lead to torture.

NOVEMBER 15, 2016

Respectfully submitted,



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TERRICK NOONER, JACK JONES, MARCEL WILLIAMS,
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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 the Petitioners' Reply Brief. Specifically, in compliance with S. Ct. R. 29.3, I emailed and hand-delivered a copy of these documents to below-listed counsel on November 15, 2016:

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