

# *BUCKLEW V. PRECYTHE*: THE POWER OF ASSUMPTIONS AND LETHAL INJECTION

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## INTRODUCTION

Once again, the Supreme Court of the United States has an opportunity to determine the extent to which death-row inmates can bring as-applied challenges to the states' method of execution and prevent possible botched executions. In *Bucklew v. Precythe*, the Court will confront the assumptions that the execution team is equipped to handle any execution and that the procedure will go as planned.<sup>1</sup> Additionally, the Court will determine whether the standard articulated in *Glossip v. Gross*, which requires inmates asserting facial challenges to the states' method of execution to plead a readily available alternative method of execution, further extends to inmates asserting as-applied challenges.<sup>2</sup> If inmates must plead an alternative method less likely to cause severe pain, the Court will clarify whether such motions for summary judgment should be decided based on the record as a whole or if the inmate must present evidence comparing the two alternative methods of execution through the testimony of a single witness.<sup>3</sup> Based on these findings, the Court will determine whether *Bucklew* met the standard under *Glossip v. Gross*.<sup>4</sup>

This commentary argues that inmates launching an as-applied challenge to the state's method of execution should be given relevant discovery regarding the execution teams' qualifications, that inmates should not have to provide a detailed alternative method of execution, and that summary judgment decisions should be made

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\* J.D. Candidate, Duke University School of Law, Class of 2020.1. Brief for Petitioner at \*i, *Bucklew v. Precythe*, No. 17-8151, 2018 WL 3456065 (U.S. July 16, 2018) (No. 17-8151[hereinafter Brief for Petitioner]).

2. *Id.*

3. *Id.*

4. *Id.* (referencing *Glossip v. Gross*, 135 S. Ct. 2726 (2015)).

after considering the record as a whole. Only then will inmates be afforded complete and fair access to the protections of the Eighth Amendment in the interest of avoiding more botched executions. In addressing the questions presented, the Court must weigh the ease with which an inmate can raise a viable challenge to the method of execution against the State's ability to carry out a death sentence. The Supreme Court should remand to the lower court for a further evidentiary hearing in Bucklew's case to determine whether execution by lethal gas significantly reduces a substantial risk of severe pain compared to lethal injection.

## I. FACTS

### A. *Bucklew's Medical Condition*

A Missouri jury convicted and sentenced Russel Bucklew to death in 1998 for first degree murder, kidnapping, burglary, forcible rape, and armed criminal action.<sup>5</sup> Bucklew is challenging the method of execution as it applies to him, not his conviction or death sentence.<sup>6</sup> Bucklew suffers from cavernous hemangioma, which causes "inoperable, blood-filled tumors to grow in his throat and around his face, head, and neck."<sup>7</sup> Bucklew's tumors are extremely sensitive,<sup>8</sup> so "merely touching his airway can cause his airway and uvula" to bleed.<sup>9</sup> Bucklew also has difficulty breathing,<sup>10</sup> and the peripheral veins in his hands and arms have been damaged by the illness.<sup>11</sup>

### B. *Missouri's Execution Protocol and History*

Missouri's method of execution statute authorizes execution by either lethal gas or lethal injection.<sup>12</sup> Missouri has not conducted an

5. Brief for Petitioner, *supra* note 1, at \*5.

6. *See id.* (clarifying that "[Bucklew] does not challenge the validity of his conviction or death sentence").

7. *Id.* (citing Joint Appendix Vol. II at \*857, \*819–20, \*220, \*328, \* 648–49, *Bucklew v. Precythe* (No. 17-8151), 2018 WL 3473995 (U.S. March 15, 2018), *petition for cert. filed*, (U.S. Mar. 15, 2018) [hereinafter J.A. II]).

8. J.A. II, *supra* note 7, at \*857.

9. Brief for Petitioner, *supra* note 1, at \*5 (citing Joint Appendix Vol. I at \*225–26, \*228–29, *Bucklew*, 2018 WL 3473994 [hereinafter J.A. I]).

10. Brief for Petitioner, *supra* note 1, at \*6 (citing J.A. I, *supra* note 9, at \*226–27). *But see* Brief of Respondents, at \*9, *Bucklew*, 2018 WL 3969564 (citing J.A. II, *supra* note 7, at \*643) (stating that Bucklew has never shown signs of having trouble breathing).

11. J.A. II, *supra* note 7, at \*857.

12. *See* MO. ANN. STAT. § 546.720 (West 2007).

execution by lethal gas since 1965.<sup>13</sup> While the state has developed a written procedure for execution by lethal injection, it does not have a written procedure for execution by lethal gas.<sup>14</sup> While one state official in Missouri has researched execution via Nitrogen Hypoxia, it was determined that there was not enough information available to answer open questions about the procedure.<sup>15</sup> However, officials in Louisiana and Oklahoma concluded that execution by Nitrogen Hypoxia would be an easy, cheap, and humane method of execution after extensive investigation.<sup>16</sup>

## II. LEGAL BACKGROUND

### A. *Relevant Case Law*

The Supreme Court articulated in *Helling v. McKinney* that an inmate must show that the state's execution method presents a risk that is first, “*sure or very likely* to cause serious illness and needless suffering,” and second, “gives rise to ‘sufficiently *imminent* dangers.’”<sup>17</sup> In *Baze v. Rees*, the Court interpreted the standard presented in *Helling* to require inmates to show that there is “a ‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm’ that prevents prison officials from pleading that they were ‘subjectively blameless for purposes of the Eighth Amendment.’”<sup>18</sup> Then the Court added a second prong: an inmate must proffer an alternative method of execution that is “feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.”<sup>19</sup> Once the inmate successfully meets the first two prongs, the state can refuse to adopt the alternative method only if it

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13. J.A. II, *supra* note 7, at \*667.

14. See Mo. Dep’t of Corrs. Preparation and Admin. of Chems. for Lethal Injection (Oct. 18 2013), <https://deathpenaltyinfo.org/files/pdf/ExecutionProtocols/MissouriProtocol10.18.2013.pdf>.

15. Brief of Respondents, *supra* note 10, at \*15.

16. See J.A. II, *supra* note 7, at \*736–49 (explaining the finding by researchers in Oklahoma and Louisiana that death by Nitrogen Hypoxia through a mask or an oxygen tent would be the most humane method of execution). Researchers also noted that this method would not require medical professionals because the individual would pass out after their level of oxygen fell too low; they based their conclusions on studies examining air pilots and individuals who chose this method as a way to commit suicide.

17. *Baze v. Rees*, 553 U.S. 35, 50–51 (2008) (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993)).

18. *Id.* at 51 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n. 9, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

19. *Id.*

has a “legitimate penological justification” for keeping its current execution method.<sup>20</sup>

Most recently, the Supreme Court applied the elements articulated in *Baze* to a challenge against Oklahoma’s method of execution in *Glossip v. Gross*.<sup>21</sup> In *Glossip*, the inmates alleged that the State’s lethal injection protocol violated the Eighth Amendment because Midazolam, the first drug used under this protocol, does not render an inmate unconscious and therefore creates an unacceptable risk of severe pain.<sup>22</sup> The Court affirmed the Tenth Circuit and held that the inmates failed to identify a known and available alternative method of execution that reduces the risk of pain.<sup>23</sup> The petitioners in *Glossip* proffered the use of sodium thiopental, or pentobarbital, as part of a single-drug protocol as an alternative to using midazolam. The Tenth Circuit did not find a clear error in the lower courts’ finding that both drugs were unavailable to the Oklahoma Department of Corrections.<sup>24</sup> The Court also held that the district court did not commit clear error when it found that the petitioners did not meet their burden of proof in showing that a massive dose of midazolam carries a substantial risk of severe pain.<sup>25</sup> To support this decision, the Court cited numerous lower courts that have found that using midazolam as the first drug in a three-drug protocol is likely to render an inmate insensate to pain.<sup>26</sup>

### B. Procedural Posture

Bucklew initially filed a complaint with the district court on May 9, 2014 and moved for a stay on May 14, 2014 to provide adequate time to litigate his claims before his scheduled execution on May 21, 2014.<sup>27</sup> The district court dismissed Bucklew’s first five claims for failing to plead an alternative method of execution.<sup>28</sup> An Eighth

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20. *Id.*

21. 135 S. Ct. 2726, 2729 (2015) (“To succeed on an Eighth Amendment method-of-execution claim, a prisoner must establish that the method created a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives.”)

22. *Id.* at 2731.

23. *Id.*

24. *Id.* at 2738.

25. *Id.* at 2731.

26. *See id.* at 2739–40.

27. *Id.* at \*17.

28. *Bucklew v. Lombardi*, No. 14-8000-CV-W-BP, 2014 WL 2736014, at \*6–7 (W.D. Mo. May 19, 2014), *rev’d* by 783 F.3d 1120 (8th Cir. 2015).

Circuit panel granted a stay, but the stay was vacated *en banc* later that day.<sup>29</sup> The Supreme Court, however, ordered a stay of execution while he litigated his appeal.<sup>30</sup> The Eighth Circuit reversed the district court's dismissal and remanded for further proceedings, holding that plaintiffs asserting an as-applied challenge must proffer an alternative method of execution.<sup>31</sup> Bucklew filed his Fourth Amended Complaint in which he challenged the constitutionality of Missouri's execution protocol as it applied to him.<sup>32</sup> He alleged that Missouri's lethal injection protocol inflicted needless suffering and therefore violated the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>33</sup> The Complaint also, for the first time, proffered lethal gas as an alternative method of execution.<sup>34</sup>

On remand, Bucklew sought discovery regarding the qualifications and training of medical members of the execution team.<sup>35</sup> Although the district court denied the majority of Bucklew's discovery requests, it granted discovery regarding: the identity of the chemical to be used for the lethal injection; the chemical's expected effect; the general composition of the medical team and functions of those persons; information about how the State had used cyanide gas; and information about the States research into the feasibility of using nitrogen.<sup>36</sup> The district court then granted the State's motion for summary judgment, concluding that the record did not present a genuine dispute concerning whether execution by lethal gas would significantly reduce Bucklew's risk of needless suffering, as compared to Missouri's lethal injection protocol.<sup>37</sup>

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29. *Bucklew v. Lombardi*, 565 Fed.Appx. 562 (8th Cir. 2014), *vacated en banc*, 134 S. Ct. 2333 (2014).

30. *Bucklew v. Lombardi*, 572 U.S. 1131 (2014).

31. *Bucklew v. Lombardi*, 783 F.3d 1120, 1127–28 (8th Cir. 2015) (en banc) (rejecting Bucklew's argument that he was not required to propose an alternative method of execution because he was not raising a facial challenge to Missouri's execution protocol).

32. *See generally* Fourth Amended Complaint, *Bucklew v. Lombardi*, No.14-08000, 2015 WL 13717950 (W.D.Mo.) (challenging the constitutionality of Missouri's execution protocol as it applied to Bucklew).

33. Brief for Petitioner, *supra* note 1, at \*16 (quoting J.A. I, *supra* note 9, at \*85-86 ¶¶ 148, 151). *See generally* Fourth Amended Complaint, *Bucklew*, 2015 WL 13717950.

34. Brief for Petitioner, *supra* note 1, at \*16 (citing J.A. I, *supra* note 9, at \*85 ¶ 150). *See generally* Fourth Amended Complaint, *Bucklew v. Lombardi*, No.14-08000, 2015 WL 13717950 (W.D.Mo.).

35. Brief for Petitioner, *supra* note 1, at \*18.

36. *See* Brief of Respondents, *supra* note 10, at \*18 (citing J.A. I, *supra* note 9, at \*116–26).

37. J.A. II, *supra* note 7, at \*828–32.

### III. HOLDING

A divided Eighth Circuit panel<sup>38</sup> affirmed the district court's decision to grant summary judgment in favor of the State and vacated the stay,<sup>39</sup> concluding that Bucklew provided no evidence showing that lethal gas would substantially reduce his risk of severe pain.<sup>40</sup> The Court of Appeals reasoned that he did not meet the *Glossip* standard because the evidence showing a difference between the two methods had not come from a single witness.<sup>41</sup> The panel majority also upheld the district court's decision to deny Bucklew's request for discovery into the qualifications of the execution team,<sup>42</sup> and denied Bucklew's petition for a panel rehearing or a rehearing *en banc*, as well as his motion for an emergency stay.<sup>43</sup> On April 30, 2018, the Supreme Court stayed Bucklew's execution and granted his petition for writ of certiorari.<sup>44</sup>

### IV. ARGUMENTS

#### A. *Petitioner's Arguments*

Petitioner first argues that *Glossip* and *Baze* do not require courts to assume neither that state personnel are competent to deal with a medical condition nor that the execution will go as planned. These assumptions effectively void the purpose of as-applied challenges because the inmates bringing such challenges will necessarily assert that the procedure will *not* go as intended.<sup>45</sup> Consequently, the discovery requested by Bucklew regarding the qualifications of the execution team was relevant because the Director of Missouri's Department of Corrections testified that she would rely upon the

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38. *Bucklew v. Precythe*, 883 F.3d 1087, 1100 (8th Cir. 2018) (Colloton, J., dissenting) (“If the factfinder accepted [expert testimony from both parties] as to the effect of nitrogen gas, then Bucklew’s proposed alternative method would significantly reduce the substantial risk of severe pain.”). Justice Colloton also observed that the general rule allows the trier of fact to accept all or just a part of any witnesses’ testimony, and that on summary judgment one party can rely on a portion of the opposing party’s expert’s testimony to create a genuine issue of material fact. *Id.*

39. *Bucklew*, 883 F.3d at 1090.

40. *Id.* at 1094.

41. See Brief for Petitioner, *supra* note 1, at \*24 (stating that the 8th Circuit “imposed a novel rule that a claimant cannot prevail unless all elements of his claim are established through the testimony of a single expert witness”).

42. 883 F.3d at 1096–97.

43. J.A. II, *supra* note 7, at \*884–87.

44. *Bucklew v. Precythe*, No. 17–8151, 138 S.Ct. 1706 (2018) (mem.).

45. Brief for Petitioner, *supra* note 1, at \*25–30.

execution team to make judgments as to how to handle Bucklew's unique medical condition.<sup>46</sup> Additionally, the amount of information that the execution team has regarding his condition directly impacts the risk of severe suffering.<sup>47</sup> Without his medical history, the team will be unable to tailor the execution protocol, such as by refraining from placing the gurney in a flat position, to Bucklew's unique needs.<sup>48</sup>

Petitioner further asserts that discovery was relevant because Missouri's protocol allows the medical team to attempt to access the femoral vein "provided they have appropriate training, education and experience for that procedure."<sup>49</sup> Missouri's protocol itself makes the qualifications of the medical team relevant to assessing the risk of pain.<sup>50</sup> The State's appellate strategy also illustrates the relevance of the requested discovery in Bucklew's case because the State provided an incomplete affidavit, which indicated that Bucklew would not need to lie supine during the procedure.<sup>51</sup> Furthermore, Bucklew did not have a chance to learn what role the State's witness plays in the execution or whether she has the authority to direct the medical members of the execution team.<sup>52</sup> Thus, petitioner asserts that the lower court erred in applying these assumptions to Bucklew's claim and in finding that the requested discovery was irrelevant.<sup>53</sup>

Next, Petitioner argues that the assumptions surrounding the execution and the medical team's qualifications are erroneous because they conceal "a kind of cruelty that has been a focus of this Court's Eighth Amendment jurisprudence for decades" and indicate a

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46. *See id.* at \*32 ("Anne Precythe [the Director] has testified that she knows nothing about Bucklew's medical condition and would defer to the [unnamed nurse] and the [unnamed anaesthologist] regarding how to handle any issues that might arise during the execution, such as how to position Bucklew or obtain venous access.").

47. *See id.* ("The less the team knows, the greater Bucklew's risk of needless suffering.").

48. *See id.* at 33–34 ("The summary judgment record reflects that inmates in prior executions have been required to lie supine, and no one testified that Bucklew would be treated any differently.").

49. J.A. I, *supra* note 9, at \*214.

50. Brief for Petitioner, *supra* note 1, at \*33.

51. *Id.* at \*33–34 (explaining that the affidavit provided by the State's witness does not discuss whether Bucklew will have to lie supine if a cutdown procedure is necessary and that it is inconsistent with the testimony of the witness's superior, who said that she would leave decisions regarding positioning to the medical team).

52. *Id.*

53. *See id.* at \*30 ("In the absence of that erroneous assumption, no sound principle . . . supports depriving an inmate of the opportunity to ensure that the medical members of the execution team are informed about the details of his complicating medical condition, and are equipped to manage it so that the inmate does not needlessly suffer.").

“deliberate indifference” to an inmate’s medical condition.<sup>54</sup> The state officials, asserts petitioner, would violate the Eighth Amendment by showing a deliberate indifference to the inmate’s medical condition because their lack of accomodation constitutes an “unnecessary and wanton infliction of pain.”<sup>55</sup> Petitioner contends that the State’s decision to proceed with the ordinary execution protocol would show a deliberate indifference if state officials are aware that an inmate suffers from a rare medical condition that makes him uniquely likely to suffer during the procedure.<sup>56</sup> Additionally, if the execution goes badly, it would not be an “innocent” mistake,<sup>57</sup> but instead would deny “the essential human dignity” of the officials who carry out the execution “by making them an unwitting party to foreseeable cruelty.”<sup>58</sup> Lastly, the assumptions proffered by the Eighth Circuit “in effect absolve[] respondents of their decision to take an unjustified risk,” and “leaves state officials free to ignore that risk so long as the execution would be humane if all goes as intended.”<sup>59</sup>

Bucklew further asserts that the Court should not require inmates who raise an as-applied challenge to design an alternative method of execution because they do not present the same risk to the death penalty as facial challenges.<sup>60</sup> In as-applied challenges, the inmates are not challenging the death penalty itself as unconstitutional, nor do they seek a judgment that would require the state to alter its execution protocol as to *any other inmate*.<sup>61</sup> Instead, they are only asking that the execution protocol be invalidated in their specific cases.<sup>62</sup> Importantly, the concern that it would be difficult for a court to discern whether the method is cruel and unusual without a pleaded alternative is not relevant in as-applied challenges that are based on an inmate’s unique medical condition<sup>63</sup> because the state’s refusal to accommodate the inmate after he makes a substantial showing of risk would itself be a basis to consider the method cruel and unusual.<sup>64</sup>

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54. *Id.* at \*28.

55. *Id.* at \*28 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

56. *Id.* at \*28–29.

57. *Id.* at \*29 (quoting *Baze v. Rees*, 553 U.S. 35, 50 (plurality opinion)).

58. *Id.*

59. *Id.* at \*29–30.

60. *Id.* at \*35–36 (stating that Bucklew’s as-applied challenge presents none of the concerns that prompt the requirement to provide an alternative in other cases, such as depriving the government of the only available means of carrying out capital punishment).

61. *Id.*

62. *Id.*

63. *Id.* at \*42–43.

64. *Id.* at 43.

Even if the Court determines that inmates must assert an alternative method of execution, Bucklew argues that the Eighth Circuit's interpretation of *Glossip* requiring that the inmate produce evidence supporting a method of execution claim through the testimony of a single witness conflicts with summary judgment rules.<sup>65</sup> Therefore, the Eighth Circuit erred because it did not consider "what a reasonable factfinder could have concluded had it heard the whole of what both experts had to say," and did not consider the substantial risks that the lethal injection protocol poses to Bucklew before the lethal drug is administered when calculating the risks.<sup>66</sup> If the court had considered the medical expert testimony offered by both parties, thus considering the record as a whole, the court would have found that execution by lethal gas would significantly reduce the substantial risk of severe pain.<sup>67</sup> Furthermore, the opinion in *Glossip* did not establish this single witness standard for method of execution claims,<sup>68</sup> and this burden would cripple as-applied challenges to methods of execution because many experts who can offer that type of opinion are ethically barred from asserting a better way to implement the death penalty.<sup>69</sup>

Moreover, Bucklew contends that he met this burden under *Glossip* because Respondents did not allege that lethal gas was unavailable.<sup>70</sup> Additionally, Bucklew supported the proposition that execution by lethal gas would significantly reduce his risk of pain because it would shorten the period of time during which he would be conscious while choking on his own blood.<sup>71</sup> Petitioner asserts that he

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65. *Id.* at 45 (citing *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); Fed. R. Civ. P. 56(c)(1)) (noting that evidence at summary judgment should be evaluated in light of the record as a whole).

66. *Id.* at 46.

67. *See* J.A. II, *supra* note 7, at \*877 (Colloton, S., dissenting) ("If the factfinder accepted Dr. Zivot's testimony as to the effect of pentobarbital, and Dr. Antognini's uncontroverted testimony as to effect of nitrogen gas, then Bucklew's proposed alternative method would significantly reduce the substantial risk of severe pain that the district court identified in its analysis of the first element.").

68. Brief for Petitioner, *supra* note 1 at \*47.

69. *See id.* at 48 (explaining that witnesses with the requisite medical training "are likely to be unable, consistent with professional ethical standards, to propose an alternative method of execution that will substantially reduce the risk of suffering"). *See also The Hippocratic Oath*, wherein new medical professionals recite, "I will . . . benefit my patients according to my greatest ability and judgement, and I will do no harm or injustice to them," and vow, "I will not give a lethal drug to anyone if I am asked, nor will I advise such a plan.," [https://www.nlm.nih.gov/hmd/greek/greek\\_oath.html](https://www.nlm.nih.gov/hmd/greek/greek_oath.html) (last visited Oct. 30, 2018).

70. Brief for Petitioner, *supra* note 1, at \*51.

71. *Id.*

“faces identifiable severe risks from the procedure both before and after the medical team gains venous access and the non-medical team begins to administer the lethal drug.”<sup>72</sup> Particularly, Bucklew’s tumors are likely to rupture due to the repeated attempts by the medical team to start an IV.<sup>73</sup>

Even if the execution team is successful in starting an IV line, Bucklew argues that he is at an increased risk of his vein blowing,<sup>74</sup> and he would be in extreme pain if a vein blows because pentobarbital would leak and destroy the surrounding tissue.<sup>75</sup> Furthermore, the petitioner warns that he will lose the ability to manage his airway after the lethal drug begins to flow<sup>76</sup> and will begin to suffocate on his own blood.<sup>77</sup> If the execution team does not gain access to a peripheral vein, they will likely try to start an IV in the femoral vein.<sup>78</sup> This procedure, petitioner asserts, will cause him to convulse and that the execution team may pierce the femoral artery.<sup>79</sup>

Finally, Petitioner argues that inmates should not be required to completely design the alternative method of execution because the State is in a better position than inmates to develop the detailed protocols.<sup>80</sup> Inmates have limited access to resources in prisons, probably have no experience in writing procedures, and will have difficulty receiving guidance from a medical professional due to ethical constraints.<sup>81</sup> Furthermore, the requirement that an inmate designs a detailed step-by-step protocol for his execution does not advance the purpose of the known-and-available-alternatives requirement.<sup>82</sup>

### B. Respondent’s Arguments

The State argues that “courts ‘must and do *assume* that the state officials carr[y] out their duties under the death warrant in a careful

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72. Brief for Petitioner, *supra* note 1, at \*10 (emphasis omitted).

73. *Id.* at \*11 (citing J.A. I, *supra* note 9, at \*183, \*186–87, \*232, \*234–35, \*351).

74. *Id.* (citing J.A. I, *supra* note 9, at \*340–41, \*189–90).

75. *Id.* (citing J.A. I, *supra* note 9, at \*332–33).

76. *Id.* (citing J.A. II, *supra* note 7, at \*233).

77. *Id.* (citing J.A. I, *supra* note 9, at \*234–35).

78. *Id.* (citing J.A. II, *supra* note 7, at \*611–12) (noting that the execution team has used the cutdown procedure in the past when attempts at peripheral access failed).

79. *Id.* at \*12 (citing J.A. I, *supra* note 9, at \*343–45, 232–35).

80. *Id.* at \*52–53.

81. *Id.* at \*53.

82. *Id.*

and humane manner.”<sup>83</sup> Respondents claim, moreover, that Bucklew’s evidence supports only the prediction of isolated mishaps that would not violate the Eighth Amendment because he would be unable to feel pain twenty to thirty seconds after the pentobarbital was injected into his system,<sup>84</sup> and his prediction that the medical team may have difficulty inserting an IV line does not establish a sufficiently substantial risk of harm when the State has put in place important safeguards as a matter of law.<sup>85</sup> Here, Missouri has incorporated safeguards,<sup>86</sup> such as mandating the presence of an anesthesiologist and a nurse during executions.<sup>87</sup> Although there is disagreement as to the amount of information the medical team will have ahead of Bucklew’s execution, Respondents claim that the medical records they receive will contain more than a one-page summary of his medical condition.<sup>88</sup>

Respondents further argue that the delay from granting Bucklew’s discovery request would have been disproportional to the needs of the case because his claim is refuted by existing evidence.<sup>89</sup> Petitioner’s claim that the medical team will repeatedly fail to start an IV line is unfounded because it ignores the possibility of accessing a peripheral vein in Bucklew’s foot, a procedure he has not claimed would be abnormally difficult.<sup>90</sup> Nor, for that matter, does the record support the contention that the medical team would have difficulty establishing a central line, or that he would have to go through a shutdown procedure,<sup>91</sup> which involves “slicing into the leg to visualize the vein.”<sup>92</sup> Any error that the Court made in the decision to deny discovery, moreover, was harmless because Bucklew failed to provide

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83. Brief of Respondents, *supra* note 10, at \*39 (quoting State of La. *ex rel.* Francis v. Resweber, 329 U.S. 459, 462 (1974)) (plurality opinion) (alteration in original).

84. *Id.* at \*38 (citing *Baze v. Rees*, 553 U.S. 35, 48, 50 (2008)).

85. *Id.* at \*39–40 (quoting 553 U.S. at 55).

86. *Id.* at \*40 (citing J.A. I, *supra* note 9, at \*213–14).

87. J.A. I, *supra* note 9, at \*336, \*380 (asserting that both medical professionals involved are trained to gain IV access through peripheral veins and that all board-certified anesthesiologists are trained to access central veins if necessary during Bucklew’s execution).

88. Brief of Respondent, *supra* note 10, at \*40 (citing J.A. II, *supra* note 7, at \*627). *But See* Brief for Petitioner, *supra* note 1, at \*7–8 (citing J.A. II, *supra* note 7, at \*523–24) (stating that the medical team responsible for the execution will not examine or meet with Bucklew before the execution and will only be given a single-page summary, not Bucklew’s complete medical record).

89. *Id.* at \*53 (citing Fed. R. Civ. P. 26(b)(1)).

90. *Id.* at \*53 (citing J.A. II, *supra* note 7, at \*821).

91. *Id.*

92. Brief for Petitioner, *supra* note 1, at \*8 (citing J.A. II, *supra* note 7, at \*616–18).

an alternative method of execution,<sup>93</sup> the district court dismissed the only count that hinged on the execution team's training,<sup>94</sup> and he never claimed that his suffering would be caused by difficulty in accessing his veins in his Fourth Amended Complaint.<sup>95</sup>

Respondents argue that Plaintiff failed to provide evidence that he is "sure or very likely" to suffer severe pain during the lethal injection procedure because he will be unconscious within thirty seconds after the medical team administers pentobarbital.<sup>96</sup> Therefore, even if Bucklew experiences a blocked airway during the procedure, the execution protocol would not amount to a "serious harm" in violation of the Eighth Amendment since he would be unconscious.<sup>97</sup> Furthermore, Bucklew's expert did not estimate how long it would take for Bucklew to become unconscious, which would occur before brain death,<sup>98</sup> rendering the testimony that brain death would occur between 52 and 240 seconds after starting lethal injection irrelevant.<sup>99</sup>

Respondents next contend that Bucklew failed to identify an alternative method sufficient to satisfy the second element of *Glossip* because proffering Nitrogen Hypoxia without more information regarding the procedure (such as the method, rate, quantity, quality, concentration, delivery and timing of its administration) does not identify any known and readily feasible method of execution.<sup>100</sup> Additionally, Bucklew's proposed alternative method is both untested and vague because no state has ever carried out an execution via Nitrogen Hypoxia.<sup>101</sup> Respondents presented expert testimony that any opinion about how quickly nitrogen would work in an execution would not be well founded and that there is no way to determine whether execution by nitrogen would be cruel.<sup>102</sup> Consequently, Bucklew did not provide sufficient evidence to demonstrate the severity and duration of pain he may suffer from an execution by nitrogen.<sup>103</sup> Without this evidence, it is not possible to compare his

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93. *Id.* at \*54.

94. *Id.*

95. *Id.* at \*51 (citing J.A. I, *supra* note 9, at \*42–94).

96. *Id.* at \*33.

97. *Id.* at \*38 (citing *Baze v. Rees*, 553 U.S. 35, 48, 50 (2008)).

98. *Id.* at \*34.

99. *Id.* at \*34 (citing J.A. I, *supra* note 9, at \*196).

100. *Id.* at \*26.

101. *Id.* at \*28 (citing *McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir 2017)).

102. *Id.*

103. *Id.* at \*28–29.

pleaded alternative with the State's lethal injection protocol.<sup>104</sup> Bucklew's claim that lethal gas is less likely to cause severe pain than lethal injection is therefore unsubstantiated.<sup>105</sup>

Further, Respondents argue that Bucklew did not prove that the State refused to comply with his proposed alternative method of execution without a legitimate penological justification.<sup>106</sup> Here, the State has a penological justification in adhering to lethal injection as the method of execution because he did not successfully offer an alternative method that is feasible and readily implemented in Missouri for reasons discussed earlier.<sup>107</sup> Even if Nitrogen Hypoxia can be considered an alternative method under *Glossip*, the State is still justified in adhering to lethal injection because lethal gas has not been thoroughly tested.<sup>108</sup> Similarly, Missouri "has an interest in preserving the dignity of the procedure" and therefore it may legitimately refuse to implement an alternative execution method that causes symptoms that could be perceived by witnesses as signs that the inmate is conscious and in severe pain.<sup>109</sup> Additionally, the public may be outraged at the State's use of a gas chamber for capital punishment because many people were killed by gas in concentration camps during World War II.<sup>110</sup>

Next, Respondents argue that the *Glossip* court explicitly held that inmates must offer a feasible, readily available alternative method in *all* Eighth Amendment method of execution claims, including as-applied challenges.<sup>111</sup> The same principle applies to both types of challenges: if "capital punishment is constitutional, there must be a constitutional means of carrying it out."<sup>112</sup> Thus, if an inmate were to prevail on an as-applied challenge without indicating an alternative means of execution, then he would effectively be exempt from capital punishment and the State would be estopped from carrying through his sentence.<sup>113</sup>

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104. *Id.*

105. *Id.*

106. *See id.* at \*41 (citing *Baze v. Rees*, 553 U.S. 35, 52 (2008)).

107. *Id.* at \*42 (citing *McGehee v. Hutchinson*, 854 F.3d at 493).

108. *Id.*

109. *Id.* (citing *Baze*, 553 U.S. at 57).

110. *Id.* at \*43.

111. *Id.* at \*43 (quoting *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015)) (emphasis in original).

112. *Id.* at \*44; *see also* 135 S. Ct. at 2728.

113. *Id.* at \*44.

The State asserts that the alternative method element in *Glossip* should not be waived from as-applied challenges because the element is essential to showing that state officials were “subjectively blameless.”<sup>114</sup> The necessary *mens rea*, that State officials were inflicting pain for the sole purpose of inflicting pain, cannot be inferred if they use the only feasible method available to them.<sup>115</sup> Therefore, state officials cannot show that they are blameless and acted with a deliberate indifference to the inmates’ suffering unless there is a requirement to assert an alternative method.<sup>116</sup> In other words, state officials are more easily able to show that they did not have the culpable state of mind by explaining the reasoning behind their refusal to use the pleaded alternative.<sup>117</sup> Here, Bucklew failed to provide an alternative method of execution and, therefore, the prison officials in Missouri chose the only method available to them.<sup>118</sup> Since it is the only available method, the petitioner cannot prove that the state officials showed a deliberate indifference.<sup>119</sup>

As a matter of policy, Respondents urge that eliminating the alternative-method requirement would encourage meritless claims by inmates in an attempt to delay their execution.<sup>120</sup> Respondents worry that because death sentences have been delayed by an average of eighteen years,<sup>121</sup> inmates will allege that they have developed *some* medical condition before the State can carry out the execution,<sup>122</sup> resulting in “an explosion” of as-applied challenges.<sup>123</sup>

Finally, Respondents argue that Bucklew’s as-applied claim is barred by Missouri’s statute of limitations.<sup>124</sup> The State explains that Bucklew filed an application in 2008, seeking funds partly because he would likely suffer serious harm amounting to cruel and unusual punishment during his execution by lethal injection.<sup>125</sup> Because this is the same theory he asserted in his Fourth Amended Complaint, he

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114. *Id.* at \*45–46.

115. *Id.* at \*47.

116. *Id.*

117. *Id.*

118. *See id.*

119. *See id.*

120. *See id.* at \*47.

121. *Id.* at \*47–48 (citing *Glossip v. Gross*, 135 S. Ct. 2726, 2764–2765 (2015) (Breyer, J. dissenting)).

122. *Id.* at \*48 (emphasis in original).

123. *Id.* at \*49.

124. *Id.*

125. *Id.* (citing *J.A. II*, *supra* note 7, at \*657).

must have asserted it in 2013; and by waiting six years, he allowed the five-year statute of limitations to run.<sup>126</sup> Additionally, Bucklew had access to the information sufficient to assert this claim before 2014 because his subsequent medical expert came to the same findings as his first expert.<sup>127</sup>

Bucklew is further barred by the principal of *res judicata* because he could have included his as-applied challenge with the facial challenge he asserted in prior litigation.<sup>128</sup> Therefore, when that suit became final, he was barred from asserting his as-applied claim.<sup>129</sup> Even if Bucklew was not permitted to amend his complaint by the court, he should have requested permission from the court to split his claims into separate suits, or sought leave to amend the claim.<sup>130</sup> He could have then appealed from an adverse judgment if the court denied leave.<sup>131</sup> Moreover, the district court did not issue the order barring Bucklew from amending his complaint until a month *after* he asserted that he first learned the basis for this current as-applied claim.<sup>132</sup> Thus, Bucklew assumed the risk that the prior suit would reach a final judgment first and bar his claims in this suit.<sup>133</sup>

## V. ANALYSIS

The Supreme Court should clarify whether an inmate raising an as-applied challenge to the method of execution is required to plead an alternative method of execution under *Baze* and *Glossip*. If the Court determines that inmates bringing as-applied challenges must provide a readily feasible alternative method, the inmates should have a genuine opportunity to satisfy these elements without obstacles like historically invalidated assumptions, unpredictable state influence, and novel evidentiary burdens. Upholding these obstacles discourages inmates from bringing as-applied challenges to the state's method of execution because the risk is high that inmates would not be able to satisfy the *Glossip* standard. Finally, the Court has the opportunity to

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126. *See id.* at \*55 (referencing Mo. Rev. Stat. § 516.120(4)).

127. *Id.*

128. *See Zink v. Lombardi*, 783 F.3d 1089, 1095 (8th Cir. 2015) (seeking a declaratory judgment that the lethal-injection protocol facially violates the Constitution of the United States, the Missouri Constitution, several provisions of state law, and Missouri common law).

129. Brief of Respondent, *supra* note 10, at \*56.

130. *Id.* at \*57 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. b (AM. LAW INST. 1982)).

131. *Id.*

132. *Id.* (citing J.A. II, *supra* note 7, at \*852).

133. *Id.*

create a categorical exemption for inmates who show a significant risk of suffering due to a medical condition. The Supreme Court should reverse the Eighth Circuit's holding and remand for an evidentiary hearing.

The assumptions that the medical personnel on an execution team have adequate training, and that the execution will go as intended, are rebuttable according to the text in *Glossip* and run counter to the nature of as-applied claims. The Respondents argue in their Brief that the courts “must and do *assume* that the state officials carry out their duties under the death warrant in a careful and humane manner.”<sup>134</sup> However, the *Glossip* court opines in full: “*As nothing has been brought to our attention to suggest the contrary*, we must and do assume that the state officials carried out their duties under the death warrant in a careful and humane manner.”<sup>135</sup> Therefore, even if there is a presumption, *Glossip* allows inmates to effectively rebut it presenting medical evidence demonstrating that they suffers from a rare medical illness and that the state has not amended their protocol to specifically mitigate the risks in their cases. Additionally, the state should not trivialize as an “accident” the occurrence of severe suffering that medical experts in these cases predicted because the two are entirely inconsistent. To *predict* an outcome is defined as “to declare or tell in advance”<sup>136</sup> and an *accident* is defined as “any event that happens unexpectedly.”<sup>137</sup> The inmates, and their experts, are predicting in advance that botched executions will occur if the state does not take precautions. The harm is, therefore, neither “unexpected,” nor an “accident,” and may amount to deliberate indifference by the state officials in violation of the Eighth Amendment.

Furthermore, the inquiry into the qualification of execution team members should not end with the member's job title because past experience shows that the title does not necessarily correspond with competency.<sup>138</sup> For example, a member of Tennessee's current

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134. *Id.* at \*39 (quoting *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1974)) (plurality opinion).

135. 329 U.S. at 462.

136. Random House Webster's Dictionary 1523 (2d unabr. ed. 2001).

137. *Id.* at 12.

138. See generally *Botched Executions*, DEATH PENALTY INFO. CENTER, <https://deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (last visited Oct. 22, 2018). See, e.g., Cedwards, *7 of the World's Most Horrific Botched Executions*, LIFE! DEATH! PRIZES! (Sept. 9, 2017), <https://www.lifedeathprizes.com/real-life-crime/the-worlds-worst-botched-executions-59193> (reporting that human error was the cause of using a synthetic sponge

execution team had a history of drug and alcohol addiction, as well as psychological disorders.<sup>139</sup> The same medical team was not trained in setting up IV lines, administering drugs through the IV lines, or monitoring the IV lines while the injections are administered.<sup>140</sup> Importantly, they were not able to identify several problems that could occur with IV lines during their use, including “slippage of the catheter, stopcocks used to set the directional flow of the IV turned in the wrong direction, and injection of the wrong drug.”<sup>141</sup> Despite evidence to the contrary, the Sixth Circuit in *Harbison v. Little* hid behind stare decisis, citing *Baze*.<sup>142</sup> The court vacated and remanded the judgment back to the lower court, determining that the Tennessee execution team was adequately trained.<sup>143</sup>

In another chilling example, Alan Doerhoff, a doctor on Missouri’s execution team, was diagnosed with dyslexia,<sup>144</sup> and admitted that he both had difficulty reading drug names and improvised drug doses.<sup>145</sup> Even though the state of Missouri fired him for his incompetence, he still supervises executions for the federal government.<sup>146</sup> These instances illustrate the danger and invalidity of these assumptions. Discovery should be granted to hold the government employees tasked with administering the death penalty to a higher standard. Granting discovery may also decrease the frequency of botched executions.

Moreover, the Respondent’s reasoning that, because one member of the medical team is an anesthesiologist, Bucklew’s prediction would only amount to an “isolated mishap” does not hold merit. Recently, the attempted execution of Doyle Lee Hamm in Alabama demonstrates the fault in this reasoning.<sup>147</sup> After Hamm was

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which caused an inmate’s head to catch on fire during execution by electric chair).

139. *Harbison v. Little*, 571 F.3d 531, 537 (6th Cir. 2009) (citing *Harbison v. Little*, 511 F. Supp. 2d 872, 887–88 (M.D. Tenn. 2008)).

140. *Id.* (citing *Harbison*, 511 F. Supp. 2d at 887).

141. *Id.* (citing 511 F. Supp. 2d at 888–890) (emphasis added).

142. *Id.* at 539 (citing 511 F. Supp. 2d at 888–890).

143. *Id.*

144. Mike Pearl, *What It’s Like to Be a Death Row Executioner in America*, VICE (May 27, 2015, 12:00 AM), [https://www.vice.com/en\\_us/article/bnpxp5/how-do-you-get-a-job-as-an-executioner-in-america-526](https://www.vice.com/en_us/article/bnpxp5/how-do-you-get-a-job-as-an-executioner-in-america-526).

145. *Id.*

146. *Id.*

147. See Liliana Segura, *Another Failed Execution: The Torture of Doyle Lee Hamm*, THE INTERCEPT (Mar. 3, 2018, 9:58 AM), <https://theintercept.com/2018/03/03/doyle-hamm-alabama-execution-lethal-injection>; see also Tracy Connor, *Doyle Lee Hamm wished for death during botched execution, report says*, NBC NEWS (Mar. 5, 2018, 3:40 PM), <https://www.nbcnews.com/>

diagnosed with large-cell lymphoma, Hamm's attorney had warned the courts for seven months that the medical team would have difficulty finding a vein.<sup>148</sup> The warnings were ignored. The execution team inserted needles multiple times in Hamm's legs and ankles, and eventually tried to gain access through a central line in his right groin, despite the State's own doctor's warning that there were abnormal lymph nodes in that area.<sup>149</sup> Witnesses recollected that Hamm, because it was so painful, prayed that the medical team would finally succeed in taking his life.<sup>150</sup> Hamm collapsed once the execution was called off and was removed from the gurney.<sup>151</sup> It was later discovered that the medical team "almost certainly punctured Doyle's bladder, because he was urinating blood for the next day."<sup>152</sup> Thus, medical evidence supporting the prediction that the medical team will have difficulty inserting an IV should be sufficient to warrant more discovery after numerous botched executions.<sup>153</sup> To do otherwise simply because there is an anaesthologist on the execution team would be to turn a blind eye to the suffering that has already tarnished the supposedly humane nature of lethal injection.<sup>154</sup>

The Respondent's concern that not requiring inmates to plead an alternative method of execution would result in an "explosion" of claims is equally unpersuasive because inmates must still satisfy the pleading standard established by the Federal Rule of Civil Procedure 8(a)(2)<sup>155</sup> and the Court's interpretation of Rule 8(a)(2) in *Bell Atlantic Corp. v. Twombly*.<sup>156</sup> The strengthened pleading standard was

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storyline/lethal-injection/doyle-lee-hamm-wished-death-during-botched-execution-report-says-n853706.

148. *See id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *See Botched Executions*, DEATH PENALTY INFO. CENTER, <https://deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (last visited Oct. 22, 2018) (listing examples and causes of botched executions that have occurred in the United States from 1982 to 2018).

154. It is worth noting that a bill was introduced earlier this year in Missouri that would abolish the death penalty. H.B. 2218, 99th Gen. Assemb., 2d Reg. Sess. (Mo. 2018).

155. *See* Fed. R. Civ. P. 8(a)(2) (stating that a successful pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief").

156. *See* 550 U.S. 544, 570 (2007) (holding that a plaintiff must assert enough facts to state a claim to relief that is plausible on its face to pass the pleading stage). *See also* Brief for Amici Curiae Megan McCracken and Jennifer Moreno in Support of Petitioner, *Bucklew v. Precythe*, 2018 WL 3584094 (No. 17-8151) (July 23, 2018) (arguing that because as-applied challenges are based on specific medical conditions that interact with aspects of the lethal injection process, they are necessarily brought only infrequently, and when an inmate brings such a claim, it will

created specifically by the Court in *Bell* to keep out frivolous suits from advancing and spending resources in discovery. Additionally, the Court went through great lengths to clarify that it was not a probability standard.<sup>157</sup> Inmates would still need to proffer extensive medical evidence to “nudge[] their claims across the line from conceivable to plausible” to survive a motion to dismiss, but would not need to plead that their suffering is “probable.”<sup>158</sup> The Court should not address this concern by treating inmates differently than other plaintiffs. If the State and Court are concerned with a flood of as-applied challenges, then the solution must be found elsewhere, such as through better medical care in prisons to decrease the frequency of inmates suffering from medical illnesses at the time of execution.

If an inmate who asserts an as-applied challenge to the method of execution must offer a readily feasible alternative procedure that in fact significantly reduces a substantial risk of severe pain, and further demonstrate that the state lacked a penological justification for rejecting the alternative, then the different execution methods that are available to an inmate should not be limited by the state’s statute. First, as argued in the Brief of Scholars and of Academics of Constitutional Law, the current test to determine whether the inmate-offered alternative is readily available to the state is inconsistent<sup>159</sup> and gives the states a veto power over an inmate’s Eighth Amendment rights.<sup>160</sup> Inmates are restricted in some states because an alternative method is only available if it is authorized by statute “and/or [the state] has kept its equipment in good operational order.”<sup>161</sup> In other jurisdictions, the state “must have access to the alternative and be able to carry out the alternative method relatively easily and reasonably quickly.”<sup>162</sup> Thus, the states that follow the former standard predetermine the very ability of an inmate to name another alternative and the states could pass a statute denying any alternative method from being considered altogether. This leaves the inmates unable to challenge a state’s method of execution as being

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present concrete factual issues that are well within the court’s adjudicative competence and the state’s own knowledge).

157. *See id.* at 545.

158. *See id.* at 570.

159. Brief of Scholars and of Academics of Constitutional Law as Amicus Curiae in Support of Petitioner at \*11, *Bucklew v. Precythe*, 2018 WL 3584093, (U.S. July 23), *petition for cert. filed*, (U.S. Mar. 15, 2018) (No. 17-8151) [hereinafter Brief of Scholars].

160. *Id.* at \*16.

161. *See id.* at \*16.

162. *Id.* at \*12 (quoting *McGehee*, 854 F.3d at 493, *cert. denied*, 137 S. Ct. 1275 (2017)).

cruel and unusual.<sup>163</sup> Under the latter standard, the same state that reasoned that a “lack of an extensive history of use” was a basis to reject an alternative methods of execution also found that execution by firing squad was not a readily implemented alternative method<sup>164</sup> even though it is one of the nation;s oldest and most easily performed methods of execution.<sup>165</sup> Thus, the uncertainty around what courts would allow as an acceptable alternative method under *Glossip* discourages inmates from asserting as-applied claims.

The states should share data concerning their methods of execution, costs associated with different methods of execution, and studies on public opinion. With this shared information, an inmate would be able to offer an alternative practice in other states as long as it is not cost-prohibitive and there is no proof of public outcry. For example, an inmate should be able to offer execution by firing squad as an alternative because other states use this method,<sup>166</sup> and because research indicates that it is an easy and inexpensive method.<sup>167</sup> This would provide inmates with more options when asserting a readily feasible alternative method, increase the odds that they would be able to successfully offer an alternative method, and decrease the risk that they would suffer extreme pain.

Alternatively, the Court should categorically exempt from execution those inmates who show that a medical condition puts them at risk for severe suffering if the state’s protocol is followed without accommodation and if there is no alternative method available to the State. This type of categorical exemption would not radically deviate from Eighth Amendment jurisprudence because the Court has made similar determinations in the past based on age,<sup>168</sup> and mental illness.<sup>169</sup> This exemption would reestablish the protection for inmates at risk of severe suffering and preserve the states’ power to inflict the death penalty when constitutional violations are not implicated.

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163. *See id.* at \*18.

164. *Id.*

165. *Id.* (quoting *McGehee*, 854 F.3d at 493, *cert. denied*, 137 S. Ct. 1275 (2017)).

166. *See id.* at \*23 (stating that Utah, Oklahoma and Mississippi currently authorize firing squad as a method of execution) (citing Utah Code Ann. § 77-18-5.5; Oklahoma H.B. 1879 at § 1014(D); Miss. Code Ann. § 99-19-51).

167. *See id.*

168. *See Roper v. Simmons*, 543 U.S. 551 (2005) (invalidating the death penalty for inmates who were under eighteen years old at the time the crime was committed).

169. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the death penalty is not constitutional when an inmate is intellectually disabled).

## CONCLUSION

After seventy-five documented botched executions by lethal injection,<sup>170</sup> the warnings of the inmates and their medical experts can no longer be ignored. The Supreme Court should take care to protect the dignity of the Eighth Amendment and protect inmates from undue burdens in avoiding inhumane executions. In considering a multitude of options from shifting evidentiary burdens to creating an exemption, a state's ability to implement a death sentence should not come at the cost of an inmate's right to access the justice system.

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170. See, e.g., *Botched Executions*, DEATH PENALTY INFO. CENTER, <https://deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (last visited Oct. 22, 2018).