No. 18-852

In the
Supreme Court of the United States

ANNE L. PRECYTHE

Petitioner,

v.

ERNEST JOHNSON

Respondent.

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

Brief for the Respondent in Opposition

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QUESTION PRESENTED

In *Baze v. Rees*, 553 U.S. 35 (2008), and *Glossip v. Gross,* 135 S. Ct. 2726 (2015), this Court ruled that an inmate challenging the method by which the state intends to execute him "must show that the risk is substantial when compared to the known and available alternatives." *Baze*, 553 U.S. at 61; *see Glossip*, 135 S. Ct. at 2738. The question presented is:

Whether the court of appeals correctly held that respondent adequately pled an alternate execution method under the well-established notice pleading requirements set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), *Bell-Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

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STATEMENT

1. Ernest Johnson was convicted of three counts of first degree murder in Missouri state court and sentenced to death. Pet. App. A2. He was subsequently diagnosed with an atypical brain tumor. *Id.* at A63. To treat the tumor, he underwent a craniotomy surgical procedure in August 2008. *Id.* As a result of this surgery, Mr. Johnson has a hole in the top of his skull and is missing approximately 15-20% of his brain tissue. *Id.* at A84-85. The craniotomy procedure also resulted in scarring and a brain defect, which caused Mr. Johnson to suffer from a seizure disorder. *Id.* at A67-68.

Missouri's lethal injection protocol employs pentobarbital, which is part of a class of drugs known to produce seizures, even in individuals who do not have an underlying seizure disorder. *Id.* at A69. Because Mr. Johnson's seizure threshold is substantially lower than the general population as a result of his pre-existing seizure disorder, the use of pentobarbital on him is especially likely to trigger severely painful and prolonged seizures and convulsions. *Id.* at 71-72.

2. Mr. Johnson filed suit against petitioner, the Director of the Missouri Department of Corrections, under 42 U.S.C. § 1983, alleging that executing him pursuant to Missouri's lethal injection protocol would violate the Eighth Amendment's prohibition on cruel and unusual punishment. *See id.* at 63-82. Mr. Johnson alleged that the State's use of pentobarbital is sure or very likely to cause him serious and needless suffering and severe pain because of his unique medical condition. *See Baze v. Rees*, 553 U.S. 35, 50 (2008); *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

Because this Court held in *Baze* and *Glossip* that an inmate challenging his execution method has the "burden of establishing that any risk of harm was substantial when compared to a known and available alternative method of execution," Mr. Johnson alleged in his Second Amended Complaint that execution by nitrogen gas is an alternative execution method that is feasible, readily implemented, and in fact would significantly reduce the substantial risk of pain created by executing him pursuant to Missouri's standard protocol. *Glossip*, 135 S. Ct at 2738; s*ee* Pet. App. at A77-A79.

In support of this contention, Mr. Johnson alleged that execution by lethal gas is authorized pursuant to Missouri law, Mo. Rev. Stat. § 546.720.1, and that nitrogen-induced hypoxia would be among the methods authorized by that statute. *Id.* at A78. In support of that allegation, Mr. Johnson further alleged that the state of Oklahoma has recently passed legislation authorizing the use of nitrogen gas as a means of execution, and a study commissioned by Oklahoma lawmakers concluded that use of nitrogen gas would provide a safe, inexpensive, and readily available execution method. *Id.* Mr. Johnson alleged that "the tools necessary to perform nitrogen-induced hypoxia are easily acquired in the open market," and that "[n]itrogen can be obtained without the need for a license," as it is used in welding, hospital facilities, and in cooking. *Id.* Mr. Johnson also alleged that the gas "can be administered to the inmate through several different feasible and readily implementable methods, including the use of a hood, a mask or some other type of medically enclosed device to be placed over the mouth or the head"; that use of the gas "would not require a gas chamber or the construction

of a particular type of facility"; and that the gas could be administered "in the same room or facility now utilized by [Missouri] for lethal injection." *Id.* at A78-A79.

Mr. Johnson also alleged that execution by lethal gas would substantially reduce the risk of severe pain that he faces as a result of the interaction of his seizure medical condition and Missouri's standard lethal injection method. Using nitrogen gas, Mr. Johnson explained, would not cause him to suffer the uncontrollable seizures and convulsions that would likely be triggered by the use of pentobarbital. *Id.* at A79.

The district court granted petitioner's motion to dismiss Mr. Johnson's Second Amended Complaint on the grounds that Mr. Johnson failed to adequately plead both (1) that the state's method of execution was sure or very likely to cause needless suffering, and (2) that execution using nitrogen gas was feasible, readily implemented, and would in fact reduce the substantial risk of severe pain. *See id.* at A37-53.

3. The Eighth Circuit (Colloton, J.) reversed. *See id.* at A1-A13. Applying the settled pleading standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell-Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the court held that Mr. Johnson's complaint sufficiently pleaded both elements of his claim. *Id.* at A7-A11; *see id.* at A5-A6. With respect to the alternative method requirement, the court of appeals observed that "the State . . . contend[s] that Johnson failed to plead that nitrogen-induced hypoxia is a readily implemented method of execution" because the complaint did not "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." *Id.* at A9. In other words, petitioner argued that Mr. Johnson was required to set forth a step-by-step execution protocol for lethal gas in his complaint. *Id.*

The court of appeals rejected that argument. The court explained that Mr. Johnson "alleged that nitrogen gas is readily available on the open market, could be introduced through a 'medically enclosed device to be placed over the mouth or head of the inmate,' and would not require construction of a new facility." *Id.* at A9. After detailing the extensive allegations in the complaint, the court of appeals concluded that "[u]nder the notice pleading regime of the federal rules, this is []sufficient."[1] *Id.* Mr. Johnson, the court observed, "need not set forth a detailed technical protocol for the administration of nitrogen gas to state a claim." *Id.*

4. The court of appeals subsequently denied the State's petition for rehearing en banc. *Id.* at A54.

ARGUMENT

The court of appeals correctly held that respondent need not set forth a detailed procedure for administering lethal gas in order to sufficiently plead his claim that the State's lethal injection procedures, as applied to him, violate the Eighth Amendment. That decision does not conflict with any decision of

[1] In the petition appendix, the state incorrectly reproduces the text of the opinion, indicating that the Court of Appeals wrote "this is *in*sufficient." *See id.* The correct text of the opinion as filed in the Eighth Circuit and published in the Federal Reporter states "this is sufficient," as set forth in the main text above.

this Court or another Court of appeals. Further review is not warranted.

1. Petitioner does not contend that the court of appeals' decision conflicts with any decision of another court of appeals. Indeed, petitioner does not identify any case in which any other federal court, besides the Eighth Circuit, has expressly considered whether a lethal injection plaintiff must plead the specific technical procedures that the State could use in implementing an alternative method of execution.

That is unsurprising. The standard for evaluating the sufficiency of a complaint is well-established: "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Courts around the country have had no trouble applying this rigorous standard to complaints of inmates challenging lethal injection procedures — and often have found the allegations insufficient on that basis. *See, e.g., Jones v. Commissioner, Georgia Dep't of Corrections*, 812 F.3d 923, 931 (11th Cir. 2016) ("The complaint is insufficient to satisfy Jones's pleading burden under Federal Rule of Civil Procedure 8, which required him to 'plead[ ] factual content that allows the court to draw the reasonable inference,' that Georgia has access to a 'feasible, readily implemented' alternative source of pentobarbital[.]") (citations omitted).

Indeed, the Eighth Circuit itself has previously applied the *Twombly-Iqbal* standard in concluding that other Missouri inmates had failed to adequately plead the existence of a feasible alternative method of execution. *See Zink v. Lombardi*, 783 F.3d 1089, 1106

(8th Cir. 2015) (en banc). In *Zink*, the Eighth Circuit held that a lethal injection plaintiff may not conclusorily assert that other methods of execution would be constitutional, but must instead allege sufficient facts to plausibly allege that the proposed method is "feasible and readily implemented," and would "significantly reduce the risk of severe pain." *Id*. at 1103. In this case, the court of appeals applied that well-established standard to the specific factual allegations in this particular complaint and concluded that respondent's allegations were sufficient. See Pet. App. at A5, A8-A10.

2. The court of appeals correctly held that the generally-applicable *Twombly-Iqbal* standards apply to a plaintiff's allegation that a feasible alternative method of execution exists.

a. This Court has held that in order to prevail on a claim that a State's lethal injection procedures violate the Eighth Amendment, the plaintiff must establish that (1) the existing procedure imposes a substantial risk of serious harm; and (2) there is an "alternative [execution] procedure" that is "feasible, readily implemented, and in fact [will] significantly reduce a substantial risk of severe pain." *Baze v. Rees*, 553 U.S. at 52 (plurality op.); *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015). Here, Mr. Johnson contends that as a result of his medical condition, Missouri's lethal injection procedure imposes a substantial risk of inflicting serious harm on him. Pet. App. A2. In order to state an Eighth Amendment claim, therefore, respondent was required to allege "sufficient factual matter" to give rise to a plausible inference that the existing procedure causes a substantial risk, and that there is an alternative

procedure that is feasible, readily implemented, and significantly less risky. *Twombly*, 550 U.S. at 570.

Applying that standard, the court of appeals held (as relevant here) that Mr. Johnson had sufficiently pleaded the existence of an alternative execution procedure. Specifically, the complaint identified nitrogen hypoxia as a feasible alternative, and pleaded that (1) execution by lethal gas is authorized by Missouri statute; (2) the tools necessary to induce nitrogen hypoxia are available on the market; (3) nitrogen is easily obtainable in the United States; (4) nitrogen can be administered by using a hood or other device placed over the mouth or head of the inmate; (5) a gas chamber or other specialized facility would not be necessary; (6) according to a study conducted by Oklahoma, nitrogen hypoxia would be a humane method of execution; and (7) as applied to him, nitrogen gas would be significantly less risky, as it would not trigger the uncontrollable seizures that execution by pentobarbital would. Pet. App. A8-A9. The court of appeals correctly found that Mr. Johnson alleged the specific facts that, taken as true, give rise to the plausible inference that nitrogen hypoxia would be a feasible, readily implemented, and significantly less risky alternative. *Id*. That case-specific conclusion does not warrant this Court's review.

b. Indeed, petitioner does not challenge the court of appeals' application of *Twombly* and *Iqbal* to the facts alleged in respondent's complaint. Petitioner contends instead that in the specific context of lethal injection claims, more is required: a lethal injection plaintiff "must plead facts detailing the procedure by which his proposed alternative method of execution would be administered," Pet. i — right down to "the grade of nitrogen to be used" and the

"particular hood or mask," Pet. 9. Petitioner does not argue that this pleading requirement is necessary to satisfy *Twombly* and *Iqbal*. Rather, petitioner urges a newly-minted heightened pleading standard especially for lethal injection claims. The court of appeals correctly rejected that contention.

The law governing pleading standards is straightforward and settled. Federal Rule of Civil Procedure 8(a) requires only that the plaintiff set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957))).

Petitioner argues that the court of appeals should have abandoned this well-established rule to create a unique heightened standard for pleading the existence of an alternative execution method. But this is flatly contrary to the Federal Rules and this Court's precedent. Rule 9 provides an exclusive list of situations that call for a heightened pleading standard. *See* Fed. R. Civ. P. 9. An alternative method of execution for inmates challenging their means of execution is not among them. *See id.* Accordingly, the only means to achieve the State's end of "broaden[ing] the scope of Federal Rule of Civil Procedure 9," is "by the process of amending the Federal Rules, and not by judicial interpretation." *Twombly*, 550 U.S. at 569 n.14 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (quoting

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993))).

If the Federal Rules alone were not clear enough, this Court has already made clear that it will not impose heightened pleading standards on inmates challenging their method of execution. In *Hill v. McDonough*, 547 U.S. 573 (2006) — decided before this Court determined the elements of a claim challenging lethal injection procedures in *Baze* — the Court rejected the United States' suggestion that an inmate should have to plead an alternative method of execution in order to challenge a lethal injection procedure under 42 U.S.C. § 1983 rather than in a habeas petition. *Hill*, 537 U.S. at 582. The Court explained that "[s]pecific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts." *Ibid.*; *see also Jones v. Bock*, 549 U.S. 199, 212 (2007) ("In a series of recent cases, we have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns."); *id.* at 224 ("We once again reiterate, however—as we did unanimously in *Leatherman*, *Swierkiewicz*, and *Hill*—that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.").

c. Petitioner's arguments in support of its heightened pleading rule (Pet. 6-9) are non sequiturs. Petitioner asserts that the "alternative method of execution" requirement itself serves four salutary

purposes. But the wisdom of requiring plaintiffs to prove the existence of a feasible alternative is not at issue here: *Baze* and *Glossip* held that the alternative method is an element of the plaintiff's claim; Mr. Johnson accordingly alleged the alternative method in his complaint; and the court of appeals found those allegations sufficient.

Moreover, far from supporting a heightened pleading requirement, petitioner's arguments collectively illustrate the shortcomings of her proposed rule. A heightened pleading requirement would not actually further any of the purposes served by the alternative-method requirement. For instance, petitioner argues that the alternative-method requirement is necessary to provide a meaningful baseline against which to measure the State's chosen execution method and the extent to which it wantonly inflicts pain, and to avoid judicial inquiry into best execution practices. But as *Baze* explained, those concerns are satisfied by requiring the plaintiff to *prove* the existence of an alternative method before he is entitled to relief. 553 U.S. at 51-52. And given that the plaintiff must already plausibly allege that a specific alternative method is feasible and readily implemented in his complaint, requiring the plaintiff also to allege the specific steps that would appear in an execution protocol would not add anything.

Petitioner also suggests that the heightened pleading requirement would minimize piecemeal litigation, apparently by functioning as a concession on the plaintiff's part that the alleged "technical protocol," Pet. App. A9, would be constitutional. But once a plaintiff has sufficiently alleged the alternative method, discovery may well reveal facts about the State's facilities and capabilities that were not known

to the plaintiff at the pleading stage and overtake the plaintiff's initial allegations. The parties' ultimate dispute over the alternative method therefore may bear little relation to the specifics alleged in the complaint, such that any implicit concession that those specific alleged steps were constitutional would be irrelevant.

Finally, a requirement to allege a detailed execution protocol would not even serve the purpose of assisting the State in developing the proposed new execution method. By statute, Missouri legislators have directed the Missouri Department of Corrections to design a protocol for using lethal gas in executions. *See* Mo. Rev. Stat. § 546.720.1 ("[T]he director of the department of corrections is hereby authorized and directed to provide a suitable and efficient room or place, enclosed from public view, within the walls of a correctional facility of the department of corrections, and the necessary appliances for carrying into execution the death penalty by means of the administration of lethal gas or by means of the administration of lethal injection."). Regardless of what the plaintiff alleges, then, the State must exercise its own discretion in developing a new protocol. And because the State is far more expert not only with respect to carrying out executions in general, but also its own resources and personnel, it stands to reason that the details of any alternate procedure would require the State's input. Imposing a requirement to allege a technical protocol in a complaint, without any knowledge of how such a protocol would actually need to be adapted to the State's circumstances, would be a pointless exercise.

3. Petitioner suggests that this Court should hold the petition pending its decision in *Bucklew v. Precythe*, No. 17-8151. There is no need to do so.

While one of the questions in *Bucklew*, like the question here, involves the alternative method requirement, the questions posed by the two cases are distinct. Bucklew challenges the dismissal of his as-applied lethal injection claim on summary judgment, and one of the questions presented is whether the inmate "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." That question is case-specific: it asks whether Bucklew presented sufficient factual evidence to survive summary judgment in light of the risks created by his unique medical condition (which bears no relation to Mr. Johnson's medical condition).

Even assuming the Court's resolution of that question has implications beyond Bucklew's specific case, the Court's decision will not affect the proper outcome of this case. The quantum and nature of factual support necessary to satisfy the alternative method requirement at trial is a distinct question from what must be pled to satisfy the requirement for purposes of a motion to dismiss. *See, e.g., Swierkiewicz*, 534 U.S. at 510 (distinguishing "an evidentiary standard," for proof at summary judgment, such as the *McDonnell Douglass* prima facie case standard in the employment discrimination context, from "a pleading requirement" necessary to survive a motion to dismiss); *see also Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ("When a federal court reviews the sufficiency of a complaint, before the

reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims"). Detailing the quantum of proof necessary to prevail at trial will not change the requirements of notice pleading or otherwise change the fact that Mr. Johnson's pleading was adequate. See *Swierkiewicz*, 534 U.S. at 515.

Bucklew also concerns the question whether a plaintiff raising an as-applied challenge must prove an alternative method of execution at all. *See* Pet. Br., *Bucklew v. Precythe*, No. 17-8151, at 35-44. If Bucklew were to prevail on that question, that would be an alternative ground supporting the court of appeals' holding here that Mr. Johnson's complaint was adequate. Conversely, a holding that the *Baze*/*Glossip* alternative-method requirement governs as-applied challenges will not affect this case, because Mr. Johnson has proceeded on the assumption that he must plead and prove an alternative method, and the court of appeals held that he did so sufficiently.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

March 6, 2019

Respectfully submitted,

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