No. 14-7955

IN THE

Supreme Court of the United States

RICHARD E. GLOSSIP, et al.,
Petitioners,

vs.

KEVIN J. GROSS, et al.,
Respondents.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does a Federal District Court correctly deny an injunction against execution of a state prisoner in a § 1983 action when it finds, based on substantial evidence, that the plaintiffs have failed to establish that the protocol to be used is "sure or very likely" to cause severe pain?

2. Is the standard for a stay set forth in *Baze* v. *Rees* narrowly limited to execution protocols nearly identical to the one at issue in that case, or does it apply to any execution protocol alleged to create a risk of pain but not designed to cause pain?

3. When challenging an execution method alleged to create a risk of severe pain, must the prisoner show that there is an available alternative with a substantially lower risk?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. Both parties have filed blanket consents to the filing of *amicus* briefs.

   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* CJLF made a monetary contribution to its preparation or submission.

This case is part of an effort to obstruct the execution of well-deserved sentences for the worst murderers, even when there is no doubt of guilt and even when the penalty determination has been thoroughly reviewed and found to be proper. Such obstruction is contrary to the interests of victims of crime that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Four Oklahoma murderers sought a preliminary injunction against the use of Oklahoma's lethal injection protocol. J. A. 112. All four committed severely aggravated murders for which death is clearly a just punishment. Charles Warner anally raped and murdered the eleven-month-old daughter of his girlfriend. Richard Glossip hired another employee to beat their employer to death with a baseball bat. Benjamin Cole murdered his nine-month-old daughter by bending her in half backward, snapping her spine. J. A. 113-114. John Grant was already in prison for a *de facto* life sentence, and thus "judgment proof" from any sentence but death, when he murdered a prison food service supervisor, stabbing her 16 times with a "shank." *Grant* v. *State*, 58 P. 3d 783, ¶¶ 2-6 (Okla. Crim. App. 2002). As of the date of the Court of Appeals opinion, "all four of the plaintiffs ha[d] exhausted their state and federal court remedies and the State of Oklahoma ha[d] established specific execution dates for each of them." J. A. 114.

Oklahoma for many years used a three-drug protocol for executions, with a barbiturate for the first drug, like the protocol upheld in *Baze* v. *Rees*, 553 U. S. 35, 44 (2008). When thiopental became unavailable, the state substituted another barbiturate, pentobarbital, but when that drug also became unavailable the state

substituted midazolam, "a sedative in the benzodiazepine family of drugs." J. A. 114-115. The present case is primarily a challenge to that substitution. After hearing expert testimony from both sides, the District Court denied the preliminary injunction.

> "I conclude on the basis of the evidence before me that plaintiffs have failed to establish that proceeding with the execution of these plaintiffs on the basis of the revised protocol presents a risk that is 'sure or very likely to cause serious illness and needless suffering,' amounting to 'an objectively intolerable risk of harm,' in the words of the Supreme Court at page 50 of the Baze decision." J. A. 96.

The Tenth Circuit affirmed. J. A. 111-112. This Court denied a stay of execution for Charles Warner by a 5-4 vote, see *Warner* v. *Gross*, 135 S. Ct. 824, 190 L. Ed. 2d 903 (2015), and Warner was executed.

Petitioners cite a press report that Warner said "my body is on fire." Brief for Petitioners 22. They omit the essential fact that a media witness also reported that Warner said this "*before* the three-drug cocktail was administered." DeLaTorre, Doney, and Broyles, Oklahoma Inmate Said His 'Body Was on Fire' Prior to Being Executed for 1997 Murder and Rape, KFOR (Jan. 16, 2015) (emphasis added).[2] That report continues,

> "His last words before the drugs took full effect were 'I'm not afraid to die, we's [we are] all gonna die.'

2. http://kfor.com/2015/01/15/oklahoma-inmate-said-his-body-was-on-fire-prior-to-be-executed-for-1997-murder-and-rape/ (all Internet materials as visited April 8, 2015).

> "Broyles said it did not appear Warner was in pain. He never raised his head off the gurney and did not convulse the way Lockett did last April.
>
> "Sean Murphy with the Associated Press said afterwards, 'It appeared the sedative worked.' "

Warner's *pre*-injection "on fire" exclamation is not evidence that the Oklahoma protocol causes extreme pain. It is further evidence that there is a campaign of deception that extends to soliciting condemned inmates to fake agony in their last moments, and some are going along with it, though some are not. See Smyth, Public Defender Accused of Coaching Dennis McGuire to Exaggerate Suffocation During Execution, Associated Press (Jan. 27, 2014).[3]

This Court granted certiorari on January 23, 2015. On January 28, at the request of the State, the Court stayed executions using midazolam.

SUMMARY OF ARGUMENT

The Eighth Amendment does not allow torturous methods of execution but also does not require completely painless ones. The *Wilkerson*/*Kemmler* rule does not require an available alternative but only applies to methods that are intended to or certainly do cause extreme pain. The *Baze* standard is adapted from the prison conditions "deliberate indifference" cases and applies whenever the claim relates to a risk of pain. The *Baze* standard requires threshold showings of both severity and risk of pain, and it requires comparison to available alternatives.

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3. http://www.cleveland.com/nation/index.ssf/2014/01/public_defender_accused_of_coa.html.

When relief is required, the Prison Litigation Reform Act of 1995 requires that it be the least intrusive possible. In the context of a method-of-execution claim, an order requiring a specific, available alternative method instead of the state's proposed method is less intrusive than one that simply bars use of the state's method. Without an approval of a specified alternative, the state would have to start over, possibly delaying justice for years. In addition, it is doubtful whether a federal court in a § 1983 action has jurisdiction to issue an order that amounts in practice to an indefinite stay of execution. *Nelson* and *Hill* suggest that such an order may require conversion to a habeas petition, with all the limitations imposed on that form of action.

The present case has arisen only because of a restriction on the distribution of the preferred drugs for lethal injection, caused primarily by European companies under pressure from European governments. The people of the United States are entitled to decide through the democratic process whether to have capital punishment. We must not allow ourselves to be pressured and manipulated from Europe. A rule of law that says a state cannot proceed without the optimum drugs, when those drugs have been cut off from abroad, would facilitate an assault on our sovereignty and our democracy.

The consensus that is most relevant in this case is the consensus of the American people that capital punishment has an important place in our system of criminal justice and needs to be enforced. The fact that most states have not yet needed to select a replacement for barbiturates in their lethal injection protocols, because so far they have been able to obtain them or because executions are stalled for other reasons, does

not establish a "consensus" that midazolam is an unacceptable substitute.

ARGUMENT

I. The Eighth Amendment does not require completely painless executions or "best practices," but a "risk" claim must consider alternatives.

A. Not Torturous, But Not Painless.

To many Americans, the amount of hand-wringing over the risk of pain felt by murderers during execution seems very strange. For example, Petitioners and supporting *amici* make much of the fact that midazolam is not considered a proper drug to use as the sole anesthetic in surgery. See Brief for Petitioners 13; Brief of Sixteen Professors of Pharmacology as *Amici Curiae* 20.[4] John and Jane Public would likely say, "So what? This isn't supposed to be a medical procedure. It's supposed to be punishment."

By insisting that the state must use a drug that puts the inmate in a "comalike" state, see Brief for Petitioners 26, Petitioners are arguing in essence that a murderer is entitled to a completely painless execution. The Eighth Amendment requires no such thing, and *Baze* v. *Rees*, 553 U. S. 35 (2008), did not change that. There is a wide gulf between torturous and painless, and forbidding one does not equal requiring the other.

An *amicus* supporting Petitioners has again traced the familiar history of the evolution of methods of execution in the United States. See Brief for the Louis

4. This brief is labeled as being in support of neither party. It actually attempts to support Petitioners.

Stein Center for Law and Ethics at Fordham University School of Law as *Amicus Curiae* ("Fordham Brief"); see also *Baze*, 553 U. S., at 42-43 (summarizing same history). The history does indeed show that our society has made an effort to make executions as painless as feasible. It does not follow, though, that executions must be completely painless. On the contrary, methods of execution continued to be used even though they were recognized to often be painful. Hangings continued throughout most of the nineteenth century, even though they were known to sometimes result in "slow strangulations." See Fordham Brief 5.

Wilkerson v. *Utah*, 99 U. S. 130 (1879), was a territorial case where the Eighth Amendment applied directly, even before "incorporation." "Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting . . . is not included in that category within the meaning of the eighth amendment." *Id*., at 134-135. No one could think that shooting is painless, and the *Wilkerson* Court did not require painlessness.[5] The constitutional prohibition was directed at "punishments of torture." *Id*., at 136. Electrocution was adopted in the belief that it was a "more humane" method than the prior methods, primarily hanging. See *In re Kemmler*, 136 U. S. 436, 447 (1890). That is not to say it was completely painless or that painlessness was constitutionally required.

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5. Utah has recently reinstated the firing squad as an alternative, drawing surprising support from well known death penalty opponent Deborah Denno. See Lopez, Why Utah Is Bringing Back the Firing Squad for Executions, Vox (as of Mar. 27, 2015), http://www.vox.com/2015/3/27/8301357/utah-death-penalty.

> "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."[6] *Ibid*.

Pain is a part of life. All of us experience it at some time. Some people choose to endure pain as the price of participating in athletic activity. People often voluntarily endure pain during medical treatment or while recovering from it. People may choose to endure pain from medical conditions or in childbirth as preferable to taking the drugs that would be needed to be pain-free. We should not be so squeamish as to recoil in horror at the possibility that someone who has intentionally inflicted enormous suffering on innocent others might suffer some pain as an incidental consequence of receiving the punishment he richly deserves for his crime. The Court's decision in this case should permanently put to rest any notion that a murderer is constitutionally entitled to a completely painless death. See *Baze*, 553 U. S., at 104 (Thomas, J., concurring in the judgment) ("anesthetized"). Extreme or prolonged pain is the concern here, not any pain at all.

B. The Alternative Problem.

The idea that methods of execution must be judged relative to available alternatives is a relatively recent development, and it came from the defense side. The gas chamber had been regularly upheld against Eighth Amendment challenge from its introduction through the 1980s. See *State* v. *Gee Jon*, 46 Nev. 418, 435-437,

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6. To be sure, *Kemmler*'s discussion of the requirements of the Eighth Amendment is dictum. The holding is that the Eighth Amendment does not apply to a state case. *Id*., at 447-448.

211 P. 676, 681-682 (1923); *Gray* v. *Lucas*, 710 F. 2d 1048, 1057-1061 (CA5 1983). In 1992, as California prepared to carry out its first post-*Furman* execution, the Ninth Circuit stayed the execution on an Eighth Amendment challenge to the gas chamber. This Court vacated the stay on the ground that the inmate, Robert Alton Harris, had abusively delayed a known claim to the last minute. *Gomez* v. *U. S. District Court*, 503 U. S. 653, 653-654 (1992) (*per curiam*), but two dissenting Justices agreed with the claim on the merits.

The *Gomez* dissenters agreed with the inmate's argument that "in light of the availability of more humane and less violent methods of execution, Harris' claim has merit." 503 U. S., at 654 (Stevens, J., dissenting). The alternative, endorsed by "numerous medical, legal, and ethical experts," *id*., at 656, was, of course, lethal injection, exactly the method attacked in *Baze* v. *Rees*. See *Baze*, 553 U. S., at 104 (Thomas, J., concurring in the judgment).[7]

In the abstract, it is easy to say that states should move to methods inflicting less pain or creating less risk of severe pain as improved methods become available. As the history noted above indicates, they have generally done that. Imposing such a requirement as a constitutional mandate, however, would severely distort the democratic process of deciding whether a state will have capital punishment.

Enacting or repealing a statute is not easy, by design. Most states follow the federal model where enacting a statute requires majorities in both houses of the state legislature plus concurrence of the governor or

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7. Later challenges to the gas chamber after the lethal injection alternative was made available were rejected in *Gomez* v. *Fierro*, 519 U. S. 918 (1996) (grant, vacate, remand) and *Stewart* v. *LaGrand*, 526 U. S. 115, 119 (1999) (waiver).

a two-thirds majority in both houses to override a veto. See National Conference of State Legislatures, Inside the Legislative Process 6-33 (1998).[8] Once the lawmaking authorities have come to this level of agreement, the decision should remain in place unless and until there is the same level of agreement to change it. Repealing a statute therefore requires the same process as enactment. In the legislative process, blocking legislation is far easier than repealing legislation. If a state is constitutionally required to enact new legislation to maintain an existing law, then a determined minority can effectively repeal a law merely by blocking the maintenance bill in one house or convincing the governor to veto it.

New York provides an example. Murder in the first degree is a capital offense by statute in New York and has been throughout the modern era, see N. Y. Crim. Proc. L. § 400.27, but opponents of the death penalty have been able to nullify the law most of that time by blocking the legislation to fix real or fabricated problems with it. See *People* v. *Davis*, 43 N. Y. 2d 17, 32, 371 N. E. 2d 456, 463 (1977) (1974 mandatory law); *People* v. *Taylor*, 9 N. Y. 3d 129, 156-157, 878 N. E. 2d 969, 984-985 (2007) (Smith, J, concurring) (precedent striking down 1995 law was wrongly decided, but not overruled as a matter of *stare decisis*). Such repeal-by-deadlock would become a frequent occurrence if states were required to regularly enact new execution methods from time to time, allowing opponents to effectively repeal laws that they are unable to actually repeal through the regular democratic process. And that is precisely the idea. Cf. *Baze*, 553 U. S., at 71 (Alito, J., concurring) (warning of *de facto* ban by litigation

8. http://www.ncsl.org/documents/legismgt/ILP/98Tab6Pt3.pdf.

gridlock); *id*., at 105 (Thomas, J., concurring in the judgment).

Making the "best practices" a constitutional mandate could actually inhibit the adoption of improvements. If opponents of the death penalty believe that they have a chance of getting a state's law struck down by blocking a new, better, more humane method, they might well oppose it for that reason. Indeed, the present case arises precisely because of such a cynical blockage, though it occurs in the commercial realm rather than the legislative one. Oklahoma is forced to use the suboptimum drug because and only because opponents of the death penalty have blocked the optimum one.

C. Nelson and Hill.

Yet alternatives are relevant under *Baze*. The case Petitioners cite as rejecting a need to show an alternative does not support their argument.

The switch to lethal injection seemed to eliminate method-of-execution litigation for about a decade, but then it was back as the formerly preferred alternative came under attack. One preliminary question that needed to be resolved was whether a habeas corpus petition or a civil rights suit under 42 U. S. C. § 1983 was the correct procedure. This procedural question, not the substantive Eighth Amendment question, was at issue in *Nelson* v. *Campbell*, 541 U. S. 637, 639 (2004) and *Hill* v. *McDonough*, 547 U. S. 573, 585 (2006).

In *Nelson*, an inmate with compromised veins challenged the state's plan to use a "cut down" procedure as a last resort to gain venous access. 541 U. S., at 641-642. The Court held that this particular claim, not "method-of-execution claims generally," could proceed

as a § 1983 action. *Id*., at 644. The Court emphasized that "the gravamen of petitioner's entire claim is that use of the cut-down would be *gratuitous*." *Id*., at 645 (emphasis in original). If on remand the challenged procedure turned out to actually be necessary to execute the judgment, the holding that the case could proceed under § 1983 rather than habeas would not apply. *Id*., at 646.

Significantly, the *Nelson* Court noted that a stay of execution, initially requested by Nelson, undermined his position on the applicability of § 1983. Relief that goes beyond prohibiting the specific practice complained of to prevent the execution altogether raises doubt as to whether the case can proceed as a civil rights action and potentially conflicts with the requirement of the Prison Litigation Reform Act that relief extend no further than necessary. *Id*., at 648. See Part II, *infra*, at 20-22.

Hill v. *McDonough*, which Petitioners rely on heavily, see Brief for Petitioners 48-49, was also a habeas versus § 1983 case. See 547 U. S., at 576. Essential to the holding that the case could proceed under § 1983 was the fact that "respondents do not contend, at least to this point in the litigation, that granting Hill's injunction would leave the State without any other *practicable*, legal method of executing Hill by lethal injection." *Id*., at 580 (emphasis added).

The *Hill* Court did decline the suggestion of *amicus* United States to create a special pleading requirement for all method-of-execution challenges under § 1983 that "the prisoner [must] identif[y] an alternative, authorized method of execution." *Id*., at 582. However, Petitioners place more weight on this holding than it can bear. The Court's reluctance to impose a special pleading requirement through case law when such requirements are more properly established by rule, see *ibid*., does not mean that the fact at issue is irrelevant

to either the substance of claim or the proper form of action. Quite the contrary, *Hill* says the existence of an alternative is quite relevant to the latter point. "If the relief sought would foreclose execution, recharacterizing a complaint as an action for habeas corpus might be proper." 547 U. S., at 582.[9] Of course "*Baze* did not overrule" *Hill*. See Brief for Petitioners 28, 51. There was no reason to do so. The cases addressed different questions. *Hill* addressed jurisdiction to proceed under § 1983 rather than habeas and whether special pleading requirements apply, while *Baze* addressed the merits of the underlying Eighth Amendment claim, an issue *Hill* expressly disclaimed any opinion on. See 547 U. S., at 585.

Petitioners rely on *Jones* v. *Bock*, 549 U. S. 199, 213 (2007), for their expansive interpretation of *Hill*, Brief for Petitioners 28, but in context *Jones*'s citation of *Hill* cuts the other way. The question the Court was considering there is succinctly stated at the beginning of Part II of the opinion.

> "There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court. [Citation.] What is less clear is whether it falls to the prisoner to plead and demonstrate exhaustion in the complaint, or to the defendant to raise lack of exhaustion as an affirmative defense." *Id*., at 211.

This is all about *who* has to raise in the pleadings a fact of unquestioned importance to the decision. That is the

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9. Recharacterization as habeas would invoke limitations as to exhaustion if the inmate had not presented his claims to the state courts and deference if he had, see 28 U. S. C. §§ 2254(b), (d), such that it would be unlikely he could prevail in federal court. The successive petition limitation might also bar some petitions. See *Hill*, *supra*, at 576.

context in which *Jones* cites *Hill*, right after it says that discrimination plaintiffs do not have to "specifically allege the elements of a prima facie case of discrimination." *Id*., at 213. They still must establish the elements to prevail, obviously. A pleading requirement is not a rule of substantive law.

Nothing in *Nelson* or *Hill*, therefore, negates the relevance of the existence of "other legal, practicable method[s]" as a factor in the substance of an Eighth Amendment challenge to a method of execution. The gas chamber cases did not address that issue on the merits. See *supra*, at 9, and n. 7. *Baze* v. *Rees* was therefore the first case in this Court in the modern era to squarely present the substantive Eighth Amendment question.

D. Baze, Risk, and Alternatives.

In *Baze*, unlike previous method of execution challenges, the method was concededly painless as designed. See *Baze*, 553 U. S., at 41 (plurality opinion). Under *Wilkerson* and *Kemmler*, that would be the end of the case, as only intentionally torturous methods violate the Eighth Amendment. Justice Thomas, joined by Justice Scalia, concurring in judgment, would so hold. See *id*., at 94, 102. However, the plurality opinion allowed for the possibility of an Eighth Amendment violation based on a risk of unintentionally inflicted pain.

"When there is no majority opinion, the narrower holding controls." *Panetti* v. *Quarterman*, 551 U. S. 930, 949 (2007) (citing *Marks* v. *United States*, 430 U. S. 188, 193 (1977)). In some cases this rule is "more easily stated than applied," *Nichols* v. *United States*, 511 U. S. 738, 745 (1994), but in this case there appears to be general agreement that the plurality opinion is

controlling in *Baze*. See J. A. 123-124, n. 6 (Court of Appeals opinion, collecting cases).[10]

The *Baze* plurality standard requires "a demonstrated risk of severe pain" that is "substantial when compared to the known and available alternatives." 553 U. S., at 61; see also *id*., at 52. *Amicus* submits that severity, degree of risk, and alternatives are conjunctive requirements that apply to all claims of unintended, or at least unknowing, pain in execution.

The first question is what kinds of claims this three-part standard applies to. That is, what are the "grounds such as those asserted here," referred to by the *Baze* plurality. See 553 U. S., at 61. After reviewing the *Wilkerson* and *Kemmler* decisions and their formulation of the intentional infliction of pain "superadded" to death as additional punishment, see *id*., at 48-49, the plurality turned to cases regarding civil liability for injuries to prisoners for recognition of an additional Eighth Amendment prohibition against "subjecting individuals to a risk of future harm." See *id*., at 49-50 (citing *Helling* v. *McKinney*, 509 U. S. 25 (1993) and *Farmer* v. *Brennan*, 511 U. S. 825 (1994)). In this line of cases, we see that different rules apply based on the mental state of the prison officials. If injury is caused "maliciously and sadistically for the very purpose of causing harm," then liability can be imposed even if the use of force occurs while putting down a prison disturbance, and there is no threshold requirement of a serious injury. See *Hudson* v. *McMillian*, 503 U. S. 1, 6-7 (1992) (internal quotation marks omitted). In contrast, a claim of "deliberate indifference" to a risk requires a "substantial risk of serious harm," *Farmer* v. *Brennan*, 511 U. S. 825, 834

10. All further *Baze* citations are to the plurality opinion unless otherwise indicated.

(1994), and such claims are not available at all for uses of force that "are typically made in haste, under pressure, and without the luxury of a second chance." *Id*., at 835 (citations and internal quotation marks omitted). *Farmer* refers to the *mens rea* categories of the criminal law, defining "deliberate indifference" as less than "purpose or knowledge," *id*., at 836, and equivalent to "subjective recklessness as used in the criminal law." *Id*., at 839-840.

The *Baze* plurality's adoption of the *Helling*/*Farmer* standards suggests where to draw the line on its application. If a method is adopted with the *purpose* of causing pain, that is an Eighth Amendment violation under *Wilkerson* and *Kemmler*. The existence of alternatives is irrelevant for such a claim. See *Baze*, 553 U. S., at 102 (Thomas, J., concurring in the judgment) (no "comparative analysis" in *Wilkerson* and *Kemmler*). From *Farmer*'s reference to "purpose or knowledge" together, we can infer that a state's method of execution would similarly be unconstitutional if it were *known* to cause extreme pain without a need to consider the availability of alternatives. See *Warner* v. *Gross*, 135 S. Ct. 824, 826, 190 L. Ed. 2d 903, 906 (2015) (Sotomayor, J., dissenting) ("burned alive"); Brief for Petitioners 47-48. It is when we move from purpose to cause pain or knowledge that a method *will* cause extreme pain into claims of deliberate indifference to a *risk* it will do so that alternatives become important.

The requirement to consider available alternatives also comes from root Eighth Amendment principles. There is no dispute in these cases that the Eighth Amendment only prohibits *unnecessary* pain. See *Baze*, 553 U. S., at 114 (Ginsburg, J., dissenting); *Warner*, 135 S. Ct., at 828, 190 L. Ed. 2d, at 907 (Sotomayor, J., dissenting). Carrying out the well-deserved and thor-

oughly reviewed sentence for a horrific crime is *necessary*. The extreme delays presently (and unnecessarily) being incurred to review cases multiple times in multiple courts, typically on claims having nothing to do with actual guilt, are bad enough. For justice to be further delayed, perhaps by years, for further litigation over method of execution is a travesty. Given the necessity to execute the judgment, a state is not causing unnecessary pain if it endeavors to execute the judgment via a method that does not have a risk of severe pain that is substantially greater than any other method available to it.

The requirement that the pain in question be severe is also worth noting here. The *Baze* plurality quotes *Farmer* referring to a "substantial risk of serious harm" and adopts that standard, 553 U. S., at 52, but in applying the word "harm" in this standard it is important to consider the different contexts of the cases. In *Farmer* and the other cases involving injuries to persons sentenced to incarceration, physical harm was "simply not 'part of the penalty'" to which the inmates were sentenced. See *Farmer*, 511 U. S., at 834. In a method-of-execution case, the ultimate physical harm, death, is the very sentence imposed. Further, from the earliest days of the republic until fairly recently, it was understood that some degree of pain in the execution of the sentence was to be expected though not intended. *Baze* did not need to go into the degree of pain in any detail because the method in question was conceded to be painless if it worked as designed, but the claimed risk was of excruciating pain. See 553 U. S., at 113 (Ginsburg, J., dissenting). In stating that the standard resolves a great many cases, the plurality says the prisoner must show "a demonstrated risk of *severe* pain." *Id*., at 61 (emphasis added). Thus there is a threshold requirement for severity of pain. *Cf*. *id*., at 116 (Ginsburg, J., dissenting). A risk, however large

and however avoidable, of some lesser degree of pain incident to an execution does not establish an Eighth Amendment violation or entitle a prisoner alleging it to a stay.

Do the Petitioners have a *Wilkerson* claim rather than a *Baze* claim? That is, is midazolam so completely incapable of preventing the extreme pain that an unanesthetized person would feel upon the injection of the second and third drugs that such pain is essentially certain, and has this been established so clearly that the Oklahoma officials can be charged with knowledge that this result *will* follow, not merely deliberate indifference to a risk that it *might* follow? The thrust of Part III of their argument, see Brief for Petitioners 46-48, seems to imply something along these lines. If that is the argument, though, it appears to be unsupported by the record in this case.

In their extensive discussion of the testimony regarding the protocol at issue in this case, Petitioners do not point to a single statement in any of their experts' testimony or reports that this protocol would necessarily result in extreme pain. See Brief for Petitioners 9-19. Instead, they hammer over and over on the minimally relevant testimony that midazolam is not considered a sufficient anesthetic for surgery and cannot induce a comalike state. See *id*., at 12, 13, 16. Producing the degree of pain reduction or complete elimination that doctors want for their patients is not the test. It is not the Eighth Amendment requirement. There is a wide gap, indeed a chasm, between the standard of care for patients in medicine and the minimal requirement that murderers not be tortured. To say that midazolam is not "adequate anesthesia" in a medical context, see *id*., at 13-14, is not to say that it cannot meet the far lower standard of reducing any

pain experienced in execution to a level that is acceptable for Eighth Amendment purposes.

In addition to the record in this case, the Court has been presented with an *amicus* brief devoted entirely to the properties of midazolam. See Brief for Sixteen Professors of Pharmacology as *Amici Curiae*. This brief similarly fails to address the actual question. It begins with the assumption that a "comalike unconsciousness" like that produced by thiopental is required, see *id*., at 9, and then proceeds to describe why midazolam cannot provide that. The graph on page 19 indicates that the effects of midazolam reach a plateau a bit short of full anesthesia. That effect may not result in the complete painlessness achievable with barbiturates, but is it sufficient to avoid the extreme pain forbidden by the Eighth Amendment? The brief does not say.

Neither in the District Court, nor as supplemented in the Court of Appeals, nor as further supplemented in this Court does the case for the Petitioners rise to the level of a *Wilkerson* claim. The state is not using a method for the purpose or with the knowledge that it will result in a torturous level of pain. That leaves the *Baze* standard, and again their case fails as already described by the District Court, the Court of Appeals, and the Brief for Respondents. Petitioners must show that there is "a demonstrated risk of severe pain" that is "substantial when compared to the known and available alternatives." Thiopental and pentobarbital are not alternatives available to the State of Oklahoma at present due to a concerted effort by opponents of the death penalty to make them unavailable. The state may constitutionally proceed with a method available to it that is not substantially, demonstrably inferior to other *available* methods.

II. Any relief granted in a federal court should be the least intrusive possible, with injunction of the execution only as a last resort.

In the Prison Litigation Reform Act of 1995 (PLRA), Congress limited the authority of federal courts to grant relief in prison conditions cases, which include actions "with respect to . . . the effects of actions by government officials on the lives of persons confined in prison . . . ." 18 U. S. C. § 3626(g)(2). That language is broad enough to include method-of-execution cases. See *Nelson* v. *Campbell*, 541 U. S. 637, 650 (2004) (noting PLRA applies). That Act provides,

> "Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is *narrowly drawn*, extends *no further than necessary* to correct the violation of the Federal right, and is the *least intrusive means* necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U. S. C. § 3626(a)(1)(A) (emphasis added).

Preventing the execution of a valid judgment of a state court is a particularly intrusive form of relief. As far back as the Second Congress, there has been a general prohibition of federal court stays of state court proceedings. See Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 334-335. That prohibition is now codified as 28 U. S. C. § 2283. Although the civil rights private action statute, 42 U. S. C. § 1983, has been held to be an exception, prudence still requires that federal injunctions interfere

with state criminal justice systems as little as possible. See *Rizzo* v. *Goode*, 423 U. S. 362, 379-380 (1976).

Congress has further recognized that victims of crime have a "right to proceedings free from unreasonable delay." 18 U. S. C. § 3771(a)(7). Congress has extended the explicit protection of this right to federal habeas corpus petitions by state prisoners, *id*., subd. (b)(2)(A), which has been the primary means by which federal courts have violated the rights of victims of state crimes. Though the act may not directly apply to federal civil actions, the principles that motivated Congress to enact it should be considered in the same way that *Rizzo* noted with the Anti-Injunction Act. By the time capital cases complete state court review and federal habeas, the families of the victims have typically waited far too long for justice already. To further delay justice with a federal civil action, possibly for years, would require the most compelling justification.

Finally, there is reason to doubt whether a federal court in a § 1983 action even has jurisdiction to issue an injunction that, in practice, amounts to an indefinite stay of execution. If the plaintiff seeks an injunction that prohibits the use of the only method that state law allows, that "may amount to a challenge to the fact of the sentence itself," and thus require a habeas corpus petition rather than a § 1983 action. See *Nelson* v. *Campbell*, 541 U. S., at 644; *Hill* v. *McDonough*, 547 U. S., at 582; see also *supra*, at 13, n. 9.

As explained in Part I, *supra*, the existence of an available alternative is an important factor in determining whether a given protocol violates the Eighth Amendment so that any relief at all is warranted. If a court finds that there is a violation and relief is warranted, it may need to choose between an order that says "do not use method X" or one that says "use method Y instead of method X." In most cases, *amicus*

CJLF submits, the latter will be less intrusive, more respectful of federalism, more respectful of the rights of the victims, and more clearly within the court's § 1983 jurisdiction.

An order that simply bars one method may require the state to start over and formally adopt another method. Condemned inmates may then start the litigation process over, file new challenges to the new method, and demand new temporary restraining orders and preliminary injunctions while they litigate that new method. Victims of crime who have already waited far too long may have to wait years longer. Where the relief granted directs that the execution of the state judgment proceed but by a different method, the jurisdictional problem identified in *Nelson* and *Hill* does not arise. Without such an alternative, the court issues an order that it may not have jurisdiction to issue.

For all of these reasons, a federal court hearing a method-of-execution challenge in a § 1983 action should not only require the plaintiff to identify an available alternative method, but the relief granted, if any, should direct the use of that method rather than simply forbid use of the state's original method.

III. The United States must not allow its justice to be obstructed by an antidemocratic and largely foreign conspiracy.

Each Fourth of July, we celebrate the day that the Second Continental Congress declared that the United States of America were ready "to assume among the Powers of the Earth the separate and equal Station to which the Laws of Nature and of Nature's God entitle them . . . ." See Declaration of Independence, para. 1 (1776). While acknowledging the need for "a decent

Respect to the Opinions of Mankind," *ibid*., the whole point was not to be governed by others but rather for the *people* of the country "to institute new Government, laying its Foundations on such Principles . . . as *to them* shall seem most likely to effect their Safety and Happiness." *Id*., para. 2 (emphasis added).

The consensus of the people of the United States, the law of its federal government, and the law of an overwhelming majority of its states is that death is the appropriate punishment for the worst murders. See Part IV, *infra*. The United States must not allow the execution of the sentences that most of its people believe to be just to be blocked by the actions of foreign governments, foreign corporations, or a minority within the United States that has failed to achieve its goals by democratic means and therefore resorts to undemocratic ones. That would be the result if a rule of law is created that requires use of only the optimum methods of execution when those optimum methods can be rendered unavailable by agreements in restraint of trade, particularly those erected under foreign pressure.

While the United States should refrain from actions that violate the treaties it has duly ratified, other countries should respect the right of the United States to make its own choices within the bounds allowed by those same treaties. The relevant treaty to which the United States and the countries of Europe are parties is the International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U. N. T. S. 171 (entered into force Mar. 23, 1976). Article 6 of that agreement permits capital punishment under certain conditions, all of which the United States complies with. Although the United States originally made a reservation regarding Article 6(5), see *Roper* v. *Simmons*, 543 U. S. 551, 567 (2005), that reservation was rendered moot by *Roper*.

Continued use of capital punishment by the United States in compliance with all the conditions of the ICCPR is therefore no legitimate concern of European governments. They can let their own murderers off with absurdly light punishments if they choose. See, *e.g.*, Anders Behring Breivik: Norway Court Finds Him Sane, BBC News (Aug. 24, 2012) (21 years for murdering 77 people, 3¼ months per life).[11] They can make further agreements among themselves, and they can bludgeon other countries into abolition of capital punishment as the price for the economic advantages of joining the European Union. See Gibson & Lain, Death Penalty Drugs and the International Moral Marketplace 22 (rev. Feb. 26, 2015), Georgetown L. J., vol. 103 (forthcoming).[12] None of this amounts to a license for meddling in America's contrary choice.

> "The use of the death penalty in the United States is a decision of democratically elected governments at the federal and individual State levels and is not prohibited by international law. Capital punishment does not violate any OSCE commitments. The people of the United States, acting through their freely elected representatives, have chosen, in most States, not to abolish the death penalty." United States Mission to the OSCE, Response to the European Union's Statement on the Death Penalty (May 14, 2009). [13]

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11. http://www.bbc.com/news/world-europe-19365616.

12. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524124. *Amicus* CJLF cites this paper only for its historical information. *Amicus* does not endorse the views of the authors, who seem to think that European government meddling in American criminal justice policy is a good thing.

13. http://www.osce.org/pc/37216?download=true.

Yet they meddle nonetheless, and their meddling led to Oklahoma's adoption of midazolam and to the present case.

There is no doubt that barbiturates are the preferred agents if the goal is to induce a painless death. The American Veterinary Medical Association endorses injectable barbiturates as the preferred method of euthanasia for primates. See American Veterinary Medical Association, Guidelines for Euthanasia of Animals 50, 99 (2013 ed.).[14] Thiopental was the primary agent in the physician-assisted euthanasia method developed in the Netherlands. See *Baze* v. *Rees*, 553 U. S. 35, 58 (2008) (plurality opinion of Roberts, C.J.). Oklahoma would use them if they were available. See J. A. 79.

The history of the supply restriction, including the underappreciated role of European governments, is traced in a forthcoming article in the Georgetown Law Journal, Gibson & Lain, *supra*. "At first blush, the drug shortage appears to be the result of pharmaceutical industry norms; companies that make drugs for healing have little interest in being merchants of death. But closer inspection reveals that European governments are the true instigators of the shortage." *Id*., Abstract.

Sodium thiopental was the drug used in the first step of the three-drug protocol in most if not all states with capital punishment at the time of *Baze* v. *Rees*. See 553 U. S., at 44. For reasons unrelated to capital punishment, the sole American manufacturer of thiopental, Hospira, decided to move its production to a facility in Italy. The Italian subsidiary of Hospira

14. The AVMA specifies "nonhuman primates" in accordance with their scope of practice. See *id*., § I2.3, at 6.

initially took the position that what was done with its drugs was not its concern. See Hands Off Cain and Reprieve, Lethal Trade: How an Abolitionist Country is Collaborating in Putting People to Death in the United States, Hands Off Cain (Dec. 2, 2010).[15] The Italian government then threatened the company with denial of a license and with legal liability for itself and its employees, and Hospira got out of the thiopental market altogether. Gibson & Lain, *supra*, at 25-27. Other European governments then moved to cut off other sources. *Id*., at 27. "European governments were driving this train; the pharmaceutical industry merely climbed on board once it became clear that state actors were serious about using the market to fight capital punishment." *Id*., at 28.

States then turned to pentobarbital. This is the drug of choice for animal euthanasia. See R. Rhoades, The Humane Society of the United States Euthanasia Training Manual 3-4 (2002). This drug was manufactured in the United States by a Danish company, H. Lundbeck A/S. Lundbeck restricted its distribution to buyers who agreed not to redistribute the drug for capital punishment. See Gibson & Lain, *supra*, at 12-13. Again, however, it did so only after being pressured by European governments. *Id*., at 29.[16] When Lundbeck sold the rights to the drug to an American company, Akorn, Inc., the sale agreement required continuation of the restrictive distribution system. See Lundbeck Divests Several Products in the US As Part of

15. http://www.handsoffcain.info/chisiamo/index.php?idtema=13316650.

16. Whether this amounts to growing a backbone, see *ibid*., or lacking one is debatable.

Long-Term Business Strategy, H. Lundbeck A/S, Press Release (Dec. 22, 2011).[17]

The stratagem of cutting off the supply of the optimum drugs for lethal injection has, so far, not succeeded in producing a major reduction in the number of executions in the United States. States have gone to other drugs or found other sources of supply. The paradoxical result that a campaign by death penalty opponents may have resulted in unneeded pain being inflicted on the inmates they were supposedly trying to help has not gone unnoticed. See Deng & Lithwick, Liberal Guilt: In the Push to Abolish the Capital Punishment, Opponents of the Death Penalty Have Made It Less Safe, Slate (May 9, 2014).[18] Participants in this conspiracy are no doubt hoping that a rule of law will emerge from this case that enhances their ability to meddle in the American criminal justice system and frustrate the will of the people as expressed in democratically enacted laws. If this Court cuts off all methods that are less than optimum and if market manipulation or coercion can cut off the optimum methods, then the stratagem may yet succeed.

For the sake of American sovereignty and democracy, it is important that this stratagem fail. The people of the United States must retain the ability to decide how best to punish the perpetrators of the most heinous crimes committed within our country. We must not allow ourselves to be dictated to by European governments or by a handful of corporations. So long

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17. http://investor.lundbeck.com/releasedetail.cfm?ReleaseID=635094.

18. http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/death_penalty_in_america_how_the_push_to_abolish_capital_punishment_has.html.

as the less-than-optimum methods are not torturous, they must remain available unless and until the optimum methods become available again.

IV. The national consensus is that capital punishment serves an important function and needs to be enforced.

A group calling itself the National Consensus Project (NCP) has filed an *amicus curiae* brief contending that a national consensus supports a decision in favor of the murderers in this case. See generally Brief of the National Consensus Project, *et al.*, as *Amici Curiae* (NCP Brief). Actually, the one clear national consensus in this area is that death is the appropriate punishment for the worst murderers, and the sentences need to be carried out.

After this Court declared unconstitutional the then-existing death penalty statutes in *Furman* v. *Georgia*, 408 U. S. 238 (1972), the reaction of the American people through the democratic process was swift and overwhelming.

> "The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death." *Gregg* v. *Georgia*, 428 U. S. 153, 179-180 (1976) (lead opinion) (footnotes omitted).

That "marked indication" remains essentially unchanged today. Over two-thirds of the states and the

federal government have current death penalty laws, outstanding death sentences, or both. U. S. Department of Justice, Bureau of Justice Statistics, Capital Punishment, 2013—Statistical Tables 1 (2014). Although a few state legislatures have decided not to seek new death sentences for future crimes, these statutes do not represent a rejection of death as an appropriate punishment, as demonstrated by the fact that all but one of the recent repeal statutes have provided for the continuation of existing sentences. See *id*., at 1, n. *. Instead, recent repeal efforts have been largely based on practical arguments invoking the extreme delays and high costs.[19] For example, in a 2012 initiative to repeal the death penalty in California, the proponents mentioned only the risk of executing an innocent person as an argument against capital punishment as such. The rest of the argument was devoted entirely to matters of cost. Not a single word in the argument even suggests that death is an unjust punishment for a person guilty of the worst kind of murder. Cal. Secretary of State, Official Voter Information Guide, California General Election 40 (2012) (argument in favor of Proposition

19. Reasons for the extreme delays and costs include the bloating of the constitutional requirement of mitigating evidence to include vast amounts of irrelevant or minimally relevant information, see *Graham* v. *Collins*, 506 U. S. 461, 500 (1993) (Thomas, J., concurring), massive resistance of some federal courts to the Chapter 153 reforms of the Antiterrorism and Effective Death Penalty Act of 1996, see *Lopez* v. *Smith*, 574 U. S. __, 135 S. Ct. 1, 2, 190 L. Ed. 2d 1, 2 (2014) (*per curiam*) ("time and again"), and the obstruction of the Chapter 154 reforms. See *Habeas Corpus Resource Center* v. *Dept. of Justice*, No. 4:13-cv-04517-CW, 2014 U. S. Dist. LEXIS 109532 (ND Cal., Aug. 7, 2014) (appeal pending) (enjoining implementing regulations); cf. 28 U. S. C. § 2265(c)(2) (exclusive jurisdiction in the D.C. Circuit).

34).[20] Even the most intractable opponents of the death penalty know that they have no chance of convincing the American people on the basic moral correctness of capital punishment for the worst murderers.[21]

NCP purports to show a "consensus" against the use of midazolam by adding up jurisdictions that have no death penalty (including New York, where the democratically enacted statute is still on the books, blocked by a dubious judicial decision, see *supra*, at 10), NCP Brief 11, jurisdictions where execution has been blocked by the unilateral act of a governor misusing the reprieve power, *id*., at 11-13, states that have not conducted executions because of a combination of having small death row populations and lengthy judicial delays, *id*., at 13-14,[22] states that have not carried out many executions without reasons given for the rarity, *id*., at

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20. Despite a massive campaign funding imbalance, the initiative still lost. See Ballotpedia, California 2012 Ballot Propositions, http://ballotpedia.org/California_2012_ballot_propositions (Prop. 34).

21. For what it is worth, properly asked poll questions consistently show strong support for the death penalty. See Scheidegger, Americans' Support for Death Penalty Stable, Crime and Consequences Blog (Oct. 23, 2014), http://www.crimeandconsequences.com/crimblog/2014/10/americans-support-for-death-pe.html, and they have for a long time. Only very badly skewed questions show an even split. See *ibid*.

22. The extreme hostility of the Supreme Court of Kansas to capital punishment says nothing about a consensus of the *people* of that state. Despite its small death row, this Court has found it necessary to take up a disproportionately large number of that court's capital case reversals. See *Kansas* v. *Cheever*, 571 U. S. __, 134 S. Ct. 596, 187 L. Ed. 2d 519 (2013) (unanimously reversed); *Kansas* v. *Marsh*, 548 U. S. 163 (2006) (reversed); *Kansas* v. *Carr* (Jonathan), No. 14-449 (cert. granted); *Kansas* v. *Carr* (Reginald), No. 14-450 (cert. granted); *Kansas* v. *Gleason*, No. 14-452 (cert. granted).

14-15, and states that so far have not needed to resort to midazolam, with one exception. See *id*., at 15-17.

The last group warrants a closer look. Of the states listed in this group, only Ohio has actually used midazolam and then suspended executions rather than continue using it. NCP Brief 16, n. 21. The protocol in use there was midazolam plus hydromorphone, a different protocol than the one at issue in this case. See *In re Ohio Execution Protocol Litig.*, 994 F. Supp. 2d 906, 912 (SD Ohio 2014). Other states actively carrying out executions have, so far, been able to obtain pentobarbital, but the future is uncertain. See Berman, Texas Finds More Lethal Injection Drugs After All, The Washington Post (Mar. 25, 2015).[23]

The only consensus that NCP's collection establishes is that pentobarbital or thiopental is preferable to midazolam *when the state can get it*. That is not in dispute. Oklahoma agrees. See J. A. 79. NCP has not demonstrated a consensus that halting executions that would otherwise go forward is preferable to using midazolam. There is no such consensus and cannot be because most states have not been faced with that question. In the vast majority of jurisdictions, either executions are halted for reasons having nothing to do with the issue in this case or they are going forward with the drugs that everyone agrees is preferred when available. It is preposterous to assert that a state's nondecision on a question it does not face can be counted in determining a national consensus.

The consensus that counts for the purpose of the Eighth Amendment is the consensus of the *people*. Legislation enacted by state legislatures and direct

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23. http://www.washingtonpost.com/news/post-nation/wp/2015/03/25/texas-finds-more-lethal-injection-drugs-after-all/.

votes by the people are strong indications, see *Gregg* v. *Georgia*, 428 U. S., at 179-181, but actions by other state actors have far less value. The primary, enduring consensus of American society in this area is that death is the appropriate punishment for the worst murders. Execution of these judgments, after the cases have been thoroughly reviewed, should not be halted merely because the preferred method has been blocked by nefarious means so long as an acceptable one remains available.

CONCLUSION

The decision of the Court of Appeals for the Tenth Circuit should be affirmed.

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Respectfully submitted,

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