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Henness v. DeWine

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IN THE
Supreme Court of the United States

WARREN KEITH HENNESS,
Petitioner,
v.
MIKE DEWINE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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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INTEREST OF *AMICUS CURIAE*[1]

The Louis Stein Center for Law and Ethics ("Stein Center") 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 the Court has been asked to examine methods of execution: *Bryan v. Moore*, 528 U.S. 960 (1999); *Baze v. Rees*, 553 U.S. 35, 43 (2008) (citing Stein Center brief); and *Glossip v. Gross*, 576 U.S. 863 (2015).

Implementation of lethal injection as an execution method 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

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[1]Pursuant to Rule 37.3, the parties have consented to the filing of this brief. Pursuant to Rule 37.6, 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.

execution methods achieve that goal. There are serious concerns whether legislatures, courts, and prison officials have responded to the risks associated with the implementation of lethal injection in an ethical manner.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since this Court's decision in *Baze v. Rees*, 553 U.S. 35 (2008), the composition of lethal injection protocols implemented by States has been defined by rapid changes, experimentation with new drugs and drug combinations, and reversion to previously abandoned protocols. With rare exception, such changes have been implemented not by State legislatures, but by prison officials charged with carrying out lethal injection executions. Against this backdrop, this brief urges the Court to grant Petitioner's request for certiorari to challenge Ohio's lethal injection protocol for two main reasons:

(1) Judicial review of challenges to lethal injection protocols is necessary in light of the historical development of execution methods and such protocols. Historically, States have moved toward new methods in an effort to execute inmates in a humane manner free from unnecessary pain. These changes came about as society became more aware of the risks associated with a certain execution method. However, when States adopted lethal injection as an execution method, the great majority of States left statutes purposefully vague as to the lethal injection procedure. Thus, States largely left the composition of their lethal injection protocols in the hands of unelected prison officials who are generally

not subject to public scrutiny or oversight. But prison officials—including those in Ohio—have continued to adopt protocols lacking a sufficient scientific or medical basis. The responsibility for ensuring that executions and related protocols do not risk unnecessary cruelty or lingering death, in violation of the Eighth Amendment, thus lies with the courts.

(2) By allowing Ohio to categorically reject Petitioner's proposed alternative drug protocol on the basis that no other State has used it in an execution, the Sixth Circuit's decision effectively forecloses judicial review of execution methods and is contrary to States' historical experimentation with execution methods. Careful judicial scrutiny of evolving execution methods is critical to aiding the search for more humane methods and ensuring compliance with the Eighth Amendment. Not only does the Sixth Circuit's decision eviscerate this scrutiny, but States' frequent historical experimentation with execution methods also belies any State's claimed reticence to implement a protocol proposed by an inmate. Thus, States should not be permitted to categorically reject an inmate's proposed alternative execution method. Ohio's rejection of Petitioner's proposed drug protocol—a one-drug protocol using secobarbital—is particularly grievous because secobarbital is used frequently in physician-assisted suicides in the United States, and Ohio has historically been the State most willing to try new lethal injection protocols.

ARGUMENT

I. JUDICIAL REVIEW OF METHOD-OF-EXECUTION CHALLENGES IS ESSENTIAL TO EDUCATE THE PUBLIC AND TO ENSURE COMPLIANCE WITH EIGHTH AMENDMENT STANDARDS.

Since the founding of the United States, the evolution of execution methods has often been driven by the public's increasing awareness of the risks associated with a particular method. This awareness placed pressure on State legislatures to implement a new execution method. Since the adoption of lethal injection, however, the great majority of State legislatures have delegated the composition of the specific lethal injection protocols to unelected prison officials generally not subject to public scrutiny and oversight. Yet prison officials have continued to adopt protocols lacking a sufficient scientific or medical basis. This dangerous dynamic has enhanced the importance of judicial review of lethal injection protocols to ensure that executions do not risk unnecessary cruelty or lingering death. Even when a drug protocol like the one at issue in this case has previously been reviewed, the development of new evidence showing risks of severe pain and needless suffering requires courts to be vigilant in ensuring that the administration of lethal injection comports with the Eighth Amendment.

A. Historically, Public Awareness Spurred By The Unnecessary Risk Of Pain And Suffering Of A Prior Execution Method Drove State Legislatures To Adopt A New Method.

As is well documented, the federal government and every State that has the death penalty employ lethal injection as the method of execution. Prior to lethal injection, States switched methods when pre-existing methods were shown in practice to embody a high risk of painful or lingering death. In large part, the coordinated move from one execution method to another took place by legislative dictate rather than judicial decree. *See generally* 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 (2002). With the exception of a few States that permitted use of the firing squad, the general historical trend in the United States led to the transition from hanging to electrocution, which gave way briefly to reliance on the gas chamber, before settling on lethal injection.

Hanging. Hanging was the predominant execution method in the United States in the 19th century. By 1853, hanging had become "the nearly universal form of execution in the United States and 48 States once imposed death by this method." *Campbell v. Wood*, 511 U.S. 1119, 1119 (1994) (Blackmun, J., dissenting from denial of *certiorari*) (internal citation and quotation marks omitted). After the public witnessed gruesomely botched hangings that involved decapitations and slow strangulations, legislatures searched for a more humane execution method. Stuart Banner, THE DEATH

PENALTY: AN AMERICAN HISTORY 172–75 (2003); *In re Kemmler*, 136 U.S. 436, 444 (1890) (describing the quest to determine "whether the science of the present day" could find a "less barbarous manner" of execution than hanging) (internal quotation marks omitted); *accord Barr v. Lee*, No. 20A8, 2020 WL 3964985, at *1 (U.S. July 14, 2020) (noting that States seek to "develop[] new methods, such as lethal injection, thought to be less painful and more humane than traditional methods, like hanging").

Today, no State uses hanging as an execution method—a sharp contrast to the method's dominance historically. *See* Deborah W. Denno, THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT (Meghan J. Ryan et al. eds., 2020) [hereinafter Denno, EIGHTH AMENDMENT]. The last hanging in the United States took place in 1996,[2] and only three hangings have occurred between 1965 and 1996.[3] *See id.* at 231.

Electrocution. By 1915, twelve States had switched from hanging to electrocution, in reliance upon the "belief that electrocution is less painful and more humane than hanging." *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915). Throughout the early part of the 20th century, the vast majority of States turned to the

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[2] *Hanging*, DEATH PENALTY CURRICULUM, https://deathpenaltycurriculum.org/student/c/about/methods/hanging.htm.

[3] Against this background, the Sixth Circuit's analysis of hanging, as though it were a viable option to which execution methods can be compared, is invalid and uninformed. *See* Pet'r's Br. 14–16.

electric chair as the preferred execution method. *See* Denno, 63 OHIO ST. L.J. at 130 tbl. 2.

Over the years, accounts of gruesomely botched electrocutions were widely reported. *See* Deborah W. Denno, *Getting to Death: Are Executions Constitutional*?, 82 Iowa L. Rev. 319, app. 2.A at 412 (1997) (describing examples of botched executions). Following a particularly gruesome electrocution in Florida, this Court agreed to examine the constitutionality of electrocution. *See Bryan*, 528 U.S. 960. But the Court dismissed the writ as improvidently granted after the Florida legislature altered its execution method to permit an inmate to choose between electrocution and lethal injection. *See Bryan v. Moore*, 528 U.S. 1133 (2000); Fla. Stat. Ann. § 922.105. By that time, public awareness of the risk that electrocutions would cause unnecessary pain and lingering death had reached a high point.[4]

Ohio adopted lethal injection as an alternative to electrocution in 1993. Denno, 63 OHIO ST. L.J. at 89; *see id.* tbl. 3. In 2001, when an inmate chose electrocution for his execution method, Ohio's prison officials asked the Ohio legislature to abolish the use of electrocution because they were concerned that "the 104-year-old electric chair" would malfunction. *Id.* That same year,

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[4] *See* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 62–63 (2007) (describing the 1999 botched execution of Allen Lee Davis, who suffered deep burns and bleeding, color photographs of which were viewed by millions of people on the Florida Supreme Court's website); Denno, 63 OHIO ST. L.J. at 78–79.

Ohio officially abandoned electrocution in favor of lethal injection as the State's sole execution method. *Id.*

By 2009, electrocution remained an option in only six States. Denno, EIGHTH AMENDMENT at 227. Two state courts had even ruled electrocution unconstitutional under state constitutions. *See Dawson v. State*, 554 S.E.2d 137, 139 (Ga. 2001) ("whether a particular punishment is cruel and unusual is not a static concept, but instead changes in recognition of the evolving standards of decency that mark the progress of a maturing society." (internal quotation marks omitted)); *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008) (noting legislatures "have recognized that early assumptions about an instantaneous and painless death were simply incorrect and that there are more humane methods of carrying out the death penalty.").

From 2009 to 2019, "seven inmates selected electrocution over lethal injection." Denno, EIGHTH AMENDMENT at 228. At least three inmates selected electrocution out of concern about the pain associated with lethal injection. *Id.* at 228–29.

Lethal Gas. Early problems with electrocution—together with the continued brutality of hangings—caused some States to experiment with the gas chamber as an alternative to hanging. Nevada was the first State to authorize lethal gas in 1921. Denno, 63 OHIO ST. L.J. at 83. Nevada initially sought to rely on lethal gas because it was the method used in the relatively peaceful killings of animals. *See State v. Gee Jon*, 211 P. 676, 681 (Nev. 1923). At the time, Nevada's deputy attorney general persuaded two state legislators that the method

would be more humane than hanging or the firing squad. Banner, *supra*, at 196.

By 1955, ten additional States had adopted lethal gas. Denno, 63 OHIO ST. L.J. at 83. But, again, prison officials were tasked with figuring out the details of exactly how to carry out the method on human beings. Banner, *supra*, at 197. Over time, it became clear that inmates did not die peacefully by breathing in lethal gas while sleeping: death lingered and inmates often urinated on themselves, moaned, twitched, and painfully convulsed for minutes before finally dying. *See, e.g.*, *Gray v. Lucas*, 710 F.2d 1048, 1058–59 (5th Cir. 1983); *see also* Denno, 82 IOWA L. REV. at app. 2.B. at 425. In addition, the gas chamber carried with it lasting association with the abhorrent mass killings in Nazi Germany. The gas chamber thus fell out of favor.

Today, three States provide nitrogen hypoxia as an alternative to lethal injection or as a substitute if lethal injection is deemed unconstitutional or otherwise unavailable.[5] Yet, none of these States has ever even attempted to use nitrogen hypoxia as an execution method, nor have they provided sufficiently specific information about how such a method would be implemented. Denno, EIGHTH AMENDMENT at 231.

[5] The three states are Alabama (in 2018), which provides nitrogen hypoxia as an alternative to lethal injection, and Mississippi (in 2017) and Oklahoma (in 2015), which provide the gas as a substitute if lethal injection is deemed unconstitutional or otherwise unavailable. Denno, EIGHTH AMENDMENT at 231.

B. State Legislatures Delegated Implementation Of Lethal Injection Methods To Prison Officials, Insulating That Process From Public Scrutiny Even As It Has Appeared To Cause Needless Pain.

1. The Development Of Lethal Injection Protocols And Widespread Adoption Of The Three-Drug Protocol Lacked Any Reasoned Consideration.

Public scrutiny of execution methods intensified in the 1970s after this Court affirmed the constitutionality of the death penalty. States turned to lethal injection, with Oklahoma leading the way. Denno, 76 FORDHAM L. REV. at 70, 73–75. Beginning immediately after Oklahoma adopted lethal injection, other States switched to the method, before it had been used in an execution. *Baze*, 553 U.S. at 75 (Stevens, J., concurring in the judgment). Texas adopted lethal injection the very next day. Denno, 76 FORDHAM L. REV. at 78. By 1982, when Texas conducted the first lethal injection execution, six States had enacted lethal injection statutes. Deborah W. Denno, *Lethal Injection Chaos Post*-Baze, 102 GEO. L.J. 1331, 1341 cht. 1 (2014). Another fifteen States adopted lethal injection from 1983 to 1988, and twelve more States switched to lethal injection from 1994 to 2002. *Id.*

Like Oklahoma, other States left their lethal injection statutes intentionally vague. *See* Denno, 63 OHIO ST. L.J. at 68–69; Denno, 76 FORDHAM L. REV. at 93. For example, Ohio's lethal injection statute provides that death sentences are to be carried out by "a lethal

injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death." Ohio Rev. Code Ann. § 2949.22. This delegation left the responsibility for developing execution protocols to corrections officials who had no specialized expertise.[6] Prison officials thus had "unfettered discretion to determine all protocol and procedures, most notably the chemicals to be used, for a State execution." *Hobbs v. Jones*, 412 S.W.3d 844, 854 (Ark. 2012) (discussing Arkansas statute).

Ultimately, the federal government and almost every State that adopted lethal injection as an execution method, including Ohio, adopted the original three-drug protocol that Oklahoma had initially developed—sodium thiopental, pancuronium bromide, and potassium chloride. *Glossip*, 576 U.S. at 868–69, 873 (noting at least 30 States of the 36 States that use lethal injection employed the original three-drug protocol); *Cooey v. Strickland*, 589 F.3d 210, 215 (6th Cir. 2009) (noting Ohio adopted the three-drug protocol). But, as this Court recognized, "it is undisputed that the States using lethal injection adopted the protocol first developed by Oklahoma without significant independent review of the procedure." *Baze*, 553 U.S. at 43 n.1; *see also Beardslee*

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[6] In 1978, the Texas Court of Criminal Appeals rejected a challenge to a Texas lethal injection statute, concluding that the Director of the Department of Corrections's authority to choose the lethal substance and procedure "d[id] not constitute an improper delegation of the [S]tate's legislative power." Denno, 82 IOWA L. REV. at 375 n.328 (citing *Ex parte Granviel*, 561 S.W.2d 503 (Tex. Crim. App. 1978)).

v. Woodford, 395 F.3d 1064, 1074 n.11 (9th Cir. 2005) (noting California's protocol was "informally" based on Texas's protocol, and "the precise protocol was never subjected to the rigors of scientific analysis.").

States copied the three-drug protocol despite the concerns that arose about it almost immediately. Soon after Oklahoma adopted the method, Oklahoma's medical examiner, A. Jay Chapman, who assisted with devising the protocol, "said that if the death-dealing drug is not administered properly, the convict may not die and could be subjected to severe muscle pain." Jim Killackey, *Execution Drug Like Anesthesia*, DAILY OKLAHOMAN, May 12, 1977, at 1. When Texas became the first State to employ the method in 1982, the Texas warden mistakenly mixed all three drugs into a single syringe, causing the mixture to turn into "white sludge." Stephen Trombley, THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY 74–75 (1992).

2. State Prison Officials Continue To Rely Upon Insufficient Scientific And Medical Study In Modifying Lethal Injection Protocols.

Since this Court's decision in *Baze*, the landscape of lethal injection protocols has changed dramatically. Despite the Court's approval of Kentucky's three-drug protocol of sodium thiopental, pancuronium bromide, and potassium chloride, States have subsequently experimented with various new drug protocols. Such changes resulted from either court intervention or practical considerations as opposed to medical or

scientific study. Indeed, these rapid changes have continued to accelerate.

In the years after *Baze*, all States began modifying the precise drugs used in lethal injection protocols due to pragmatic considerations. Because of drug shortages, prison officials were forced to make substitutions for the first drug from the original three-drug sequence, sodium thiopental, in both one-drug and three-drug protocols. Denno, 102 GEO. L.J. at 1360–65, cht. 3; *see Glossip*, 576 U.S. at 868–71. As a result, corrections officials sought out both alternative sources for sodium thiopental and substitutes for the drug, including pentobarbital, which itself became the subject of shortages.

Many States have turned to midazolam as a substitute for sodium thiopental and pentobarbital. *See Glossip*, 576 U.S. at 871. Ohio first adopted midazolam as part of its multi-drug protocol in 2016. *In re Ohio Execution Protocol*, 860 F.3d 881, 885 (6th Cir. 2017). Today, ten States list midazolam as part of their lethal injection protocol, two of which use the drug as part of a two-drug protocol, while the other eight employ it as part of a three-drug protocol. Denno, EIGHTH AMENDMENT at 221–22, cht. 4. Although *Glossip* found the use of midazolam was not unconstitutional, it did so because the district court's factual finding on the level of suffering caused by midazolam was not clearly erroneous based on the specific factual evidence and circumstances presented there. *See* 576 U.S. at 881, 883–84, 890–93.

Since *Glossip*, the evidence against midazolam's constitutionality has become stronger. The consensus in

the scientific and medical communities regarding midazolam's glaring deficiencies as a lethal agent has only solidified. *See, e.g.*, *McGehee v. Hutchinson*, No. 4:17-CV-00179, 2020 WL 2841589, at *5–7 (E.D. Ark. May 31, 2020) (describing the American Society of Anesthesiologists' rejection of midazolam as an anesthetic, and the FDA's recognition that midazolam can cause "airway obstruction, apnea, and cardiopulmonary arrest"). Indeed, the evidence relied on by the District Court here showed midazolam lacks the necessary analgesic effects to dull what would otherwise be excruciating pain caused by the second and third drugs in the typical three-drug protocol (the paralytic and the euthanizing agent). *In re Ohio Execution Protocol Litig.*, No. 2:11-CV-1016, 2019 WL 244488, at *21 (S.D. Ohio Jan. 14, 2019) ("Dr. Exline also opined that midazolam does not have analgesic effects and may potentially increase pain perception."), *aff'd*, 946 F.3d 287 (6th Cir. 2019). Experts testifying before the District Court further explained that midazolam itself can cause excruciating pain, especially when administered at the levels commonly used in executions. *Id.* at *15–16. Such high doses of midazolam have been associated with pulmonary edemas, wherein recipients' lungs are flooded by their own bodily fluids, causing suffocation. *Id.* at *15.

Moreover, since 2014, the number of States with botched executions attributed to midazolam have risen steadily. In 2014, Ohio executed Dennis McGuire using a two-drug protocol that consisted of midazolam and the painkiller hydromorphone. Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825,

828 (2015). Witnesses to the execution watched with horror as McGuire "gasped, choked, and repeatedly clenched his fists" after the drugs were administered. *Id.* at 829; *see also In re Ohio Execution Protocol Litig.*, 235 F. Supp. 3d 892, 905 (S.D. Ohio), *vacated*, 860 F.3d 881 (6th Cir. 2017). While the typical execution should last no longer than ten minutes, McGuire's stretched for almost thirty. Barrett Lain, 49 U. RICH. L. REV. at 828–30. The 2018 execution of Robert Van Hook demonstrated many of the problems observers witnessed in McGuire's execution. *In re Ohio Execution Protocol Litig.*, 2019 WL 244488 at *13. A reporter covering Van Hook's execution described his "labored" breathing, "wheezing," and "flushed" face after his injection with midazolam. *Id.*

Alabama's experience with midazolam was hardly any different. According to those who witnessed the 2016 execution of Ronald Smith, after receiving a 500 mg dose of midazolam, Smith began "coughing, heaving, flailing, or attempting to flail arms, clenching and unclenching [his] fists." *See In re Ohio Execution Protocol Litig.*, 235 F. Supp. 3d at 906. Just as with McGuire, Smith reportedly lingered near death for over thirty minutes before finally passing—far longer than the ten minutes expected for a problem-free execution. Kent Faulk, *Alabama Death Row Inmate Ronald Bert Smith Heaved, Coughed for 13 Minutes During Execution*, BIRMINGHAM REAL-TIME NEWS (Dec. 8, 2016), https://www.al.com/news/birmingham/2016/12/alabama_death_row_inmate_is_se.html.

In fact, evidence of botched executions involving midazolam exists in numerous States, including

Oklahoma, Florida, Arizona, Tennessee, and Virginia. *See Warner v. Gross*, 776 F.3d 721, 725 (10th Cir.) (describing Clayton Lockett's botched execution in Oklahoma, which lasted for forty-three minutes), *aff'd*, 576 U.S. 863 (2015); *In re Ohio Execution Protocol Litig.*, 235 F. Supp. 3d at 906 (describing Paul Howell opening his eyes during the consciousness check after receiving midazolam in Florida); *id.* (describing Joseph Wood "gasp[ing] and try[ing] to breathe until his death almost two hours after the process began" in Arizona); *id* at 907 (describing Rick Gray's "labored breathing, gasping, snoring, and other audible and visible activity" during his execution in Virginia); *West v. Parker*, No. 3:19-CV-00006, 2019 WL 2341406, at *13 (M.D. Tenn. June 3, 2019) (noting that Billy Ray Irick "gasped for air, he hacked and coughed, his face turned deep purple and he moved his head" after receiving midazolam for his execution in Tennessee), *aff'd*, 783 F.3d 506 (6th Cir.), *cert. denied*, 140 S. Ct. 25 (2019).

In light of midazolam's well-documented failures, multiple States have recently sought alternatives. For instance, in 2017, Florida officially replaced midazolam with etomidate as the first drug in its protocol, becoming the first State to adopt that chemical for its executions. *In re Ohio Execution Protocol Litig.*, 235 F. Supp. 3d at 906. Arizona similarly agreed to discontinue its use of midazolam in 2016 as part of a larger settlement agreement regarding its execution practices. *Id.* And in 2018, a Nevada judge halted the execution of Scott Dozier over concerns about the drug. Robbie Gonzalez, *Why Nevada's Execution Drug Cocktail Is So Controversial*, WIRED (July 11, 2017),

https://www.wired.com/story/the-untested-drugs-at-the-heart-of-nevadas-execution-controversy/. Other States that have recently amended their lethal injection protocols have also adopted non-midazolam chemicals.[7] Notably, the federal government chose not to employ midazolam in resuming executions after a nearly two decade hiatus. *Lee*, 2020 WL 3964985, at *1.

Since the beginning of 2019 alone, prison officials have employed three different drug combinations in lethal injection executions[8]—a sharp contrast to States' use of the same three-drug protocol for over thirty years until 2010.

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[7] *See Ward v. Carter*, 90 N.E.3d 660, 661 (Ind.) (upholding the state's switch to brevital, pancuronium bromide, and potassium chloride for its three-drug protocol), *cert. denied*, 139 S. Ct. 240 (2018); Mitch Smith, *Fentanyl Used to Execute Nebraska Inmate, in a First for U.S.*, N.Y. TIMES (Aug. 14, 2018), https://www.nytimes.com/2018/08/14/us/carey-dean-moore-nebraska-execution-fentanyl.html (describing Nebraska's recent switch to a four-drug protocol using diazepam, fentanyl citrate, cisatracurium besylate, and potassium chloride).

[8] The three drug combinations were: (1) a three-drug protocol using midazolam; (2) a one-drug protocol using pentobarbital; and (3) a three-drug protocol using etomidate. *See Execution List 2019*, DEATH PENALTY INFO. CENTER, https://deathpenaltyinfo.org/executions/2019 (last updated Dec. 11, 2019) (last visited Aug. 31, 2020); *Execution List 2020*, DEATH PENALTY INFO. CENTER, https://deathpenaltyinfo.org/executions/2020 (last updated Aug. 28, 2020) (last visited Aug. 31, 2020).

C. Judicial Scrutiny Of Prison Officials' Administration Of Lethal Injection Is Necessary To Ensure Compliance With The Eighth Amendment.

As the history demonstrates, States adopted lethal injection generally and numerous drug protocols specifically without serious study or independent analysis. States uniformly delegated to prison officials the details of lethal injections. Historical practice and contemporary evidence indicate that prison officials likely lack the necessary expertise to develop lethal injection protocols and fail to rely upon scientific or medical study. Yet these prison officials, operating outside the public eye, are tasked with developing procedures by which inmates will be executed. Because legislatures have delegated responsibility for such protocols to unelected officials, it is imperative that courts not insulate a State's protocol from challenge. Rather, the judiciary must provide a check on the exercise of such authority. In light of the recent trend toward constantly changing protocols, which has accelerated precipitously over the last decade, resulting in numerous botched executions, the courts have the constitutional responsibility to ensure such procedures comport with the Eighth Amendment.

For a quarter century, States followed the three-drug protocol this Court approved in *Baze*. But prison officials did not arrive at the three-drug protocol after independent analysis and evaluation. Rather, the protocol was "the product of administrative convenience and a stereotyped reaction to an issue, rather than a careful analysis of relevant considerations favoring or

disfavoring a conclusion." *Baze*, 553 U.S. at 75 (Stevens, J., concurring in the judgment) (internal quotation marks and citation omitted). In fact, "[i]n the majority of States that use the three-drug protocol, the drugs were selected by unelected department of correction officials with no specialized medical knowledge and without the benefit of expert assistance or guidance." *Id.* at 74–75.

Following *Baze*, States "have changed their lethal injection protocols in inconsistent ways that bear little resemblance to the original protocol evaluated in *Baze* and even differ from one execution to the next within the same state." Denno, 102 GEO. L.J. at 1331. Rather than correct the unreasoned manner in which protocols had been adopted in the past, however, officials prioritize concern for administrative convenience over the need for a humane execution. Thus, as with the original three-drug protocol, such changes are not the result of careful deliberation. For this reason, "their drug selections are not entitled to the kind of deference afforded legislative decisions." *Baze*, 553 U.S. at 75 (Stevens, J., concurring in the judgment).

Ohio falls into this general pattern. Ohio has implemented several different lethal injection protocols since its adoption of lethal injection as an execution method. Initially, without independent analysis, Ohio mirrored Oklahoma's original three-drug protocol that included sodium thiopental as the first drug. When sodium thiopental became unavailable, Ohio followed Oklahoma's lead again by using pentobarbital, this time implementing its own variation by using pentobarbital in a one-drug protocol. Ohio prison officials then turned to a two-drug protocol of midazolam and hydromorphone

when pentobarbital became unavailable, resulting in the botched execution of Dennis McGuire in 2014. Following Florida's lead this time, Ohio implemented the lethal injection protocol at issue in this case without independent evaluation.

Under these circumstances, judicial review provides a necessary means by which to examine the constitutionality of the chosen lethal injection drugs, procedures, and administration. *See, e.g.*, *Morales v. Tilton*, 465 F. Supp. 2d 972, 981 (N.D. Cal. 2006) (holding California's protocol unconstitutional); *Harbison v. Little*, 511 F. Supp. 2d 872, 895, 903 (M.D. Tenn. 2007) (ruling State's failure to adopt one-drug protocol recommended by state-commissioned study violated the Eighth Amendment), *vacated*, 571 F.3d 531 (6th Cir. 2009); *Taylor v. Crawford*, No. 2:07-cv-04129, 2006 WL 1779035, at *8 (W.D. Mo. June 26, 2006) (concluding that Missouri's lethal injection procedure presented unconstitutional risk due to maladministration); *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019) (rejecting the categorical approach to determining whether a punishment violates the Eighth Amendment, and reaffirming the judicial role in comparing alternative methods).

The plurality opinion in *Baze* did not seek to insulate lethal injection protocols from scrutiny. *Baze*, 553 U.S. at 62. The opinion specifically contemplated changes to the method "in light of new developments, to ensure humane capital punishment." *Id.* As a result, in light of new evidence, each combination of drugs must be evaluated independently to determine whether it inflicts severe pain and needless suffering.

Such judicial oversight would not "substantially intrude on the role of state legislatures in implementing their execution procedures," *id.* at 51, because legislatures do not concern themselves with the intricacies of lethal injection procedures. Thus, as Justice Stevens explained, "[t]he question whether a similar three-drug protocol may be used in other States remains open, and may well be answered differently in a future case on the basis of a more complete record." *Id.* at 71 (Stevens, J., concurring in the judgment).

The development of such records is critical. History demonstrates that the lethal injection protocols that prison officials created or modified embodied constitutionally unacceptable risks. Even when faced with evidence of botched executions involving the exact same combination of drugs, States have proceeded to use the protocol. Closer examination of such procedures was (and remains) hindered and, in some cases, foreclosed by the secretive nature in which prison officials develop and ultimately carry out their lethal injection protocols. Denno, 76 FORDHAM L. REV. at 121–23; Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1388–95 (2014). The rigorous scientific examination required to prevent unnecessary pain and needless suffering will occur only if this Court reinforces the necessity of Eighth Amendment review of prison officials' chosen lethal injection drugs and procedures.

II. THE SIXTH CIRCUIT'S DECISION EFFECTIVELY FORECLOSES JUDICIAL SCRUTINY OF EXECUTION METHODS AND IS CONTRARY TO STATES' HISTORICAL EXPERIMENTATION WITH EXECUTION METHODS.

The Sixth Circuit's finding that Petitioner failed to carry his burden under *Glossip*'s second prong—identification of an available, feasible execution method that can be readily implemented—because Ohio may decline to be the first State to use a reliable and humane lethal injection protocol in the context of an execution effectively forecloses the judicial scrutiny that is critical to developing more humane execution methods and is contrary to States' historical experimentation with execution methods. As established in Section I, *supra*, careful judicial review of States' evolving execution methods is required to ensure compliance with the Eighth Amendment. If left standing, the Sixth Circuit's decision not only would eliminate that crucial safeguard of an individual's Eighth Amendment rights, but it is also in tension with the practical reality of how lethal injection methods are developed. States—including Ohio—have frequently and brazenly experimented with execution methods. This frequent experimentation belies any State's claimed reticence to implement a protocol proposed by an inmate. To this end, States should not be permitted to categorically reject an inmate's proposed alternative execution method merely on the basis that another State has not used the method in an execution. Ohio's categorical rejection of Petitioner's proposed alternative method—lethal

injection by secobarbital—is particularly problematic given that secobarbital is the most common drug used in physician-assisted suicides in the United States.

If there has been one consistent theme in our country's approach to executions, it is its experimentation. States have abandoned and adopted execution methods with alacrity. As soon as an older method no longer proved tenable, officials have adopted new protocols. This practice of experimentation necessitates robust judicial review of the new methods, to ensure that the new method does not inflict unnecessary pain and needless suffering, *see supra* Section I.C., but it is also necessary to facilitating the introduction of more humane methods of execution.

Despite this history, the Sixth Circuit would halt this important search for more humane execution methods and foreclose the judicial scrutiny required to determine a State's compliance with the Eighth Amendment. In rejecting Petitioner's claim that secobarbital is a viable alternative to midazolam, the Sixth Circuit concluded that Ohio's desire "not to be the first [state] to experiment with a new method of execution" was a legitimate reason for Ohio to reject it as an alternative. *In re Ohio Execution Protocol Litigation*, 946 F.3d 287, 291 (2019). But the Court in *Glossip* summarily rejected the petitioner's attempt to cast the country's slow adoption of midazolam as evidence that the drug was unsuitable for executions. 576 U.S. at 891–92. According to the Court, "[t]hat argument, if accepted, would hamper the adoption of new and potentially more humane methods of execution and would prevent States from adapting to changes in the availability of suitable

drugs." *Id.* By the same token, allowing States to reject a proposed alternative method merely because another State has not used it in an execution renders this Court's two-prong test in *Glossip* a dead letter and forecloses the judicial review required to aid that search for more humane methods.

The Sixth Circuit's logic contradicts historical practice. States, and Ohio in particular, have historically adopted new methods of execution that have not previously been used by another State. As noted by Petitioner, Ohio has "been the State most willing to try new executions methods" when it became the first State (1) to adopt a one-drug protocol using sodium thiopental, (2) to use a one-drug protocol with pentobarbital, and (3) to use a two-drug protocol with midazolam and hydromorphone. Pet'r's Br. 21–22 n.6. States' experimentation with new methods even dates back to the end of the 19th century. When New York replaced hanging with electrocution, no death row inmate had ever been executed by electric chair, and the electric chair *had not even been invented.* Banner, *supra*, at 181; Denno, 63 OHIO ST. L.J. at 71–74. Likewise, no other State employed lethal gas as an execution method when Nevada made its switch out of a desire to take a more humane approach. Denno, 63 OHIO ST. L.J. at 83. Within thirty-five years, another ten States would follow Nevada's lead. *Id.* And Oklahoma employed both a novel method and novel drug cocktail in replacing electrocution with lethal injection, in an effort described by the initiative's sponsor "to make the execution less violent and a little more quiet." Denno, 76 FORDHAM L. REV. at 66–71; Tim Barker, *Author of Lethal Injection*

Bill Recalls His Motive, TULSA WORLD (Sept. 7, 1990), http://www.tulsaworld.com/archives/author-of-lethal-injection-bill-recalls-his-motive/article_90c3f8c3-22c5-5cd7-8d0c-42fb17378968.html. This spirit of experimentation has continued to this day in the numerous States that have rejected the national trend toward midazolam and instead adopted protocols that their peers have yet to test. *See supra* pp. 16–17.

Ohio's categorical rejection of secobarbital is particularly irrational given that the drug is frequently used in physician-assisted suicides. Jennie Dear, *The Doctors Who Invented a New Way to Help People Die*, ATLANTIC (Jan. 22, 2019), https://www.theatlantic.com/health/archive/2019/01/medical-aid-in-dying-medications/580591/ ("For years, the two barbiturates widely considered the best drugs for hastening death in terminally ill patients were pentobarbital and secobarbital."). Ohio's claimed reticence to use secobarbital because no other State has used it in an execution rings hollow where Ohio has frequently experimented with drugs that have a far thinner track record than secobarbital. The mere fact that the drug has not been used in an execution should hardly be sufficient on its own to foreclose Petitioner's challenge.

To prevent this incoherent result, States should not be permitted to categorically reject alternative methods of execution on the basis that the method has not previously been used in an execution. Holding otherwise would foreclose judicial scrutiny of execution methods and cut short the critical search for more humane execution methods.

CONCLUSION

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

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