No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Charles F. Warner; Richard E. Glossip; John M. Grant; and Benjamin R. Cole, by and through his next friend, Robert S. Jackson, Petitioners,

vs.

Kevin J. Gross, Michael W. Roach, Steve Burrage, Gene Haynes, Frazier Henke, Linda K. Neal, Earnest D. Ware, Robert C. Patton, and Anita K. Trammell, Respondents.

*****CAPITAL CASE*****
EXECUTION OF CHARLES WARNER
SCHEDULED FOR 6:00 PM (CST)
THURSDAY, JANUARY 15, 2015

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED
CAPITAL CASE

In *Baze v. Rees*, 553 U.S. 35 (2008), the Court held that Kentucky's three-drug execution protocol was constitutional based on the uncontested fact that "proper administration of the first drug"—which was a "fast-acting barbiturate" that created "a deep, comalike unconsciousness"—will ensure that the prisoner will not experience the known pain of suffering from the administration of the second and third drugs, pancuronium bromide and potassium chloride. *Id.* at 44.

The *Baze* plurality established a stay standard to prevent unwarranted last-minute litigation challenging lethal-injection protocols that were substantially similar to the one reviewed in *Baze*; a stay would not be granted absent a showing of a "demonstrated risk of severe pain" that was "substantial when compared to the known and available alternatives." *Id.* at 61.

In this case, Oklahoma intends to execute Petitioners using a three-drug protocol with the same second and third drugs addressed in *Baze*. However, the first drug to be administered (midazolam) is not a fast-acting barbiturate; it is a benzodiazepine that has no pain-relieving properties, and there is a well-established scientific consensus that it cannot maintain a deep, comalike unconsciousness. For these reasons, it is uncontested that midazolam is not approved by the FDA for use as general anesthesia and is never used as the sole anesthetic for painful surgical procedures.

Although Oklahoma admits that administration of the second or third drug to a conscious prisoner would cause intense and needless pain and suffering, it has selected midazolam because of availability rather than to create a more humane execution. Oklahoma's intention to use midazolam to execute the Petitioners raises the following questions, left unanswered by this Court in *Baze*:

Question 1: Is it constitutionally permissible for a state to carry out an execution using a three-drug protocol where (a) there is a well-established scientific consensus that the first drug has no pain relieving properties and cannot reliably produce deep, comalike unconsciousness, and (b) it is undisputed that there is a substantial, constitutionally unacceptable risk of pain and suffering from the administration of the second and third drugs when a prisoner is conscious.

Question 2: Does the *Baze*-plurality stay standard apply when states are not using a protocol substantially similar to the one that this Court considered in *Baze*?

Question 3: Must a prisoner establish the availability of an alternative drug formula even if the state's lethal-injection protocol, as properly administered, will violate the Eighth Amendment?

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PETITION FOR A WRIT OF CERTIORARI

Charles F. Warner, Richard E. Glossip, John M. Grant, and Benjamin R. Cole, by and through his next friend Robert S. Jackson, respectfully petition this Court for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals rejecting their allegations of Eighth Amendment violations.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Tenth Circuit denying relief is reported at __ F.3d __, 2015 WL 137627, and is attached *infra*, App. A. The order of the United States District Court denying relief is attached *infra*, App. B, and the transcript of the district court's ruling is attached *infra*, App. C.

STATEMENT OF JURISDICTION

The court of appeals issued its decision affirming the district court's denial of a preliminary injunction on January 12, 2015. This petition is timely. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

Title 42, section 1983, of the United States Code: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

STATEMENT OF THE CASE

This Petition asks this Court to revisit its decision in *Baze v. Rees*, 553 U.S. 35 (2008), because the lethal-injection landscape has changed significantly in the last seven years. The three-drug formula using the barbiturate sodium thiopental as the first drug—a formula that was created by an Oklahoma medical examiner in the late 1970s[1] and reviewed by this Court in *Baze*—is no longer being used to carry out executions in the United States. Instead, states now experiment with various drug formulations that have resulted in multiple malfunctioning executions—indeed, spectacles—over the past year. The bungled executions are unsurprising, because they arise from the use of midazolam, a drug that is *pharmacologically unable* to conform to the constitutional requirements in *Baze*. Thus, these new experiments have resulted in the types of unconstitutional executions that *Baze* was designed to prevent.

[1] *See Baze*, 553 U.S. at 117 (Ginsburg, J., dissenting).

Oklahoma intends to execute Petitioners by lethal injection using a three-drug protocol substantially different from the one this Court reviewed in *Baze*.[2] The Oklahoma protocol will begin with the administration of an intravenous injection of 500 milligrams of midazolam, followed by the administration of 100 milligrams of rocuronium bromide (a paralytic), and then 240 milliequivalents of potassium chloride (a heart-stopping agent). (Dist. Ct. ECF No. 119-1; Supp. Vol. X at 333 (Att.D-OP-040301 Chart D.) It is uncontested that administering a paralytic (such as pancuronium, vecuronium, or rocuronium bromide), and/or potassium chloride to a conscious person would cause intense and needless pain and suffering. (Dist. Ct. ECF Nos. 75, 96, ¶50.) Because of the pharmacological properties of midazolam, Oklahoma cannot constitutionally carry out Petitioners' executions.

A. Oklahoma's goal was political expediency, rather than the development of a more humane execution process, when it hastily switched to a three-drug protocol using midazolam.

Until March 2014, Oklahoma used pentobarbital, a barbiturate similar to sodium thiopental, as the first drug in its three-drug execution protocol. (Tr. 12/17/2014 at 90:22-91:3.) In mid-March, with April execution dates pending for Clayton Lockett and Petitioner Charles Warner, the Oklahoma Attorney General advised the Oklahoma Department of Corrections to use midazolam, a

[2] The execution of Charles Warner is set for January 15, 2015; the execution of Richard Glossip is set for January 29, 2015; the execution of John Grant is set for February 19, 2015; and the execution of Benjamin Cole is set for March 5, 2015. (App. C at 9:5-10.)

benzodiazepine, as the first drug, retaining the paralytic and potassium chloride as the second and third drugs in the formula. (Tr. 12/18/2014 at 469:3-6.) The Attorney General did not choose midazolam because it would lead to a more humane method of executing the condemned; the Attorney General chose midazolam out of convenience and political expediency to ensure that then-scheduled executions would go forward. (Tr. 12/18/2014 at 289:22-24; Tr. 12/18/2014 at 290:2-6.)

Based in part on the Department of Corrections' General Counsel's research of midazolam on the internet, including "Wiki leaks or whatever it is" (Supp. Vol. II at 211:19-22), Oklahoma used midazolam for the first time in its execution of Clayton Lockett. Mr. Lockett was administered 100 milligrams of midazolam, and seven minutes later, he was declared unconscious by the attending physician-executioner. (App. C at 13:5-22; Tr. 12/17/2014 at 214:8-215:10.) Mr. Lockett was then administered the second drug, the paralytic vecuronium bromide, and most of the third drug, potassium chloride. (App. C at 13:22-24; Tr. 12/17/2014 at 170:2-4.) After being declared unconscious, he began to speak, buck, raise his head, and writhe against the gurney (App. C at 13; Tr. 12/17/2014 at 19:6-16, 181:17-25, 193:1-194:3, 205:19-21; Tr. 12/18/2014 at 219:19-220:12; Tr. 12/19/2014 at 494:8-25).

Subsequently, as the district court found, post-execution analysis confirmed that Mr. Lockett's blood contained enough midazolam to render the average person unconscious. (App. C at 18:13-15.) Thus, according to accounts from the physician-

executioner and the toxicology analysis, Mr. Lockett had become unconscious from the midazolam. Despite Oklahoma's awareness of both the fact that midazolam rendered Mr. Lockett unconscious and the fact that Mr. Lockett regained consciousness *after* he had been declared unconscious, the state did not abandon its use of midazolam.[3] Instead, the Department Director maintained the use of midazolam in a three-drug protocol "because a court in Florida found it constitutional." (Tr. 12/18/2014 at 508:1-7.) The Director relied upon the Attorney General's office, rather than his own consultation with medical professionals, in determining whether "midazolam is a reliable drug that would produce a level of unconsciousness" sufficient to prevent prisoners from experiencing pain and suffering from the second and third drugs. (Tr. 12/18/2014 at 509:10-510:5.) In the face of subsequent evidence from an anesthesiologist that midazolam has no analgesic properties and that increasing its dosage does not increase its effect, the Director continues to hold steadfast to his reliance upon the advice of the Attorney General's office that midazolam is an appropriate drug for executions. (Tr. 12/18/2014 at 509:10-510:17.)

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[3] Ohio, on the other hand, abandoned its use of midazolam after its problematic execution of Dennis McGuire last year. *See* Alan Johnson, *Ohio revises death penalty protocol, will delay executions*, The Columbus Dispatch, Jan. 9, 2015, *available at* http://www.dispatch.com/content/stories/local/2015/01/08/death-penalty-protocol.html (last visited Jan. 11, 2015) (reporting that Ohio is dropping use of midazolam and hydromorphone after it "caused problems in the last execution"); *see also In re: Ohio Execution Protocol Litigation*, 2:11-cv-1016-GLF-MRA, Order (S.D. Ohio filed Jan. 9, 2015), ECF No. 509 (vacating scheduling order in light of new protocol).

B. Midazolam is not an acceptable substitute for sodium thiopental because it has different pharmacological properties and cannot reliably produce a deep, comalike unconsciousness.

The Court's holding in *Baze* is premised on three key facts. First, it was uncontested that administering either a paralytic (such as pancuronium, vecuronium, or rocuronium bromide) or potassium chloride (or both) to a conscious person would be unconstitutional. *Baze*, 553 U.S. at 53. Second, sodium thiopental, the first drug at issue in *Baze*, was a "fast-acting barbiturate," a drug used for general anesthesia and designed to produce "a deep, comalike unconsciousness when given in the amounts used for lethal injection." *Id.* at 44. Third, because sodium thiopental acts as an anesthetic at the levels administered, "[t]he proper administration of the first drug *ensures* that the prisoner does not experience any pain" from the administration of the second and third drugs. *Id.* at 44 (emphasis added).

The first finding from *Baze* is undisputed here, and the second finding is equally uncontested; midazolam is *not* in the same class of drugs as sodium thiopental. It is *not* a barbiturate, but a benzodiazepine—an entirely different class of drug, with different pharmacological properties and different intended uses. (App. C at 41:4; Tr. 12/17/2014 at 109:8-10.)

The key point of contention in this case is the third *Baze* finding: whether the "proper administration" of midazolam will "ensure" that Petitioners will not experience the pain caused from the second and third drugs. Unlike the petitioners

in *Baze*, Petitioners here have not—and in light of scientific data cannot—concede that the use of 500 milligrams of midazolam, even if properly administered can reliably produce a deep, comalike unconsciousness, such that a prisoner will not feel pain and suffering from the second and third drugs.

There are several uncontested facts that make midazolam an unreliable drug to assure that a deep, comalike unconsciousness is achieved:

1. Midazolam is not an analgesic, meaning it has no pain-relieving properties. (App. C at 41:11-12; Tr. 12/17/2014 at 107:18-108:3; Tr. 12/18/2014 at 342:19-21; Tr. 12/19/2014 at 599:18-19; Tr. 12/19/2014 at 661:8-9.) Thus, the administration of midazolam alone will not prevent one from feeling pain from noxious stimuli. (Tr. 12/17/2014 at 143:21-24.)

2. Midazolam has not been approved by the Food & Drug Administration (FDA) to be used as the sole drug to maintain general anesthesia in surgical proceedings. (Tr. 12/19/2014 at 653:12-14; *see also* App. C at 41:6-10; Tr. 12/17/2014 at 107:11-12.) Respondents' own witness, R. Lee Evans, Pharm.D., testified that he would not condone the use of midazolam for general anesthesia in a painful procedure. (Tr. 12/19/2014 at 674:12-17.) And two practicing physicians who administer midazolam on a daily basis in the emergency room and operating room testified that midazolam would never be used as the sole anesthetic during surgery. (Tr. 12/17/2014 at 135:17-18; Tr. 12/19/2014 at 599:14-19.)

3. Respondents' own expert witness testified that there are no studies supporting his contention that 500 milligrams of midazolam will render a prisoner "unconscious and insensate to the noxious stimuli presented by the second and third drug in the lethal-injection protocol in Oklahoma." (Tr. 12/19/2014 at 653:15-22.) There are, however, clinical trials that were conducted when midazolam was being introduced and the manufacturer obtained FDA approval. (Tr. 12/18/2014 at 345:10-14.) These trials showed that patients who were "given midazolam in doses sufficient to produce unconsciousness d[id] not tolerate the noxious stimuli of surgery." (Tr. 12/17/2014 at 143:21-24.) Indeed, the midazolam product label does not list anesthesia as a use for midazolam—meaning that the FDA did not approve its use "as a single agent to try and perform any kind of surgical procedure." (Tr. 12/18/2014 at 345:20-25.) Thus, while there is no scientific evidence supporting its use as intended by Oklahoma, there are actual scientific and medical data demonstrating that midazolam cannot reliably render a person unconscious and insensate for purposes of undergoing surgery.

4. Benzodiazepines, the family of drugs to which midazolam belongs, have a "ceiling" effect, meaning that there is a certain point after which giving more of the drug does not result in added effect. (*See* Tr. 12/17/2014 at 109:5-6; Tr. 12/18/2014 at 343:10-17; Tr. 12/18/2014 at 358:19-23.) Even Respondents' witness acknowledged a ceiling effect. (Tr. 12/19/2014 at 663:8-10) (When asked, "[i]s it your opinion that there is no ceiling effect with midazolam," Evans responded,

"That's not what I said."). The ceiling effect means that a large dose of midazolam—even well beyond the typical therapeutic dose—*will not and cannot* reliably produce the intended effect of surgical anesthesia. The ceiling-effect phenomenon and its relevance here was established through expert testimony supported by scholarly articles and related research (Tr. 12/17/2014 at 113:2-6), and evidenced by Arizona's two-hour-long execution of Joseph Wood. Mr. Wood received 750 milligrams of midazolam, but even this massive dose did "not cause cessation of breathing or prevent movement, both of which are present during extremely deep levels of anesthesia." (Supp. Vol. XXIV at 6, ¶19; *see also* Tr. 12/17/2014 at 151:4-9.)

5. Midazolam can have an adverse effect, known as a paradoxical reaction. (Tr. 12/18/2014 at 347:12-25; Tr. 12/19/2014 at 669:3-5.) Some individuals who receive midazolam will not be sedated by midazolam; instead, they will experience "agitation, combativeness, and anxiety as a result of the administration of the drug." (Tr. 12/17/2014 at 114:14-15.) If a person experiences a paradoxical reaction to midazolam, the administration of additional midazolam will simply increase the paradoxical reaction rather than alleviate it. (Tr. 12/17/2014 at 115:17-21.) The fact that a paradoxical reaction can occur is an additional and separate risk presented by the use of midazolam. It is known that the risk is greater in individuals with histories of substance abuse, aggression, or psychiatric disorders, which Petitioners (like most death-row prisoners) have. (Tr. 12/17/2014 at 116:2-5; Tr. 12/18/2014 at 350:9-24; Supp. Vol. XXIV at 80-82; Supp. Vol. XXIV at 83-113;

Supp. Vol. XXIV at 114-121; Supp. Vol. XXIV at 122.) Such an additional risk highlights both the pharmacological inappropriateness of using the drug for this purpose, and the deliberate indifference exhibited by state officials who ignore not only the certainty of the lack of anesthesia, but the added risk of harm from a paradoxical reaction.

C. Despite evidence both from experts and from experimental executions demonstrating that midazolam cannot reliably render a person deeply unconscious, Oklahoma intends to use midazolam in Petitioners' executions.

Even though the Department Director is aware that midazolam has no analgesic properties and has a ceiling effect, he is nevertheless "confident" that midazolam, as it is intended to be used in Petitioners' executions, will produce a level of unconsciousness sufficient to prevent pain and suffering from the second and third drugs. (Tr. 12/18/2014 at 509:5-17.) The Director did not base his determination on his own knowledge—much less on evidence presented—but rather on what he learned from being "briefed by the Attorney General's office." (Tr. 12/18/2914 at 510:16-17.) The Director has decided to use midazolam despite evidence not only from experts, but also from Oklahoma's own execution of Clayton Lockett and Arizona's execution of Joseph Wood, all of which show that midazolam cannot reliably produce a deep, comalike unconsciousness.

Ordinarily, a three-drug protocol would obscure the evidence about how midazolam actually performs, because the paralytic hides the drug's ineffectiveness

from witnesses' observation. But Joseph Wood's execution did not include a paralytic. And the bungled execution of Mr. Lockett, in which the IV failure limited the paralytic's effect, revealed how midazolam performs—or rather, does not perform—in an execution.

The Director is familiar with Arizona's execution of Joseph Wood, which occurred several months after the execution of Mr. Lockett. (Tr. 12/18/2014 at 511:5-8.) The State of Arizona used 750 milligrams of midazolam (coupled with 750 milligrams of hydromorphone) in its execution of Mr. Wood, yet it took him nearly two hours to stop breathing, thus demonstrating midazolam's ceiling effect. (Tr. 12/17/2014 at 511:4-9; *see also* Supp. Vol. XXIV at 6, ¶19.)

Likewise, in the execution of Mr. Lockett, the failure of the paralytic to take immediate effect, due to IV failure, provided critical evidence about why midazolam is pharmacologically and constitutionally an inappropriate drug for executions.[4] If a prisoner is administered 100 milligrams of a paralytic, he "would be chemically paralyzed" or "'locked in,' where [he's] fully awake, [he] can't move, [he] can't blink, [he] can't move on [his] own." (Tr. 12/19/2014 at 600:1-4; *see also* Tr. 12/17/2014 at 126:10-17.)[5] But Mr. Lockett did not become paralyzed, because the drug infiltrated

[4] Midazolam, unlike vecuronium bromide, has a rapid absorption rate whether injected through the vein or intramuscularly. (Supp. Vol. XXIV at 3, ¶10; Tr. 12/14/2014 at 116:6-25.) Vecuronium bromide, however, would have been more slowly absorbed. (Tr. 12/17/2014 at 119:23-120:14, 121:9-11.)

[5] "The only purpose of the administration of the vecuronium bromide is to make the execution more aesthetically pleasing to observers in that it reduces the

his tissue. (Tr. 12/17/2014 at 119:12-119:25.) Instead, he awoke after he had been determined to be unconscious, and he experienced the slow effects of the paralytic. (Tr. 12/17/2014 at 120:3-9.) What happened to Mr. Lockett confirms the existing medical data that midazolam is incapable of reliably maintaining a deep, comalike level of unconsciousness.

In the face of this evidence, Oklahoma still intends to carry out Petitioners' executions using a three-drug protocol, with midazolam as the first drug.

D. The district court and Tenth Circuit decisions.

After the bungled execution of Clayton Lockett on April 29, 2014,[6] Petitioners and others filed a lawsuit challenging the constitutionality of the manner and means by which Oklahoma intends to execute them. (Dist. Ct. ECF Nos. 1, 75.) Petitioners subsequently filed a motion for preliminary injunction, alleging that because of midazolam's pharmacological properties and the known data regarding its lack of effectiveness, its use as the first drug in a three-drug protocol is unconstitutional. (Dist. Ct. ECF No 92.)

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ability of the individual being executed to move or show any pain associated with the execution process." (Supp. Vol. XXIV at 5, ¶13.)

[6] The district court found that the execution of Mr. Lockett was "ineptly performed" (App. C at 7:7-9.), and the medical experts who testified described it as a "disorganized mess" (Tr. 12/17/2014 at 83:21) and a "horrendous error in judgment" (Tr. 12/19/2014 at 561:16-17). The warden overseeing the execution described it as a "bloody mess" (Supp. Vol. II at 88), and the paramedic executioner described the whole process as "a cluster" (Supp. Vol. VI at 400).

The district court held a preliminary-injunction hearing, then denied relief in an oral ruling from the bench. (*See* App. C.) The court found that although using midazolam *does* increase the risk that a prisoner would feel pain during the administration of the second and third drugs, "nobody knows" how much greater that risk is. (App. C at 45:2-6.) Despite the uncontested evidence that midazolam has no analgesic properties and is not approved for use as an anesthetic in surgery, despite the uncontested evidence that without proper anesthesia, a prisoner will suffer an unconstitutional execution when administered the paralytic and the potassium chloride, and despite knowing that there were risks in using midazolam, the district court determined that 500 milligrams of midazolam "would make it a virtual certainty that any individual will be at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs." (App. C at 42:5-8.) Accordingly, the court found that Petitioners had not demonstrated a risk that the use of midazolam is "'sure or very likely to cause serious illness and needless suffering,' amounting to an 'objectively intolerable risk of harm.'" (App. C at 60:19-25–61:1) (citing *Baze*, 553 U.S. at 50).

In reaching its conclusion regarding the degree of risk at issue here, the district court also required Petitioners to provide an alternative method of execution. The court asserted: "It is extremely unlikely that the Supreme Court would establish a constitutional doctrine that would enable a condemned inmate to block his execution on Eighth Amendment grounds with no consideration by the

Court of alternatives which by way of comparison demonstrate the constitutional unacceptability of the risk complained of by the prisoner." (App. C at 57:10-16.) The court applied the *Baze* stay standard, which states:

> A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the state's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A state with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.

(App. C at 56:7-14) (quoting *Baze*, 553 U.S. at 61). The court, therefore, required Petitioners to propose a "known and available" alternative to the use of midazolam—thus establishing a standard that requires condemned prisoners to experience an unconstitutional execution unless they are able to conduct research, provide a source of drug, and then offer a constitutional protocol. In so doing, the court rejected the argument that *Baze* was distinguishable because Petitioners here have *never* conceded that a three-drug protocol using midazolam, even if "properly administered," will be humane. (App. C at 56:16-19.)

The Tenth Circuit affirmed the denial of preliminary injunctive relief, adopting wholesale the district court's opinion. Like the district court, the Tenth Circuit ignored the uncontested facts about midazolam's known pharmacological properties. As a result, it did not address the core difference between this case and *Baze,* rooted in the difference between midazolam and sodium thiopental. (App. A at 22-27.)

The Tenth Circuit also applied the *Baze* stay standard, assuming (as the district court did) that Oklahoma's protocol using midazolam is "substantially similar" to the one at issue in *Baze*, and that Petitioners must show a known and available alternative. (App. A at 19.) Finally, rejecting Petitioners' argument that *Baze* was specific to the challenges to the established and "widely tolerated" drug protocol submitted to this Court for review in that case, the Tenth Circuit held that *Baze* applies to "all challenges to 'a State's chosen procedure for carrying out a sentence of death.'" (App. A at 21.)

REASONS FOR GRANTING THE WRIT

As prisoners have raised legal challenges to novel execution methods, the lower courts have been forced to react to ever-changing lethal injections when they apply *Baze*. Consequently, lower courts have empowered the states use *Baze* to insulate their protocols from any meaningful review—leaving the Eighth Amendment no work to do in protecting constitutional rights. First, the courts have treated *Baze* as a shield, protecting state execution protocols against any challenge. This has enabled the states to engage in unconstrained experimentation, heedless of empirical scientific evidence, and without any need to show that the experimentation is in the service of creating more humane executions. Second, the courts have simultaneously treated *Baze* as a sword, knocking down challenges to a protocol's unconstitutionality whenever the state claims it cannot obtain any other drugs, without any inquiry into the constitutionality of the chosen formula.

By granting review in this case, the Court will provide urgently needed guidance, both to prisoners seeking to challenge the states' new execution methods, and to the courts charged with reviewing such claims. Particularly because challenges to execution practices are often, and necessarily, litigated in the shadow of a looming execution date, this Court's guidance will minimize the last-minute, truncated litigation that necessarily results in inadequate review of constitutional claims.

The practice of lethal injection has changed significantly since *Baze*, and the manner in which lower courts protect against unconstitutional executions is an issue of national importance.

In 2008, when *Baze* was decided, "lethal injection" in executions meant a three-drug formula using sodium thiopental—a drug that acted as a general anesthetic at the doses used in lethal injection—as the first drug, followed by pancuronium bromide, and then potassium chloride. Thirty-six states and the federal government used lethal injection as the preferred method of execution. *Baze*, 553 U.S. at 52. The Court found it difficult to find this "widely tolerated" practice to be "objectively intolerable." *Baze*, 553 U.S. at 53.

Seven years later, the term "lethal injection" no longer has the same meaning. Thirty-two states have the death penalty, along with the federal government and the United States military.[7] But while those jurisdictions use

[7] *See* Death Penalty Information Center, States With and Without the Death Penalty, *at* http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last

lethal injection as the primary method of execution, the drugs, drug combinations, and drug doses vary widely from state to state. Additionally, execution protocols in some states, like Oklahoma, provide a choice of multiple drug combinations.[8] There is no longer a single, or even a predominant, drug formula, as there was when the Court considered the constitutionality of lethal injection in *Baze*.

With the ever-changing drug protocols,[9] the states have turned the stay standard established in *Baze* into both shield and sword, designed to protect their

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visited Jan. 9, 2015).

[8] *See* Death Penalty Information Center, State by State Lethal Injection, *at* http://www.deathpenaltyinfo.org/state-lethal-injection (last visited Jan. 12, 2015).

[9] In 2013 and 2014, at least twelve states made changes to their execution protocols, with some states making changes multiple times. *See Alabama Changes Execution Drug Combination*, THE ASSOCIATED PRESS, Sept. 12, 2014 at http://wiat.com/2014/09/12/alabama-changes-execution-drug-combination/ (last visited on Jan. 13, 2015); Arizona Department of Corrections, Department Order 710, Revised March 26, 2014; Arkansas Department of Corrections, Lethal Injection Procedure Attachment C, revised April 11, 2013; Florida Department of Corrections, Execution by Lethal Injection Procedures, effective September 9, 2013; *Kentucky Dropping 2-drug executions*, The Associated Press, November 14, 2014 at http://www.wlwt.com/news/kentucky-drops-2drug-executions-reworking-method/29716428 (last visited Jan. 13, 2015); State of Louisiana Department of Public Safety and Corrections, Department Regulation No. C-03-001, effective March 12, 2014; Missouri Department of Corrections, Preparation and Administration of Chemicals for Lethal Injection, revised October 18, 2013; Montana Department of Corrections, Montana State Prison Execution Technical Manual, effective January 16, 2013; North Carolina Department of Corrections, Execution Procedure Manual, effective October 24, 2013; State of Ohio Department of Rehabilitation and Corrections, 01-COM-22, effective October 10, 2013; State of Ohio Department of Rehabilitation and Corrections, 01-COM-22, effective April 28, 2014; Oklahoma Department of Corrections, OSP-040301-01, effective March 21, 2014; Oklahoma Department of Corrections, OSP-040301-01, effective April 28, 2014; Lucas L. Johnson II, *Tennessee Revises Protocol for Executions*, The Associated Press, Sept. 30, 2013 at http://www.memphisdailynews.com/

protocols from genuine constitutional scrutiny. They do so by continuously selecting new drug protocols while, at the same time, seeking to carry out executions, thus forcing prisoners to develop and present their claims under highly truncated schedules that provide neither adequate time, nor adequate discovery to develop a record. The states then claim that the prisoner is not entitled to a stay because *Baze* requires petitioners to establish both a "demonstrated showing" of a substantial risk of severe pain and a "known and available" alternative formula.

But this cannot be what the Court intended when it established this standard.[10] Rather, such a stay standard should be interpreted as providing states and courts a shield against *frivolous* lawsuits brought at the last minute to challenge long-established protocols that were "substantially similar" to that reviewed in *Baze*. It should not be construed, as the states and the courts have thus far done, to allow states to experiment with new drug protocols, all the while cutting off meaningful constitutional review. States should not be permitted to evade careful court review of their execution protocols by repeatedly mooting condemned prisoners' claims by executing them under a standard that—by circumstances of the states' own making—prevents review.

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news/2013/sep/30/tennessee-revises-protocol-for-executions/ (last visited on Jan.13, 2015).

[10] This Court's order, which applied *Baze* when it reversed a stay of execution, was four years ago and does not address the issue here. *Brewer v. Landrigan,* 131 S. Ct. 445 (2010) (mem) (reversing stay where there was "no evidence in the record to suggest that the drug obtained from a foreign source is unsafe" and where the district court "was left to speculate as to the risk of harm").

In this case, as in other states, Oklahoma has turned to midazolam, not because it makes executions more humane, but because it is available on the market. Oklahoma, like other states, seeks to apply *Baze*'s stay standard in a manner that will allow unconstitutional executions to proceed in Oklahoma and elsewhere.

Since 2013, eleven executions have been carried out using a three-drug formula with midazolam as the first drug—all but the Lockett execution have taken place in Florida.[11] Ohio and Arizona have each carried out one execution using a combination of midazolam and hydromorphone.[12] While most of the executions in 2013 and 2014 relied on manufactured or compounded pentobarbital either in a one-drug or three-drug protocol,[13] states have begun to turn to midazolam as the drug of choice.[14] And the states are doing so *not* because midazolam presents a safer or

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[11] *See* Death Penalty Information Center, Execution List 2014, *at* http://www.deathpenaltyinfo.org/execution-list-2014 (last visited Jan. 14, 2015); Death Penalty Information Center, Execution List 2013, *at* http://www.deathpenaltyinfo.org/execution-list-2013 (last visited Jan. 14, 2015).

[12] *See id.*; *see also* Lawrence Hummer, *I Witnessed Ohio's Execution of Dennis McGuire. What I Saw Was Inhumane*, GUARDIAN, Jan. 22, 2014, *at* http://www.theguardian.com/commentisfree/2014/jan/22/ohio-mcguire-execution-untested-lethal-injection-inhumane (last visited Jan. 13, 2015); Michael Kiefer, *Arizona inmate injected 15 times, records show*, ARIZONA REPUBLIC, Aug. 1, 2014, *at* http://www.azcentral.com/story/news/local/arizona/2014/08/01/arizona-botched-execution-report-injections/13492511/ (last visited Jan. 13, 2015).

[13] *See id.*

[14] *See, e.g.*, *Frazier v. Thomas*, Case No. 2:13-cv-00781-WKW, Mem. Op. and Order at 2-3 (M.D. Ala. filed Jan. 5, 2015), ECF No. 19 (noting that Alabama announced it will use midazolam in three-drug protocol); Letter to Arizona Governor Janice K. Brewer from Arizona Dep't of Corr. Director Charles L. Ryan,

more humane method of execution, but simply because they can readily obtain it, and because it was deemed constitutional in Florida based on preliminary-injunction review applying the *Baze* stay standard.

States seek to use new experimental protocols, claiming that these protocols are *Baze*-compliant, even though the drug protocols are substantially different from that at issue in *Baze*. There is no longer a consensus among the states regarding appropriate lethal-injection formulas.[15] Without guidance from this Court, Oklahoma and other states have moved and will continue to move to new, experimental drug combinations that are materially different from and much riskier than the one considered in *Baze*, and will do so in spite of the empirical data demonstrating the increased risk of serious harm.[16]

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dated Dec. 22, 2015, *at available* https://corrections.az.gov/sites/default/files/documents/PDFs/letter_to_governor_brewer.pdf (last visited Jan. 11, 2015) (noting that Arizona intends to use midazolam in three-drug protocol); *Chavez v. Florida SP Warden*, 742 F.3d 1267, 1269 (11th Cir. 2014) (stating that Florida adopted a three-drug protocol using midazolam); Rachel Weiner, *Virginia details protocol for controversial execution drug*, WASHINGTON POST, Apr. 30, 2014 *available at* http://www.washingtonpost.com/news/post-nation/wp/2014/04/30/virginia-details-protocol-for-controversial-execution-drug/ (last visited Jan. 13, 2015) (reporting that Virginia will use midazolam in three-drug protocol).

[15] There is, however, consensus of scientific data that midazolam cannot reliably create a deep, comalike anesthesia, as explained *supra* at 12-14.

[16] *See* App. A at 14; *Chavez*, 742 F.3d at 1272 (applying *Baze* stay requirements to protocol using midazolam).

A. The Tenth Circuit's decision cannot be reconciled with this Court's requirement that a constitutional three-drug protocol must include a first drug that reliably creates a deep, comalike unconsciousness.

In *Baze*, the risks associated with the use of sodium thiopental were those created by inadequate dosing and maladministration. With midazolam, there is no dose that can reliably maintain unconsciousness at the surgical plane of anesthesia, and increasing the dose cannot overcome the risk. Simply put, even the *proper* administration of midazolam results in an inhumane execution.

Despite the record evidence and uncontested facts establishing the material differences between midazolam and sodium thiopental, the Tenth Circuit treated the Oklahoma protocol as indistinguishable from the one at issue in *Baze,* and therefore held that Petitioners could not satisfy *Baze*'s stay standard. Under the Tenth Circuit's approach, any lethal-injection formula will be treated as "substantially identical" to that in *Baze,* and will avoid searching review in the federal courts. This cannot be the constitutional standard this Court intended to adopt in *Baze.*

B. The Tenth Circuit's requirement that condemned prisoners provide the government with an alternative method of execution in order to prevent them from being executed in an unconstitutional manner cannot be reconciled with this Court's "evolving standards of decency" jurisprudence.

The Constitution does not require those who challenge the constitutionality of governmental actions to simultaneously offer remedies to the government. A

requirement that plaintiffs delineate a remedy alongside their constitutional challenges would lead to an absurd result: If a petitioner were unable to imagine a constitutional remedy to unconstitutional activity—beyond requiring the state to stop engaging in the unconstitutional conduct—then the government would be allowed to continue to act in an unconstitutional fashion.[17] That cannot be the case.

The fallacy of such a requirement can be seen in, for example, in a First Amendment challenge to "buffer zones" around abortion clinics and an Eighth Amendment challenge to prison conditions. *See McCullen v. Coakley*, 134 S.Ct. 2518, 2530 (2014) (providing no requirement that plaintiffs "imagine[] alternatives" to the challenged buffer zone, and ruling in the absence of such alternatives that the existing zone was unconstitutional); *Farmer v. Brennan*, 511 U.S. 825, 845-46 (1994) (noting that transsexual prisoner who sued prison for deliberate indifference need only plead "a contemporary violation of a nature likely to continue"; no requirement of an alternative remedy). In neither of these cases did the Court require the petitioners to offer constitutional alternatives or remedies that would reduce the risk of constitutional violations.

And yet, that is precisely what the Tenth Circuit held below. That court read *Baze* to require prisoners to identify a "known and available" alternative drug formula in order to obtain a stay of execution or to prevail on the merits of their

[17] Additionally, from a practical standpoint, those who challenge governmental actions are often not qualified to make affirmative decisions about actions in the governmental sphere.

claims. The Tenth Circuit was relying on its own precedent that requires a prisoner to propose an alternative. (App. A at 20) (citing *Pavatt v. Jones*, 627 F.3d 1336 (10th Cir. 2010)). *Pavatt*, however, was challenging a method of execution similar to that presented in *Baze*, in which the state was using a barbiturate as the first drug in a three-drug protocol. *Pavatt*, 627 F.3d at 1337. Nevertheless, according to the Tenth Circuit, this rule applies—and will apply "absent superseding . . . Supreme Court decisions" (App. A at 20)—even if the state's chosen method is unconstitutional. Again, this cannot be what the Court intended in *Baze*, yet without this Court's intervention, lower courts will continue to impose this requirement upon plaintiffs.

Moreover, a standard that evaluates the constitutionality of a given drug *not* on empirical scientific data, but rather on a prisoner's inability to act as an informed advisor to the government, or on the asserted market unavailability of sodium thiopental, would mean that the constitutionality of midazolam on any given day is determined by the prisoner's ability to act as an advisor, or by the business decisions of private corporations to make and market a particular drug. If that were the standard, then the use of midazolam could be constitutional this week, unconstitutional next week if sodium thiopental becomes "available," and then constitutional again the week after that. The Eighth Amendment standard is not a fluctuating one, and the Tenth Circuit's interpretation of "alternative" cannot be the law. Especially when it comes to the constitutional violation at issue—a

lingering and agonizing death—a private manufacturer's decision to stop distributing a drug cannot inoculate a ghastly practice from constitutional scrutiny.

CONCLUSION

For the reasons stated, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted: January 13, 2015.

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