No. _____

In the Supreme Court of the United States

THOMAS D. ARTHUR, PETITIONER

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CAPITAL CASE
EXECUTION OF THOMAS D. ARTHUR
SCHEDULED FOR
THURSDAY, NOVEMBER 3, 2016

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. In *Glossip* v. *Gross*, 135 S. Ct. 2726 (2015), this Court held that a method-of-execution challenger must plead and prove a "known and available alternative method of execution" that is "feasible" and "readily implemented." *Id.* at 2737. The questions presented are:

A. 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.

B. Whether *Glossip* requires a prisoner proposing an alternative lethal injection drug to provide a specific willing supplier for the alternative drug.

C. Whether, to meet his *Glossip* burden, a condemned prisoner is required to provide, through a medical expert, a detailed protocol for an alternative method of execution including "precise procedures, amounts, times and frequencies of implementation."

II. The Court of Appeals for the Sixth Circuit has held that where a state voluntarily adopts a procedural safeguard in an execution protocol, the state must conduct the safeguard consistently and adequately. The court below held that as long as a

voluntarily adopted safeguard is conducted at every execution, even if done inadequately, there is no constitutional violation. The question presented is whether it is a violation of the Fourteenth Amendment guarantee of Equal Protection for a state to arbitrarily deviate from its voluntarily adopted execution safeguards.

PARTIES TO THE PROCEEDINGS

Petitioner is Thomas D. Arthur, a seventy-four year old inmate sentenced to death, and currently incarcerated at Holman Correctional Facility in Atmore, Alabama.

Respondents are the Alabama Department of Corrections (ADOC), ADOC Commissioner Jefferson Dunn, and Holman Warden Cynthia Stewart.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—continued:

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Some methods of execution are unconstitutional; it follows that there must be a way to prove it. In *Glossip* v. *Gross*, this Court set out the two elements for making that showing: first, a condemned prisoner must show that the challenged method presents "a substantial risk of severe pain," and second, he must identify a "known and available alternative method of execution that entails a lesser risk of pain." 135 S. Ct. 2726, 2731 (2015). In doing so, this Court sought to ensure that method-of-execution challenges were not veiled attempts to challenge death sentences, but also confirmed that cruel and unusual methods of execution would not escape judicial review.

In this case, the court of appeals interpreted the "known and available" alternative method requirement so restrictively as to create an insurmountable barrier to method-of-execution challenges. *First*, the court of appeals, as other courts have done, held that Mr. Arthur was limited to pleading alternatives that are expressly provided for under existing state statute. That ruling effectively allows states to legislatively exempt themselves from Eighth Amendment scrutiny by limiting their prescribed methods—indeed, if a state statute provides for only one method of execution (as many do), there are no alternatives that could be pleaded, and method-of-execution challenges are barred *per se*. *Second*, the court of appeals further held that even

where an alternative lethal injection method *is* allowed by state statute, a condemned inmate cannot satisfy his *Glossip* burden without, in essence, procuring a supply of drugs on behalf of the state, which an incarcerated prisoner has no practical ability to do. The court of appeals also upheld the district court's ruling dismissing Mr. Arthur's claim, for failing to produce expert medical evidence of an alternative protocol that includes "precise procedures, amounts, times and frequencies of implementation." This requirement is impossible to satisfy because canons of medical ethics prohibit medical experts from offering such evidence. As such, it renders the *Glossip* burden insurmountable, even where an inmate provides, as Mr. Arthur did, evidence outlining a significantly more humane method of execution.

The court of appeals' stringent (and erroneous) implementation of *Glossip* bars method-of-execution claims without regard to the evidence showing the pain and suffering caused by the execution protocol. This eviscerates the constitutional guarantee reaffirmed in *Glossip*. Here, Mr. Arthur proffered (in the words of the district court) "impressive" evidence showing that Alabama's method of execution would subject Mr. Arthur to severe pain. Yet because of its overly restrictive interpretation of *Glossip*'s alternative method requirement, the district court dismissed Mr. Arthur's claims without even considering that evidence, and the court of appeals affirmed.

Alabama's use of an unconstitutional method of execution is further exacerbated by its pattern of deviations from voluntarily adopted procedural safeguards. At the district court, the testimony of execution guards showed that they were

inconsistently and improperly performing a so-called "pinch test"—designed to ensure that condemned prisoners are adequately anesthetized. Mr. Arthur challenged Alabama's selective and inadequate implementation of its procedures under the Fourteenth Amendment, but the court of appeals held that such inconsistent application is of no consequence as long as the State goes through the motions. The court of appeals also created a circuit split—the Sixth Circuit has held that if a state adopts a protocol, it must implement it meaningfully for all, whereas the Eleventh Circuit here has given license for states to arbitrarily deviate from their protocols.

Today, Alabama intends to execute Mr. Arthur using a deficient lethal injection protocol, without affording Mr. Arthur his day in court to prove how torturous his execution would be, and a host of other condemned prisoners face the same fate, absent this Court's intervention. Indeed, as the dissent below noted, the court of appeals' "unprecedented" ruling means that "relief under *Baze* and *Glossip* is now a mirage."

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-139a) is unreported. The orders of the district court granting summary judgment (Pet. App. 140a-183a), dismissing Mr. Arthur's facial Eighth Amendment claim and his Fourteenth Amendment claim (Pet. App. 184a-239a), and denying leave to amend (Pet. App. 240a-242a) are unreported.

JURISDICTION

The decision of the court of appeals affirming the district court's judgment was entered on November 2, 2016. This petition was timely filed on November 3,

2016. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI of the United States Constitution provides: "[The] Constitution . . . shall be the supreme Law of the Land . . . Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

The Alabama Code provides:

> (a) A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution.
>
> . . . .
>
> (c) If electrocution or lethal injection is held to be unconstitutional by the Alabama Supreme Court under the Constitution of Alabama of 1901, or held to be unconstitutional by the United States Supreme Court under the United States Constitution, or if the United States Supreme Court declines to review

> any judgment holding a method of execution to be unconstitutional under the United States Constitution made by the Alabama Supreme Court or the United States Court of Appeals that has jurisdiction over Alabama, all persons sentenced to death for a capital crime shall be executed by any constitutional method of execution.
>
> . . . .
>
> (h) No sentence of death shall be reduced as a result of a determination that a method of execution is declared unconstitutional under the Constitution of Alabama of 1901, or the Constitution of the United States. In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.

Ala. Code § 15-18-82.1.

STATEMENT OF THE CASE

A. Alabama's Lethal Injection Protocol

1. To execute condemned prisoners, Alabama currently uses a lethal injection protocol consisting of three drugs: (1) midazolam hydrochloride, (2) rocuronium bromide, and (3) potassium chloride. Pet. App. 186a. It is undisputed that, absent adequate anesthesia, the administration of the second and third drugs in the protocol would cause agonizing pain and

suffering. The second drug in the protocol is a paralytic that stops muscle usage (but not the sensation of pain or brain function), and so would effectively suffocate a conscious inmate in a manner that has been compared to being buried alive, all the while preventing the inmate from physically exhibiting any signs of pain. The third drug is a caustic agent that produces a sensation akin to fire running through the veins. *See Baze* v. *Rees*, 553 U.S. 35, 53 (2008). Accordingly, the only way to avoid a torturous execution using these two drugs is to first use an anesthetic that will render the condemned unconscious and insensate to pain.

Midazolam, the first drug in Alabama's lethal injection protocol, is not an anesthetic. Rather, midazolam is commonly used in clinical settings to relieve anxiety and sedate patients before surgery; it is—according to the product's own packaging—not approved for use as a standalone general anesthetic. Pet. App. 293a.

2. Additionally, under Alabama's lethal injection protocol, after the first drug is administered, but before the last two drugs, ADOC personnel must perform a so-called "consciousness assessment." R.E. Tab 50 at 10.[1] The purpose of this assessment is to ensure the inmate has been sufficiently anesthetized to withstand the pain of the second and third drugs in the protocol. Pet. App. 206a. The final step in this assessment is for an execution team member to pinch the inmate's arm. R.E. Tab 50 at 10.

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[1] References to the record excerpts filed at the court of appeals are cited as "R.E." followed by the tab number and page number within the document.

B. Procedural History

Mr. Arthur was convicted of murder in 1992 and sentenced to death. After Alabama announced in 2011 that it was changing its lethal injection method of execution, he timely commenced this action on June 8, 2011. Mr. Arthur challenged the State's new execution protocol under the Eighth Amendment and also challenged the State's implementation of its consciousness assessment under the Fourteenth Amendment. R.E. Tab 46. The district court initially dismissed the complaint on November 3, 2011 on statute-of-limitations grounds, but, on March 21, 2012, the court of appeals reversed and remanded, holding that the issues in Mr. Arthur's complaint could not be resolved on the pleadings, and instructing the district court to provide Mr. Arthur with the "opportunity for factual development" of his claims, "including discovery between the parties." *Arthur* v. *Thomas*, 674 F.3d 1257, 1262-63 (11th Cir. 2012).

On remand, the parties engaged in some factual discovery, and the district court conducted a limited evidentiary hearing on Mr. Arthur's Fourteenth Amendment claim in 2013. After the hearing, the State moved for summary judgment, which the district court denied, ruling that there were genuine disputes of material fact on both of Mr. Arthur's claims. R.E. Tab 41.

Following the denial of its summary judgment motion, the State then sought and obtained a series of adjournments, preventing Mr. Arthur from further advancing his claims. R.E. Tab 39; Tab 40.

On September 11, 2014, the day before a scheduled status conference, the State filed a motion in the Alabama Supreme Court to set a date for Mr. Arthur's execution. R.E. Tab 36. In the motion, the

State disclosed for the first time that, the day before, it had adopted a new lethal injection protocol, replacing pentobarbital with midazolam. R.E. Tab 36 at 2-3.

Shortly afterwards, Petitioner filed an amended complaint setting forth the constitutional deficiencies in the State's new protocol. Mr. Arthur alleged that midazolam was not an appropriate anesthetic, both facially (because it is incapable of inducing anesthesia sufficient to withstand the pain of the other two drugs) and as-applied (because the large and rapid dose called for in the State's protocol would cause someone with Mr. Arthur's particular health condition to suffer an excruciating heart attack), thereby violating Mr. Arthur's right to be free from cruel and unusual punishment under the Eighth Amendment. R.E. Tab 33. Mr. Arthur's complaint also alleged a single-drug protocol using pentobarbital as a feasible, readily implemented alternative procedure. R.E. Tab 33.[2]

In the meantime, the Alabama Supreme Court granted the State's motion and set a February 19, 2015 execution date, and Mr. Arthur sought an emergency stay in the district court.

On February 17, 2015, the district court granted a stay of execution, holding that Mr. Arthur had demonstrated a likelihood of success on the merits of

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[2] Mr. Arthur's position was, and remains, that a massive bolus dose of pentobarbital would induce a heart attack, and it would not anesthetize him in time for the second and third drugs in Alabama's lethal injection protocol. However, Mr. Arthur showed with expert evidence that (1) if administered gradually at a level closer to clinical administration, he would not suffer a heart attack; and (2) if administered without the second and third (*i.e.*, painful) drugs, pentobarbital would cause a painless death. Pet. App. 265a-267a.

his Equal Protection claim. R.E. Tab 31 at 12. The court of appeals affirmed, and the State sought no further review.

After *Glossip* was decided, Mr. Arthur sought leave to amend his complaint to add further allegations regarding alternative methods of execution. The district court allowed Mr. Arthur to add allegations concerning proposed alternative lethal injection protocols, but denied Mr. Arthur leave to plead the firing squad. The district court held that the firing squad is not a permissible alternative under *Glossip* solely because it is not currently provided for under Alabama's death penalty statute. Pet. App. 261a.

C. The Bifurcated Hearing

On October 8, 2015, the district court ordered a hearing on Mr. Arthur's claims, to begin on January 12, 2016. Thereafter, Mr. Arthur and the State concluded document discovery, exchanged expert reports and completed depositions.

On January 6, 2016, six days before the hearing, the court ordered—over Mr. Arthur's objection—that the hearing would be limited to two issues: (1) the availability of an alternative to the State's current lethal injection protocol; and (2) Mr. Arthur's Equal Protection claim. R.E. Tab 23. Only if Mr. Arthur prevailed on the first phase of the bifurcated hearing, the district court ordered, would he be permitted to present his evidence (including evidence from, in the words of the district court, "world-renowned medical and scientific experts," Pet. App. 161a) of the substantial risk of pain and suffering created by the execution protocol. R.E. Tab 23. The first phase of

the bifurcated hearing was held on January 12-13, 2016.

D. The District Court's Opinion on Mr. Arthur's Facial Challenge and Equal Protection Claim

On April 15, 2016, the district court released its ruling on the issues tried at the hearing. The district court first dismissed Mr. Arthur's facial Eighth Amendment claim, reasoning that he had failed to prove the availability of an alternative method of execution under *Glossip*. In keeping with its bifurcation order, the district court *did not* rule on the substantial risk of severe pain of Alabama's protocol compared to Mr. Arthur's proposed alternatives.

At the hearing, Mr. Arthur's evidence was largely directed to proving the availability of compounded pentobarbital for use in a single-drug lethal injection protocol. That method of execution has been used by four other states in recent years (as the district court and court of appeals recognized) and is in fact the most widely used method of execution in the country.[3] Based on the evidence presented by Mr. Arthur, the district court accepted, among other things, Mr. Arthur's evidence that (i) pharmacies in Alabama have the facilities to compound pentobarbital, (ii) compounding pentobarbital is within the expertise of any qualified pharmacist, and (iii) the active ingredient for pentobarbital is available for sale in the United States and abroad. Nevertheless, despite

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[3] *Execution List 2016*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/execution-list-2016 (last visited Nov. 3, 2016).

acknowledging that this evidence was sufficient to show that pentobarbital "should" be available the district court held that Mr. Arthur had not met his burden under *Glossip*. Pet. App. 220a, 222a.

The district court also dismissed Mr. Arthur's Equal Protection claim. The uncontested evidence showed that corrections officers were improperly performing the consciousness assessment. However, the district court analyzed Mr. Arthur's Fourteenth Amendment claim under the Eighth Amendment, concluding that "a medical standard of care to execution procedures and training for them . . . are not required by the Eighth Amendment." Pet. App. 258a.

E. The District Court's Opinion on Mr. Arthur's As-Applied Claim

After the hearing, the district court sought to resolve Mr. Arthur's as-applied claim that the State's execution protocol would cause him to suffer the pain of a heart attack. It ordered the parties to confer and propose modifications to the existing protocol. R.E. Tab 20. Mr. Arthur proposed that the State's protocol be modified to provide for the gradual administration of midazolam with due care for Mr. Arthur's heart condition. The State took the position that it did not need to modify its protocol. R.E. Tab 19 at 1-2. After the parties reached an impasse, the district court ordered the State to file a motion for summary judgment, which was subsequently granted. Pet. App. 152a-199a.

The court ruled that Mr. Arthur's proposed modifications to the existing midazolam-based protocol were inadequate because he failed to offer expert medical evidence that showed "specific,

detailed and concrete alternatives or modifications to the protocol" with "precise procedures, amounts, times and frequencies of implementation." Pet. App. 179a.

The district court also excluded the expert evidence of the cardiologist offered by Mr. Arthur chiefly on the basis that the expert had no experience administering midazolam at the potentially lethal dose called for in Alabama's protocol. Pet. App. 191a-192a. Due to the exclusion of this evidence, the district court held that Mr. Arthur had failed to raise a genuine issue of material fact concerning the heart attack risk posed by Alabama's protocol as applied to Mr. Arthur.

F. Mr. Arthur's Execution Date

Two days after Mr. Arthur's claims were dismissed, the State moved the Alabama Supreme Court to set an expedited execution date for Mr. Arthur "before any other pending motions to set an execution date are addressed." Mot. to Reset Arthur's Execution Date, *Ex parte Arthur*, No. 1951985 (Ala. Jul. 21, 2016). Despite Mr. Arthur's pending appeal, the Alabama Supreme Court on September 14, 2016 set an execution date for November 3, 2016. R.E. Tab 7.

Given the pending execution date, Mr. Arthur filed his opening appeal brief at the court of appeals ten days before the deadline and almost six weeks before his execution date. The appeal was fully briefed on October 19, 2016.

G. The Court of Appeals' Opinion

A divided panel of the court of appeals issued a 111-page opinion (and 29-page dissent) affirming the district court's judgment on November 2, 2016 at 7:05

p.m. EDT—less than 24 hours before Mr. Arthur's scheduled execution. The panel majority affirmed the district court's rulings on all claims and denied Mr. Arthur's motion for a stay.

The majority affirmed that Mr. Arthur could not plead a firing-squad alternative because he had not proven that Alabama's enumerated methods of execution—lethal injection or electrocution—are *per se* unconstitutional. Pet. App. 97a-110a. The dissenting opinion explained that the panel's ruling permits the states to "insulate themselves from constitutional scrutiny," effectively abrogating the Eighth Amendment in violation of the Supremacy Clause. Pet. App. 116a-117a, 132a-134a.[4] The dissent further noted that the panel majority's interpretation of *Baze* and *Glossip* "all but forecloses method-of-execution relief." Pet. App. 137a.

The panel majority also affirmed that Mr. Arthur had not met his burden to prove an "available" alternative lethal injection drug because he had not

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[4] The panel majority also purported to find that Mr. Arthur had not "present[ed] any admissible evidence" to show that his execution under Alabama's lethal injection protocol "would cause him to suffer a substantial risk of serious harm," Pet. App. 99a, but, the dissent notes, that is not a proper basis for the court's ruling given that the district court had refused to permit Mr. Arthur to *plead* the firing squad on the basis that it is not permitted by statute. Pet. App. 138a n.12. Indeed, the district court never considered the substantial evidence Mr. Arthur offered of severe pain inherent in Alabama's protocol because it ruled solely based on availability. *See infra* Section I.C. Similarly, the panel majority's footnoted afterthought that laches provides an alternative basis to affirm, Pet. App. 110a n.35, disregards that Mr. Arthur moved to plead the firing squad shortly after *Glossip* was decided and the district court did not find Mr. Arthur's motion to amend untimely. *See also* Pet. App. 113a n.3.

provided a specific "source for [the alternative drug] that would sell it to the [State] for use in executions." Pet. App. 69a (quoting *Brooks* v. *Warden*, 810 F.3d 812, 820 (11th Cir. 2016) (emphasis in original)

The panel majority also rejected Mr. Arthur's appeal on his as-applied Eighth Amendment claim, concluding that Mr. Arthur had not provided sufficient "specifics" for the alternative protocol he had proposed and that his expert medical evidence was "speculative." Pet. App. 82a, 91a-92a.

Finally, the panel majority affirmed the district court's denial of Mr. Arthur's Equal Protection claim. The majority held that, as long as the State conducts a "pinch test," there can be no Fourteenth Amendment violation, regardless of whether the test is performed in an ineffectual manner that renders it meaningless.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONTRAVENES *GLOSSIP* AND THE SUPREMACY CLAUSE

In *Glossip*, this Court confirmed that a condemned prisoner has a right to challenge a state's method of execution by showing that (i) the challenged method presents "a substantial risk of severe pain," and (ii) there is a "known and available alternative method of execution that entails a lesser risk of pain." 135 S. Ct. at 2731. In affirming the district court's dismissal of Mr. Arthur's claim based on the supposed absence of "available" alternatives, the court of appeals turned the *Glossip* test into an insuperable barrier, rendering nugatory the availability of Eighth Amendment challenges to methods of execution.

A. *Glossip* Does Not Require an Alternative Method of Execution To Be Presently Permitted by State Law.

1. In alleging the firing squad as an alternative method of execution, Mr. Arthur met the requirements set by this Court in *Glossip*. Mr. Arthur alleged that "there are numerous people employed by the State who have the training necessary to successfully perform an execution by firing squad," and the "State already has a stockpile of both weapons and ammunition." Pet. App. 138a.

Mr. Arthur also alleged that "execution by firing squad, if implemented properly, would result in a substantially lesser risk of harm than the State's continued use of a three-drug protocol involving midazolam." Pet. App. 138a. As support, Mr. Arthur's complaint relied on (among other things) "[a] recent study, which analyzed the contemporaneous news reports of all executions in the United States from 1900 to 2010, [and] found that 7.12% of the 1,054 executions by lethal injection were botched and that 0 of the 34 executions by firing squad had been botched." Pet. App. 138a (footnotes omitted). Mr. Arthur also pointed to the experience of Utah, which as recently as 2010 executed an inmate without incident. Pet. App. 137a.

The court of appeals brushed aside these well-pled allegations as immaterial, affirming the district court's ruling that, as a matter of law, the firing squad was not a permissible alternative under *Glossip*. The court concluded that the firing squad was not "available" because it is not "a currently valid or lawful method of execution in Alabama." Pet. App. 97a.

2. By reading a "permitted by statute" requirement into *Glossip*, the panel majority disregarded this Court's precedent. In *Hill* v. *McDonough*, 547 U.S. 573 (2006), this Court rejected the government's argument that, in the procedural context of that case, a § 1983 plaintiff had to plead an "alternative, *authorized* method of execution," *id.* at 582 (emphasis added). Two years later, in *Baze*, the Court referred to the need for a "known and available," alternative, but did not state that the alternative must be "authorized." 553 U.S. at 61. Likewise, in *Glossip*, although the Court distinguished *Hill*, there was no reference to an "authorized" requirement—instead, the Court held that a plaintiff must "plead and prove" only a "known and available" alternative. *Glossip*, 135 S. Ct. at 2738-39. Had this Court intended that such an alternative also be "authorized," as was suggested in *Hill*, it would have said so.

Additionally, the *Glossip* Court *did* indicate that a condemned inmate could present alternatives not expressly permitted by statute. Petitioners in that case had "not identified any available drug or drugs that could be used in place of those that Oklahoma is now unable to obtain[, n]or have they shown a risk of pain so great that *other acceptable*, *available methods must be used*." 135 S. Ct. at 2738 (emphasis added). Accordingly, the *Glossip* Court indicated that petitioners could have pleaded not only alternative "drugs"—the only method of execution authorized by Oklahoma law, Okla. Stat. tit. 22, § 1014—but also "other acceptable, available methods" of execution. *Id.* The inescapable conclusion (cast aside as "*dicta*" by the court of appeals, Pet. App. 100a) is that if a method of execution creates a "risk of pain" that

would violate the Eighth Amendment as compared to known and available alternatives, those alternatives need not be part of a state's existing legislative scheme.

In fact, *Glossip* contemplates the firing squad in particular as an alternative method of execution, even though that method was not set out in Oklahoma's statute. In *Glossip*, the majority criticized the dissent's suggestion that the firing squad would not be a permissible alternative, noting that the firing squad was previously held to be constitutional, and that "there is some reason to think that it is relatively quick and painless." *Id.* at 2739. If the firing squad was a permissible alternative in Oklahoma, there is no reason to hold differently for Alabama, since the two states' death penalty statutes are materially indistinguishable. Under Oklahoma's death penalty statute, if the state's primary method of execution—"administration of a lethal quantity of a drug or drugs"—and first two alternatives are held unconstitutional, then the firing squad is permitted. Okla. Stat. tit. 22, § 1014. Alabama law is similar to Oklahoma's, providing that if lethal injection or electrocution is held unconstitutional, the State shall use "*any* constitutional method of execution," Ala. Code § 15-18-82.1(c) (emphasis added),[5] which of course includes the firing squad, *see Glossip*, 135 S. Ct. at 2732, 2739 (citing *Wilkerson* v. *Utah*, 99 U.S. 130, 134-35 (1879)). In attempting to distinguish Oklahoma, the court noted that Oklahoma law

[5] *See also* Ala. Code § 15-18-82.1(h) ("In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.").

"expressly allowed . . . the firing squad." Pet. App. 101a. But it strains credulity to interpret the words "any constitutional method of execution" as being *narrower* than the words "the firing squad"—Alabama's legislature took clear steps to ensure that the State could employ alternative methods of execution, and the panel majority's reading of Alabama law would defeat that clear purpose.

3. It is wholly unsurprising that this Court did not incorporate a "permitted by statute" requirement into the *Glossip* test.

First, the Eleventh Circuit's ruling permits states to legislatively exempt themselves from Eighth Amendment review by limiting their death penalty statutes to one or a few specific methods. As the dissent below notes, this "empowers states to thwart constitutional claims," Pet. App. 135a, and conflicts with the Supremacy Clause. Pet. App. 129a-132a.

The panel majority refuses to confront the necessary implications of its ruling, vaguely suggesting that "if a state's sole method of execution is deemed unconstitutional," its "inquiry . . . would be a different one." Pet. App. 105a. But that circular reasoning ignores that Mr. Arthur's firing squad alternative was dismissed on the pleadings based on its not being permitted by statute—despite Mr. Arthur's well-pled allegations that the State's existing protocol is unconstitutional. *See* Pet. App. 136a n.12.

Moreover, Mr. Arthur's drug alternatives have been dismissed as unavailable and the State claims it can obtain no other drugs. *See infra* Section I.B., "The Majority's decision therefore checkmates [Mr. Arthur], nullifying [his] constitutional right to a humane execution." Pet. App. 133a.

Second, allowing the court of appeals' decision to stand would mean the guarantee of the Eighth Amendment varies from one part of the country to another by dint of state law. For example, under the court's logic, a Montana petitioner would be barred from pleading pentobarbital as an alternative. *See Smith* v. *Montana*, 2015 WL 5827252, at *4 (Mont. Dist. Ct. Oct 6, 2015) ("[W]hile pentobarbital may operate in a fast nature, it is not ultra-fast as is required to comply with Montana's execution protocol."). Yet in Oklahoma, where the state's lethal injection statute mandates execution by any "drug or drugs," a petitioner would face no such impediment. This outcome violates the basic tenet of federalism that constitutional rights should be interpreted uniformly throughout the country. *See Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816) (Story, J.).

The court of appeals' holding elevating the particularities of state law over the Constitution's guarantee of freedom from cruel and unusual punishment is in clear violation of the Supremacy Clause. *See* U.S. Const. art. VI, cl. 2 ("Th[e] Constitution . . . shall be the supreme Law of the Land . . . Laws of any State to the Contrary notwithstanding."). As this Court's Eighth Amendment cases show, while states are accorded deference to set their own laws, "[t]he state laws respecting crimes, punishments, and criminal procedure are, of course, subject to the overriding provisions of the United States Constitution. Where the State imposes the death penalty for a particular crime, we have held that the Eighth Amendment imposes special limitations upon that process." *Payne* v. *Tennessee*, 501 U.S. 808, 824 (1991). It is the role of

the judicial branch and ultimately this Court—not the state legislatures—to set federal Constitutional standards. *See Atkins* v. *Virginia*, 536 U.S. 304, 312 (2002) ("[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." (quoting *Coker* v. *Georgia*, 433 U.S. 584, 597 (1977))).

4. The court of appeals' remaining suggestions that its ruling does not conflict with *Glossip* and the Supremacy Clause are erroneous and disregard the record and posture of this case. *First*, despite conceding the "practical constraints" imposed by the its rule, the panel majority justifies its ultimate conclusion on the basis that those constraints should be "weighed against the practical problems of instituting an untested (in Alabama) protocol for execution by firing squad." Pet. App. 105a. Such (unsupported) concerns about the firing squad disregard the allegations of Mr. Arthur's proposed pleading and are the factual questions the district court could not have resolved—and did not resolve—in denying Mr. Arthur's motion for leave to amend. *See also* Pet. App. 112a n.4. Whether Alabama is reasonably capable of adopting the firing squad is a question for trial—not for the court of appeals in the first instance as a matter of law.

Second, the panel majority insists that "[b]ecause Mr. Arthur did not satisfy the first prong as to midazolam"—*i.e.*, showing the severe pain caused by Alabama's protocol—"that means his firing-squad claim fails in any event." Pet. App. 95a. That simply disregards the basic fact that the court of appeals had previously held Mr. Arthur had plead a cognizable claim that Alabama's protocol violated the Eighth

Amendment and the district court ultimately denied summary judgment on that claim and made its ruling based *only* on the "availability" of alternatives, without regard to the evidence Mr. Arthur had developed proving the substantial risk of pain caused by Alabama's protocol. *See supra* p. 10 (describing procedural history) & *infra* Section I.C. (describing Mr. Arthur's evidence of severe pain). In short, the court of appeals' repeated references to Mr. Arthur's supposed failure of proof as to the "pain" elements of *Glossip* disregard the basis of the district court's ruling and, as the dissenting opinion notes, "confuse the posture of Mr. Arthur's claim." Pet. App. 112a n.4; *see also* 109a-111a, 136a n.12 & 137a-139a.[6]

B. *Glossip* Does Not Require a Method-of-Execution Challenger To Acquire an Alternative Method of Execution on Behalf of the State, or To Provide "Precise Procedures" for an Alternative Method.

1. In *Glossip*, this Court required only that a method-of-execution challenger "*identify*"—not "obtain" or "procure"—"an alternative [method of

[6] Similarly, the panel majority's footnoted suggestion that, alternatively, Mr. "Arthur's firing-squad claim is barred by laches," Pet. App. 107a n. 35, disregards the basis for the district court's rulings and the fact that Mr. Arthur sought to amend his pleading promptly after *Glossip*. *See also* Pet. App. 111a n.3. Given that the district court itself did not interpret *Baze* as requiring an alternative (nor did four Justices of this Court), Mr. Arthur can hardly be faulted for following suit. R.E. Tab 34 at 11 ("[T]he court does not accept the State's argument that [a known and available alternative] is a specific pleading requirement set forth by *Baze* that must be properly alleged before a case can survive a motion to dismiss.").

execution] that is 'feasible [and] readily implemented.'" *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 52) (emphasis added). Mr. Arthur did exactly that, proffering substantial evidence at his hearing showing that the State could adopt a more humane alternative to its current protocol—specifically, it could use a one-drug compounded pentobarbital protocol, which is the most commonly used form of execution in the United States. Mr. Arthur relied primarily on the expert evidence of Dr. Gaylen M. Zentner, Ph.D., a pharmaceutical chemist and registered pharmacist with over three decades of experience in the pharmaceutical industry, whose testimony the district court found credible. Pet. App. 198a.

With respect to the ready availability of pentobarbital, Dr. Zentner testified, among other things, that: (1) "no active patents cover [pentobarbital sodium], meaning that anyone who has the ingredients can make" it; (2) at least four "other states have been able to locate sources for compounded pentobarbital" for use in executions over the past year; (3) "creating compounded pentobarbital [is] a straightforward process" and "[a]ny pharmacy in any state that desires to" compound pentobarbital could implement that "straightforward process"; (4) there is a company in the United States that listed "pentobarbital sodium," the active ingredient for compounded pentobarbital, as among its products for sale; (5) "there are overseas suppliers of pentobarbital sodium"; (6) "pentobarbital sodium could be produced by drug synthesis labs in the United States"; and (7) at least two accredited pharmacies in Alabama agreed, when contacted by Dr. Zentner, "that they had the facilities necessary to do sterile

compounding." Pet. App. 193a-198a. In sum, as to the availability of pentobarbital to ADOC, Dr. Zentner's unrebutted testimony was that "the feasibility for producing a sterile preparation of pentobarbital sodium does exist." R.E. Tab 22 at 219:13-16. The State presented *no* expert evidence to the contrary.

Despite this, the district court concluded (and the court of appeals affirmed) that compounded pentobarbital was not a "feasible" or "readily implemented" alternative—the district court held that Mr. Arthur had shown only that pentobarbital "should, could or may be available." Pet. App. 204a. But if an alternative "should" be available, then it is necessarily "feasible" and "readily implemented." As this Court has explained, "[t]he plain meaning of the word 'feasible' . . . [is] '*capable* of being done, executed, or effected.'" *Am. Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 508-509 (1981) (quoting Webster's Third New International Dictionary of the English Language 831 (1976)) (emphasis added). Similarly, *Glossip*'s "readily implemented" requirement cannot be read to mean more than that such an alternative is reasonably practicable under the circumstances. *Cf. United States* v. *One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 422 (6th Cir. 2006) ("'[R]eadily' is a relative term, one that describes a process that is *fairly* or *reasonably* efficient, quick, and easy, but not necessarily the most efficient, speedy, or easy process." (citing Webster's Third New International Dictionary of the English Language 1889 (1981)) (emphasis in original)).

Under the district court's reasoning affirmed by the court of appeals, Mr. Arthur was required to identify a specific willing source or actually procure

an alternative. Pet. App. 204a; Pet. App. 68a-69a. As stated by the court of appeals, this required Mr. Arthur to show a specific "source for pentobarbital that would sell it to [Alabama] for use in executions." Pet. App. 68a (quoting *Brooks*, 810 F.3d at 820). This is a much more stringent standard than required by *Glossip*, and one that would be nigh impossible for a condemned inmate to meet. There can be no dispute that condemned prisoners lack the authority to negotiate and procure a supply of drugs on behalf of the State, and a condemned inmate cannot reasonably do more than identify a feasible alternative. R.E. Tab 22 at 229:13-20 (DR. ZENTNER: "You know, I didn't ask anybody about willingness [to sell pentobarbital] for the simple reason that from my experience in procuring both goods and services, willingness depends on an authoritative negotiation of terms for purchase, which I did not have the authority to do. I was not an agent. I was not engaged. I was not authorized in any way to speak for ADOC."). Indeed, "[d]ue to the scarcity of and secrecy surrounding lethal injection drugs, it is all but impossible" for an inmate to specify a specific, willing source—particularly given that "prisoners cannot gather the information needed to use [alternative] drugs in a method-of-execution claim because details about lethal injection drugs and their suppliers are heavily concealed." Pet. App. 134a. This is especially true for Mr. Arthur, where the district court required him to identify a specific willing supplier, but then denied him discovery on that very issue. *See* Pet. App. 74a.

Moreover, the court of appeals' conclusion that the state had made a "good faith effort" to acquire an alternative and shown unavailability based on the self-serving testimony of the general counsel of the

Alabama DOC, Pet. App. 69a-70a, also disregarded the import of *Glossip* and is clearly erroneous. Ms. Hill testified that she "contacted all eighteen accredited compounding pharmacies in Alabama [to inquire whether pentobarbital was available], but her efforts were to no avail." Pet. App. 199a. However, these calls were all made over a two-week period shortly before the hearing, R.E. Tab 22 at 147:24-25, and critically, Ms. Hill conceded that in these calls, she never attempted to offer favorable terms to induce negotiation. Further, Ms. Hill testified that two pharmacies did not say that they were unwilling, but only that they lacked the active ingredient for pentobarbital—yet Ms. Hill did not offer to assist in providing the active ingredient, which, as shown through a simple internet search (that Ms. Hill failed to conduct), was available for sale in the United States. R.E. Tab 22 at 213:1-216:6; R.E. Tab 54. This all showed Ms. Hill's calls for what they were: patent attempts to create a record of unavailability at the eleventh hour, and a far cry from a showing that the State was "unable to acquire the drug through any means." *Glossip*, 135 S. Ct. at 2733.[7]

2. Aside from the alternatives Mr. Arthur offered in his facial challenge, he also proposed (when directed to do so by the district court after the

[7] Ms. Hill also testified that between September 2014 and November 2015, she had ongoing conversations with other departments of corrections regarding the availability of lethal injection drugs, but never found a source for pentobarbital. R.E. Tab 85 at 106. However, Ms. Hill asked only whether those departments would provide pentobarbital, and went no further. In fact, the evidence showed that other states had no objection to Alabama using their sources of pentobarbital, *see*, *e.g.*, R.E. Tab 52 at 3; R.E. Tab 53 at 2.

hearing) modifications to Alabama's existing midazolam-based protocol in support of his as-applied claim. In particular, Mr. Arthur proposed a modified protocol calling for the injection of midazolam at a gradual rate closer to clinical administration. Mr. Arthur contended that this would address the high likelihood that a rapid "bolus" dose of midazolam would induce a heart attack.[8] The district court rejected Mr. Arthur's midazolam-based alternative, finding that his medical expert failed to provide "specific, detailed and concrete alternatives or modifications to the protocol" with "precise procedures, amounts, times and frequencies of implementation." Pet. App. 165a. The court of appeals affirmed that erroneous ruling, criticizing Mr. Arthur's proposal as "light on specifics." Pet. App. 78a-79a.

The requirement that Mr. Arthur's medical expert provide step-by-step instructions on an execution protocol is an impossible standard to meet, and must be rejected. As Mr. Arthur's cardiology expert, made clear, physicians are "ethically prohibited from suggesting modifications to a lethal injection protocol." Pet. App. 244a (citing American Medical Association Ethics Opinion ¶ 2.06). Indeed, the

[8] For the avoidance of doubt, Mr. Arthur's position is that midazolam will not adequately anesthetize him to withstand the pain of the second and third drugs in Alabama's execution protocol. Separate and apart from this facial challenge, the harm that Mr. Arthur identified in his as-applied claim can be cured through modifications to the manner in which midazolam is administered. Accordingly, in response to the District Court's directive, Mr. Arthur offered to advance a midazolam-based alternative that would cure the substantial risk that Alabama's execution protocol will cause him to suffer the severe pain of a heart attack.

State's own expert, Dr. Mark Dershwitz, testified that it would be an ethical violation to [redacted] R.E. Tab 60 at 225:15-226:9. And *amici* experts on medical ethics have advised that medical experts are ethically forbidden from providing the evidence that district court demanded in this case. Brief for *Amici Curiae* Experts on Medical Ethics.[9] The courts below thus placed Mr. Arthur in an untenable position—they required proof from a medical expert, Pet. App. 164a-165a, but the kind of proof that no medical expert could ethically provide.[10]

C. Preventing an Inquiry into the Severe Pain Caused by a State's Lethal Injection Protocol Runs Counter to *Glossip*.

1. The court of appeals' erroneous ruling means that Mr. Arthur's facial challenge to Alabama's protocol was dismissed without review of the substantial evidence demonstrating the severe pain and suffering it will inflict. But the lack of an alternative that meets the court of appeals' impossible

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[9] The court of appeals suggested that this argument is contradicted by the fact that Dr. Strader's testimony "outline[d] the broad components of Arthur's proposal." Pet. App. 80a. But Dr. Strader did not "outline" a proposal, which he was not ethically permitted to do so—he opined on his experience administering midazolam in a clinical setting. App. Pet. 243a-247a.

[10] The court of appeals also concluded that Mr. Arthur failed to show that his proposed modifications would "significantly reduce" the "substantial risk of severe pain" of the current protocol. Pet. App. 81a-83a. This ignores the evidence from Dr. Strader, which states that gradual administration of midazolam "would reduce the risk of a severe drop in arterial blood pressure," and thus the risk of Mr. Arthur suffering the pain of a heart attack. Pet. App. 245a.

standards in no way diminishes the severe pain that will be inflicted upon Mr. Arthur later today. The majority of this Court in *Glossip* rejected as "outlandish" the dissent's suggestion that, as a result of its ruling, inmates could be executed using torturous methods. 135 S. Ct. at 2746. Yet that is precisely what the court of appeals' decision would accomplish.

Here, Mr. Arthur proffered, in the words of the district court, "impressive" evidence showing that Alabama's lethal injection protocol will subject him to agonizing pain. Pet. App. 166a. Specifically, Mr. Arthur was prepared to offer the testimony of Dr. Alan Kaye, Chairman of the Department of Anesthesiology at Louisiana State University Health Sciences Center. In his expert report, Dr. Kaye explains that the first drug in the State's protocol, midazolam, is *incapable* of inducing anesthesia sufficient to withstand the severe pain of the second and third drugs in Alabama's protocol. The district court's determination—six days before trial—to limit the hearing to the "availability" of Mr. Arthur's lethal injection alternative meant that the district court never considered or weighed this evidence.

While petitioner in *Glossip* raised a similar theory about midazolam's deficiencies, Dr. Kaye's evidence cures the two issues this Court identified with petitioner's evidence in *Glossip*. *First*, the *Glossip* petitioner argued that midazolam is "too weak to maintain unconsciousness and insensitivity to pain," but failed to adduce any "scientific proof." 135 S. Ct. at 2740-41. Here, Dr. Kaye explained that midazolam has been shown in peer-reviewed studies to reliably achieve a "bispectral index" score of only 70, a level at which "patients are more likely to be conscious, able

to follow commands, and recall the procedure they are undergoing." Pet. App. 302a-303a.

Second, this Court noted that the *Glossip* petitioner's experts failed to specify exactly where midazolam's "ceiling effect" exists (*i.e.*, the point at which no further dose of midazolam has any effect). *Glossip*, 135 S. Ct. at 2743. In contrast, Dr. Kaye's unequivocal opinion (supported by the medical literature) shows that the "ceiling effect" occurs before a dose of 0.3 mg/kg, which is approximately 23 mg of midazolam in a 170 lb. adult. Pet. App. 301a. Thus, approximately 477 mg of the 500 mg of midazolam called for in the Alabama's protocol serves absolutely no purpose.

In light of the evidence Mr. Arthur was prepared to offer at trial, the court of appeals' ruling produces the very result this Court disclaimed as "outlandish" in *Glossip*—Mr. Arthur will be executed with a torturous method, not because he is unable to prove that Alabama's protocol will cause substantial pain and suffering, but because he cannot meet the court of appeals' insurmountable standard on an alternative.

The execution of Christopher Brooks on January 21, 2016—the only execution Alabama has performed using its current protocol—further highlights the substantial risk of pain and suffering Mr. Arthur faces. *See* Compl., *Smith* v. *Dunn*, No. 16-cv-00269, ECF No. 1 ¶¶ 35-42 (M.D. Ala. Apr. 15, 2016). A witness to Mr. Brooks' execution reported that Mr. Brooks' left eye opened *after* the consciousness test was administered (which *followed* the administration of midazolam), and it remained open until the execution chamber curtains were closed. *Id.* ¶ 37. Medical evidence shows that it is impossible for Mr. Brooks' eye to have opened after

midazolam was administered unless he was inadequately anesthetized. *See* Expert Report of Dr. Michael Froelich, *Smith* v. *Dunn*, No. 16-cv-00269, ECF No. 1-2 at 3 (M.D. Ala. Apr. 15, 2016); *see also* Pet. App. 315a (Dr. Kaye explaining that the opening of eyes "would not occur at the level of anesthetic depth necessary to avoid pain resulting from the administration of the second and third lethal injection drugs" in Alabama's protocol).

2. The court of appeals also wrongly affirmed summary judgment dismissing Mr. Arthur's as-applied claim. Mr. Arthur proffered evidence showing that the administration of midazolam under Alabama's protocol would induce a painful heart attack before the sedative effects of the drug are felt.

Mr. Arthur relied primarily on the evidence of Dr. J. Russell Strader, Jr., a practicing cardiologist with over a decade of experience. Pet. App. 251a-253a. Dr. Strader opined that midazolam has well-known hemodynamic effects, including causing a rapid drop in blood pressure upon administration. Pet. App. 256a-260a. This is particularly so with a large bolus dose, as is called for under Alabama's protocol. Pet. App. 271a-272a. Dr. Strader also opined, based on a review of Mr. Arthur's medical records, that Mr. Arthur likely has clinically significant obstructive heart disease, making him highly susceptible to a heart attack if he experienced a sudden and sharp reduction in blood pressure. Pet. App. 273a. Accordingly, Dr. Strader concluded that it is "highly likely" that the administration of midazolam called for under Alabama's protocol would cause Mr. Arthur to

suffer the "excruciating pain of a heart attack." Pet. App. 273a.[11]

The court of appeals affirmed the summary exclusion of Dr. Strader's evidence for three reasons, none of which withstand scrutiny.

First, the court of appeals concluded that Dr. Strader "could not give an opinion about how long it would take a person to be rendered unconscious after being given a 500 mg dose of midazolam." Pet. App. 88a. This is both wrong and irrelevant. Dr. Strader explained that midazolam's sedative effects take about 5 minutes, whereas its hemodynamic effects take only 1-2 minutes. Pet. App. 257a. Moreover, Dr. Strader's unrebutted evidence showed that regardless of the precise onset of sedation, the heart attack will *necessarily* occur before any of midazolam's sedative effects are felt. This is because midazolam's hemodynamic effects occur immediately at the level of the vasculature (*i.e.*, the blood vessels), whereas midazolam has no sedative effect before it circulates through the body, reaches the head, and penetrates the blood-brain barrier. Pet. App. 249a-250a.

Second, the court of appeals affirmed the exclusion of Dr. Strader's opinion because he had "no experience with a 500-mg dose of midazolam, or any dose larger than 20 mg" and "the medical literature that he relied upon did not address such large doses of midazolam." Pet. App. 86a. That ruling, however, ignored *Glossip* and the *Daubert* standard. In essence, the court of appeals affirmed summary

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[11] To be clear, this claim is in addition to Mr. Arthur's facial challenge to midazolam's lack of efficacy as an anesthetic that the district court dismissed solely on the lack of an "available" alternative.

judgment excluding Mr. Arthur's constitutional claims by holding that an expert may opine on a drug only if he has personally administered, or can point to medical literature regarding, the extraordinarily high drug dosages called for in lethal injection protocols.[12]

II. THE DECISION BELOW DENYING MR. ARTHUR'S FOURTEENTH AMENDMENT CLAIM CREATES A CIRCUIT SPLIT.

1. Under the Equal Protection clause of the Fourteenth Amendment, "States must treat like cases alike." *Vacco* v. *Quill*, 521 U.S. 793, 799 (1997). This is no different for executions. While there is no obligation under the Eighth Amendment for states to adopt "failsafe" procedures to guard against botched executions, *Baze*, 553 U.S. at 61, the Equal Protection clause commands that a "[s]tate should do what it agreed to do: in other words it should adhere to the execution protocol it adopted." *In re Ohio Execution Protocol Litig.*, 671 F.3d 601, 602 (6th Cir. 2012). And because unequal treatment in the execution context burdens a fundamental right—the right to be free from cruel and unusual punishment—the State must

[12] The court of appeals also appeared to suggest that Dr. Strader was unqualified to testify because he was not an anesthesiologist and used midazolam only for "sedation," not "anesthesia." Pet. App. 87a. The court does not, and cannot, assert any legitimate reason why that distinction should have any bearing on a cardiologist's opinion about cardiology. The court itself seems confused by its relevance, asserting that sedation is a "lighter form" of unconsciousness, yet finding that midazolam leads to "sedation" in 3-5 minutes and "anesthesia" in only 2 minutes. Pet. App. 87a-88a. Ultimately, the panel majority's opinion is based on little more than its own speculation regarding medical matters and highlights exactly why Mr. Arthur's claim should not have been dismissed on summary judgment.

justify its action as narrowly tailored to advance a compelling government interest.

2. In this case, the State has repeatedly and arbitrarily deviated from its voluntarily adopted safeguards. Specifically, the State's "consciousness assessment" requires that between the administration of the first and second drugs in the execution protocol, an execution team member must pinch the condemned prisoner—which has the purpose of "ensur[ing] that the inmate has been rendered unconscious by the first drug." Pet. App. 21a. The evidence of experts from both sides shows that to accomplish its purpose, the pinch must be as hard as possible and designed to inflict pain. R.E. Tab 60 at 80:2-81:3; R.E. Tab 43 at 179:13-16; R.E. Tab 21 at 24:23-25. But the testimony of execution team members showed that they displayed a "wide-ranging understanding of the required amount of force" for the pinch test. R.E. Tab 41 at 17-18 & n.8. For example, one execution team member testified that he would "pinch hard enough that if it was a conscious person, they would jerk their arm away from me," while another officer testified that he would pinch an inmate "on the inside of the arm hard enough to wake him if he's asleep." R.E. Tab 43 at 179:4-5, 192:7-8. According to the undisputed expert medical evidence, pinches of this variety are meaningless.

The failure of execution guards to administer the pinch test correctly is unsurprising, given that they were never, according to the district court, "afforded specific, uniform instructions on how to perform the task." R.E. Tab 41 at 17-18 & n.8. Thus, the State's own witnesses confirmed that the consciousness assessment was not done correctly, and in the words of the State's own expert, [redacted]

[redacted] R.E. Tab 60 at 190:3-9 (emphasis added).

3. The court of appeals recognized the undisputed facts, but nonetheless affirmed dismissal of Mr. Arthur's Equal Protection claim, holding that, as long as a "pinch" is always administered—no matter how slight or ineffectual—then Mr. Arthur suffers no constitutional violation. Pet. App. 93-94a ("It is enough that the district court found that Alabama does conduct the consciousness assessment as part of its lethal injection protocol."). This defies common sense—the undisputed evidence (from the State's own expert) is that an improperly conducted consciousness assessment is [redacted] R.E. Tab 60 at 190:3-9. And if the State (without reason) sometimes properly conducts the safeguard, but sometimes not, that is the definition of unequal treatment. As the court of appeals recognized years ago, before reversing itself *sub silentio*, "[s]ignificant deviations from a protocol" that result in a "reduction in safeguards" run afoul the Fourteenth Amendment. *Arthur*, 674 F.3d at 1263.

III. THIS CASE IS AN IDEAL VEHICLE FOR ADDRESSING THE RECURRING AND EXCEPTIONALLY IMPORTANT QUESTIONS PRESENTED

Mr. Arthur's case, having proceeded through discovery and a partial hearing, has a fully developed record on the relevant issues.

The questions presented also arise with great frequency. On his Eighth Amendment claim, Mr. Arthur is aware of at least twenty plaintiffs raising method-of-execution challenges, across six states and five circuits, that would benefit from clarification of

Glossip's alternative method requirement.[13] Indeed, petitioners in *Johnson* v. *Kelley* (No. 16-6496) filed for certiorari two weeks prior to this Petition, and raise many of the same issues, including whether, under *Glossip*, an alternative method of execution must be permitted by state statute, and the standard for showing that an alternative is "available."

On Mr. Arthur's Fourteenth Amendment claim, three other circuits have had the opportunity to consider the meaning of the Equal Protection clause in the context of execution protocols, and thus the time is ripe for this Court's guidance. *See In re Ohio*, 671 F.3d at 602; *Towery* v. *Brewer*, 672 F.3d 650, 660 (9th Cir. 2012); *Wood* v. *Collier*, 2016 WL 4750879, at *3-5 (5th Cir. Sept. 12, 2016).

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[13] *See, e.g.*, *First Amend. Coalition of Ariz., Inc.* v. *Ryan*, No. 14-cv-01447, ECF. No. 117 (D. Ariz. May 18, 2016); *Abdool* v. *Palmer*, No. 14-cv-01147, ECF. No. 27 (M.D. Fla. Nov. 13, 2015); *Bucklew* v. *Lombardi*, No. 14-cv-08000, ECF. No. 63 (W.D. Mo. Jan. 29, 2016); *Johnson* v. *Lombardi*, No. 15-cv-4237, ECF. No. 40 (W.D. Mo. Sept. 30, 2016); *In re Ohio Execution Protocol Litig.*, No. 11-cv-01016, ECF. Nos. 691, 692, 695 (S.D. Ohio Oct. 26, 2016); *Whitaker* v. *Livingston*, No. 13-cv-2901, ECF. No. 133 (S.D. Tex. Jun. 6, 2016); *Wood* v. *Collier*, No. 16-cv-02497, ECF. No. 22 (S.D. Tex. Aug. 19, 2016); *Kelley* v. *Johnson*, 2016 Ark. 268, 18 (2016). Moreover, there are method-of-execution statutes on the books in 31 states, raising the possibility of 31 different Eighth Amendment standards.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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