No. _____

IN THE

Supreme Court of the United States

ANNE L. PRECYTHE,
Director, Missouri Department of Corrections,
Petitioner,

v.

ERNEST JOHNSON,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Capital Case

Question Presented

Inmates who wish to challenge a method of execution under the Eighth Amendment must plead and prove an alternative method that is "feasible, readily implemented, and that in fact significantly reduces a substantial risk of severe pain." *Glossip v. Gross*, 576 U.S. ___ (2015).

Missouri carries out rapid and painless executions by using a single dose of pentobarbital. Ernest Johnson, a condemned murderer, does not want to receive a pentobarbital execution, and has demanded execution by nitrogen gas. The Missouri Department of Corrections does not have procedures in place to administer nitrogen gas, and Johnson did not plead any specific procedures to do so. The district court, therefore, dismissed Johnson's complaint for failing to plead a feasible, readily implemented alternative method of execution. The Eighth Circuit reversed because it believed Johnson was not required to plead such procedures.

The question presented is:

Whether an inmate who demands an alternative method of execution must plead facts detailing the procedure by which his proposed alternative method of execution would be administered.

Parties to the Proceeding

Petitioner, Anne Precythe, Director of the Missouri Department of Corrections was the appellee below. Respondent, Ernest Johnson, was the appellant below.

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The opinion of the United States Court of Appeals for the Eighth Circuit, issued on August 27, 2018, is reported at *Johnson v. Precythe*, 901 F.3d 973 (8th Cir. 2018), and is reprinted in the Appendix to this petition at A1-A14. The United States District Court for the Western District of Missouri's memorandum granting the motion to dismiss is reprinted in the Appendix to this petition at A38-A54.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion August 27, 2018, and denied a petition for rehearing on October 2, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT

In a closely related case, *Bucklew v. Precythe*, No. 17-8151, this Court granted certiorari and asked the parties to address "[w]hether the petitioner met his burden under *Glossip v. Gross*, 576 U.S. ___ (2015), to prove what procedures would be used to administer his proposed alternative method of execution…." 576 U.S. __ (2018). In this case, another inmate has raised yet another as-applied challenge to Missouri's method of execution. The two cases present closely related questions: whether an inmate's demand for a nitrogen gas execution complies with the Eighth Amendment's requirement that the inmate plead and prove what procedures would be used to administer an alternative method of execution that is feasible and readily implemented.

This question is of national importance. For at least the last decade, Missouri and the several States have responded to frequent and shifting challenges to methods of execution. These challenges—nearly always arising under the federal constitution—have frequently prevented the several States from enforcing their lawful criminal judgments in a timely fashion. And this series of cases has affected many States, leading one member of the Court to describe the process as a "guerrilla war against the death penalty." Tr. of Oral Arg. at 14, *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955).

The question in this case is closely related to the question that this Court added in *Bucklew*, and this Court should consider holding this petition until *Bucklew* is resolved. *Bucklew* addresses what facts an inmate must prove to establish that an alternative method of execution is feasible and readily implemented. This case addresses what facts an

inmate must plead to establish that an alternative method of execution is feasible and readily implemented. Given the close relationship between the two cases, this Court should consider holding this case pending the resolution of *Bucklew*, then either grant this petition or vacate and remand in light of *Bucklew*.

I. Factual Background

A. Johnson is sentenced to death for triple homicide.

On February 12, 1993, Mary Bratcher, Fred Jones, and Mable Scruggs were working at a Missouri gas station that Johnson decided to rob. In order to carry out his plan, Johnson murdered the employees. Johnson beat Ms. Bratcher, Mr. Jones, and Ms. Scruggs to death with a claw hammer. As part of the killings, Johnson also stabbed Ms. Bratcher with a screwdriver and shot Mr. Jones in the face with a .25 caliber pistol. Johnson was arrested, tried, convicted, and sentenced to death.

B. Johnson develops brain cancer and receives treatment.

While he was incarcerated, Johnson developed and was eventually diagnosed with an atypical parasagittal meningioma. App. at A67. This type of brain tumor develops extraordinarily slowly. App. at A88. In 2008, Johnson received treatment in the form of surgery to excise the tumor. App. at A67. That surgery was successful. Although a portion of the tumor remained, the majority of the tumor was removed. App. at A67. Scar tissue was a side effect of the surgery. App. at A67. Johnson has pleaded that "[t]he brain defect and the scarring tissue that

resulted from the craniotomy procedure were not known until an MRI procedure was conducted in April 2011." App. at A67. Johnson has contended that, as a result of the surgery's side effects, he has developed epilepsy. App. at A68.

II. Proceedings Below and at this Court

A. Johnson's complaint and this Court's stay.

In 2015, the Missouri Supreme Court issued a warrant of execution directing the Missouri Department of Corrections to carry out Johnson's sentence on November 3, 2015. Two weeks before his sentence was to be carried out, Johnson challenged Missouri's method of execution as it would be applied to him. He contended that Missouri should use nitrogen gas, and not pentobarbital, to carry out his execution. The district court granted the Director's motion to dismiss. App. at A15. Johnson filed an appeal and requested a stay of execution, which the Eighth Circuit denied. App. at A3. This Court then issued a stay of execution. App. at A32. This Court directed that, as the appeal proceeded in the Eighth Circuit, that court would be "required to decide whether petitioner's complaint was properly dismissed for failure to state a claim or whether the case should have been permitted to progress to the summary judgment stage." App. at A32.

B. The Eighth Circuit's dismissal and Johnson's first and second amended complaints.

When the case returned to the Eighth Circuit, that Court determined that it did not have jurisdiction over the appeal. App. at A36. The appeal was dismissed. Back in the district court, Johnson filed an amended

complaint, which was dismissed under Rule 12(b)(6). App. at A4. Johnson obtained an amended affidavit from his expert, Dr. Zivot, and then filed a second amended complaint. App. at A63–A82; A84–A93. That second amended complaint was again dismissed under Rule 12(b)(6). App. at A37. This time, Johnson sought review, and the case returned to the Eighth Circuit.

C. The Eighth Circuit's opinion below.

After briefing and argument, the Eighth Circuit concluded that Johnson had satisfied Rule 12(b)(6)'s requirement to plead sufficient factual matter on each element of his claim. App. at A9. In the Eighth Circuit's view, Johnson had sufficiently pleaded the procedures that would be used to carry out his proposed alternative because Johnson had pleaded that nitrogen gas was permissible under state law; that nitrogen gas and "the tools necessary" to carry out a nitrogen gas execution were available on the open market; that Missouri would not have to construct a new facility; and that "nitrogen gas can be administered by 'the use of a hood, a mask or some other type of medically enclosed device to be placed over the mouth or head of the inmate.'" App. at A9. According to the Eighth Circuit, these generalized statements were enough to satisfy the pleading requirements. As a result, the Eighth Circuit rejected the State's argument that Johnson had failed to explain "how Missouri could take nitrogen gas from a tank and administer it to an inmate in a way that produces a rapid and painless death." App. at A9.

REASONS FOR GRANTING THE PETITION

I. The question presented is recurring and of national importance.

In 2004, this Court addressed the concern that allowing a method-of-execution claim to proceed under 42 U.S.C. § 1983 would "open the floodgates to all manner of method-of-execution challenges. . . ." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). Since *Nelson*, this concern has become critical. Capital inmates across the country frequently employ method-of-execution challenges to interpose years of litigation and delay before the States may carry out lawful sentences of death.

In the past eleven years, this Court has twice held that the Eighth Amendment requires inmates to plead and prove an alternative method of execution that is available, feasible, and readily implemented. *Baze v. Rees*, 553 U.S. 35, 52 (2008) ("the alternative procedure must be feasible, readily implemented. . . ."); *see also Glossip*, 135 S. Ct. 2726 (2015). This requirement serves multiple purposes.

First, the roots of the alternative-method requirement lie in the Eighth Amendment's prohibition on the unnecessary and wanton infliction of pain. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). This, in turn, requires a consideration of whether state officials are acting with the "purpose to inflict unnecessary pain. . . ." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (plurality opinion). The bar on deliberate infliction of excessive pain comes from the original public meaning of the Eighth Amendment's text. *See, e.g.,* James A. Bayard, Jr., *A Brief Exposition of the Constitution of the United States* 154 (2d ed. 1840). This analysis applies in

method-of-execution cases. *Baze*, 553 U.S. at 52 (requiring the petitioner to establish an alternative method that is available, feasible, readily implemented, and "in fact significantly reduces a substantial risk of severe pain"). And it applies in conditions-of-confinement cases. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Helling v. McKinney*, 509 U.S. 25, 32 (1993). The alternative-method requirement implements this longstanding principle of Eighth Amendment jurisprudence, because it requires inmates to show that state officials have refused to adopt a specific, well-defined, alternative method. *Baze*, 553 U.S. at 51. Absent the availability of an alternative method, one cannot infer that state officials intended to inflict "pain for the sake of pain." *Baze*, 553 U.S. at 50.

Second, the alternative-method requirement prevents the federal courts from becoming embroiled in policy questions over what constitute "best" methods of execution. As this Court explained in *Baze*, courts should not be "transform[ed] into boards of inquiry charged with determining 'best practices' for executions." *Baze*, 553 U.S. at 51. Such policy questions are best left to legislatures and officials, not the courts, which lack the necessary scientific expertise to answer them. *Baze*, 553 U.S. at 52. As this Court explained in *Gregg*, "a heavy burden rests on those who would attack the judgment of the representatives of the people." 428 U.S. at 175.

Third, the alternative-method requirement provides the federal court reviewing a method-of-execution challenge with a meaningful basis to compare the State's chosen method. Because "some risk of pain" is present in any "method of execution—no matter how humane," a meaningful basis for comparison is required to draw conclusions about

whether the State's chosen method entails a constitutionally intolerable risk of suffering. *Baze*, 553 U.S. at 47. As a result, this Court has held that "the constitution does not require the avoidance of all risk of pain." *Glossip*, 135 S. Ct. at 2733. For this reason, the proposed alternative method of execution must be pleaded and proven with sufficient specificity to quantify and assess the risk of pain expected from the alternative method.

Fourth, the alternative-method requirement restricts the ability of capital inmates to transform method-of-execution challenges into vehicles for interminable litigation. As this Court has acknowledged, "States have an earnest desire to provide for a progressively more humane manner of death." *Baze*, 553 U.S. at 51 (citing *Bell v. Wolfish*, 441 U.S. 520, 562 (1979)). An inmate should not be allowed to file a second or successive lawsuit that challenges each new method of execution. The alternative-method requirement precludes piecemeal litigation where inmates challenge one portion of a protocol at a time.[1] The alternative-method requirement cannot accomplish these goals if an inmate does not have to plead the procedures used to implement that method with specificity.

This Court's cases reflect that the reality of piecemeal litigation is well-established. For instance,

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[1] Missouri has been subjected to such piecemeal litigation for many years. *See, e.g., Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007) (challenge to Missouri's three-drug protocol); *Clemons v. Crawford*, 585 F.3d 1119 (8th Cir. 2009) (challenge to Missouri's execution personnel); *Ringo v. Lombardi*, 677 F.3d 793 (8th Cir. 2012) (challenge to Missouri's three-drug protocol under federal law); *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015) (en banc) (challenge to Missouri's one-drug protocol).

in *Nelson*, this Court noted that "Petitioner has alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution as scheduled." *Nelson*, 541 U.S. at 646. But two years later, in *Hill*, this Court noted that the petitioner in *Nelson* had returned to district court and challenged the constitutionality of his own proffered alternative. *Hill*, 547 U.S. at 582.

This Court has seen similar litigation strategies as recently as two months ago. For instance, in *Zagorski v. Haslam*, 139 S. Ct. 20 (2018), the inmate demanded electrocution in order to frustrate Tennessee's efforts to carry out his sentence through lethal injection. But then, on the eve his scheduled execution, the inmate raised claims urging that electrocution was unconstitutional. *Id*.

Johnson's second amended complaint, if successful, portends future piecemeal litigation about any procedure used to administer nitrogen. The complaint merely alleges that "nitrogen" should be used, and that it could be administered by using "a hood, a mask or some other type of medically enclosed device. . . ." App. at A78–A79. Even if the State assented to Johnson's requested alternative, future litigation would undoubtedly ensue over the grade of nitrogen to be used, or over the use of a particular hood or mask, etc. Requiring Johnson to plead specific procedures—consistent with the history and purpose of the alternative-method requirement—would eliminate this risk.

II. This case is an ideal vehicle for resolving an issue of national importance.

This case is an ideal vehicle to review the question presented for three reasons. *First*, this case

supplements the question presented in *Bucklew* by addressing standards of pleading, whereas *Bucklew* addresses standards of proof, on the same underlying legal question. *Second*, the procedural posture of the case—and the stable nature of Johnson's unique medical condition—guarantees that the case's circumstances will not change before final judgment. And *third*, because of the close connection between the question in this case and the question in *Bucklew*, this Court could simply hold the petition until after *Bucklew* is decided, and then either grant this petition or vacate and remand for further consideration in light of *Bucklew*.

A. This case, taken together with *Bucklew v. Precythe*, will allow the Court to define the metes and bounds of the alternative-method requirement.

In *Baze* and in *Glossip*, this Court explained that an inmate must "*plead* and *prove*" the alternative method. *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015). The requirement, therefore, exists at both the pleading stage *and* the summary-judgment or trial stage of a suit. Since *Baze*, this Court has not addressed pleading standards for the alternative-method requirement.

This case, when taken together with *Bucklew*, provides the Court with the opportunity to provide a complete answer to questions surrounding the alternative-method requirement. History has demonstrated the advantages of providing such complete answers.

For instance, in 2010, this Court was presented with questions over the effect of uncommunicated plea offers. This Court chose to provide a complete answer

to those questions by granting review in both *Lafler v. Cooper*, No. 10-209 and *Missouri v. Frye*, No. 10-444. By granting review in both *Lafter* and *Frye*, this Court avoided further piecemeal litigation and conclusively answered a question of national importance. The issue in this case—just as in *Frye*—is "the other half of a question" of national importance.

B. Full briefing and argument is appropriate to address whether an inmate must plead the procedures of his proposed alternative method with specificity.

If the Court does not wish to hold this petition for the opinion in *Bucklew*, then the Court should grant the petition, because this case squarely presents the question without any procedural or factual difficulties.

Here, all parties agree that Johnson's condition progresses extremely slowly. App. at A88. Johnson's condition will not materially change between the time this Court grants certiorari review and the time this Court issues a decision. In any event, the question presented turns solely on the language of Johnson's second amended complaint. Further factual development is not necessary to answer the question presented. The case thus presents a clean record upon which the legal question is squarely presented.

C. The Court may wish to hold this petition for disposition in light of *Bucklew v. Precythe.*

When this Court granted review in *Bucklew v. Precythe*, No. 17-8151, it directed the parties to address "[w]hether the petitioner met his burden under *Glossip v. Gross*, 576 U.S. ___ (2015), to prove

what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the State's method of execution." 576 U.S. __ (2018). This case concerns what an inmate must *plead*, and *Bucklew* concerns what an inmate must *prove*, regarding the alternative-method requirement. The answer to one question is likely to shed considerable light on the other question. In light of the close relationship between the questions presented, this Court may wish to hold this petition until after it issues an opinion in *Bucklew*, and then either grant this petition or vacate and remand in light of *Bucklew*, depending on the disposition of *Bucklew*.

CONCLUSION

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

Respectfully submitted,

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January 2, 2019