No. 17-3076

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: OHIO EXECUTION PROTOCOL LITIGATION FEARS, ET AL., Plaintiffs-Appellees, v. MORGAN, ET AL., Defendants-Appellants.	On Appeal from the United States District Court for the Southern District of Ohio Eastern Division District Court Case No. 2:11-cv-1016 **DEATH PENALTY LITIGATION**

BRIEF OF DEFENDANTS-APPELLANTS DONALD MORGAN, ET AL.

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STATEMENT CONCERNING ORAL ARGUMENT

This case has already been set for oral argument on February 21, 2017.

ISSUES PRESENTED

This case presents two questions:

1. The Supreme Court upheld a midazolam three-drug protocol of execution in *Glossip v. Gross*, 135 S. Ct. 2726 (2015). When doing so, it affirmed that a midazolam three-drug protocol (1) does not present a substantial risk of severe harm when compared to a known and available alternative method of execution, and (2) that no known and available alternative method had been proved. Shortly after, in October 2016, Ohio announced that it would follow a nearly-identical protocol as that upheld in *Glossip*. Does Ohio's midazolam three-drug protocol violate the Eighth Amendment?

2. Back in November 2009, Ohio represented that it planned to use a new execution protocol in a December 2009 execution rather than its older *sodium thiopental* three-drug protocol. Based on that representation, this Court held that Ohio's appeal involving that old protocol was moot. *Cooey v. Strickland*, 588 F.3d 921, 923 (6th Cir. 2009). Is Ohio judicial estopped from using its current *midazolam* three-drug protocol by the litigation position in 2009?

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. It entered its stay of execution on January 26, 2017. Order, R.948, PageID#32124. Defendants timely appealed that same day. This Court has jurisdiction over that injunction under 28 U.S.C. § 1292(a)(1). *See, e.g.*, *Cooey v. Strickland*, 588 F.3d 921, 923 (6th Cir. 2009) (finding jurisdiction over order that the "The State of Ohio . . . is hereby STAYED from implementing an order for the execution of [the plaintiff] . . . until further Order").

INTRODUCTION

Decades ago, Plaintiffs Ronald Phillips, Raymond Tibbetts, and Gary Otte were convicted of committing brutal murders and sentenced to death. In 2015, *Glossip v. Gross*, 135 S. Ct. 2726 (2015), affirmed the constitutionality of Oklahoma's midazolam three-drug execution protocol on two grounds: that it did not present a "substantial risk of serious harm" that is "objectively intolerable" and "subjectively blame[worthy]," *id*. at 2737, and that the inmate had failed to prove a "known and available alternative method," *id*. In October 2016, Ohio adopted a nearly identical method for the Plaintiffs' scheduled executions in early 2017. *See* Execution Protocol, R.667-1, PageID#19812. But on January 26, 2017, the district court found that Ohio's protocol failed on both grounds identified in *Glossip*. Order, R.948, PageID#32124. This Court should reverse.

As to risk of harm, the district court's rehashing of the issue is expressly foreclosed by *Glossip*'s binding contrary holding. As a matter of legislative fact, this midazolam three-drug protocol *does not* present a risk of harm. Ohio presented extensive expert testimony that midazolam renders a person insensate, unconscious, and incapable of feeling pain just as *Glossip* and courts around the country have found. As to an available alternative, the district court admitted that "compounded pentobarbital will not be available to Ohio to permit it to execute Plaintiffs on the dates now set." *Id*., PageID#32230. Its ultimate contrary

conclusion does not reasonably interpret what the Supreme Court meant by "available" and "readily implemented."

In addition, the district court held that Ohio was judicially estopped based on a statement that Ohio made in 2009. Judicial estoppel ordinarily does not even apply against a State, and Ohio's 2009 statement was in no way "clearly inconsistent" with Ohio's current position. Even if it were, however, Ohio's change in position is amply explained by a change in facts (the unavailability of drugs), and a change in law (the *Glossip* decision). These types of changes foreclose any type of judicial-estoppel claim.

All of this, combined with the long delay in enforcing Plaintiffs' sentences, means the balance of stay factors weigh heavily against the district court's order.

STATEMENT OF THE CASE

The Supreme Court has "never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." *Baze v. Rees*, 553 U.S. 35, 48 (2008) (plurality op.). In an ongoing effort to carry out death sentences humanely, however, Ohio has used lethal-injection since it resumed executions in 1999. Ohio amends its lethal-injection protocol occasionally as needed with legal precedent in mind. Ohio's ability to do so is not constitutionally debatable: States may move from one drug protocol to another or back again to "adapt[] to changes in the availability of suitable drugs." *Glossip v. Gross*, 135 S. Ct. 2726, 2745 (2015).

A. Ohio Judges And Juries Convicted And Recommended The Death Sentence For Each Of These Plaintiffs Many Years Ago.

These Plaintiffs were sentenced many years ago. Ronald Phillips was convicted for the 1993 rape and murder of his girlfriend's three-year-old daughter. *State v. Phillips*, 74 Ohio St.3d 72 (1995). Gary Otte was convicted for the 1992 robbing and shooting of Robert Wasikowski and Sharon Kostura. *State v. Otte*, 74 Ohio St.3d 555 (1996). Raymond Tibbetts was convicted for the 1997 stabbing and beating of Susan Crawford, his wife, and James Hicks, an elderly man at the scene. *State v. Tibbetts*, 92 Ohio St.3d 146 (2001).

B. Back In 2009, Ohio Moved From The Three-Drug Protocol Approved In *Baze* To The Alternative One-Drug Protocol The *Baze* Plaintiff Requested.

In 2004, Richard Cooey challenged Ohio's then-existing three-drug execution protocol in federal court. Many other prisoners intervened or brought separate suits, including Kenneth Biros. During ongoing litigation, Ohio carried out fourteen additional executions with that three-drug protocol. However, on December 21, 2006, the district court preliminarily enjoined Biros's execution. Order, Case No. 2:04-cv-1156, R.151. Defendants appealed. *Cooey (Biros) v. Strickland*, 6th Cir. Case No. 06-4660. During the pendency of that appeal, the Supreme Court upheld Kentucky's similar sodium thiopental three-drug protocol. *See Baze v. Rees*, 553 U.S. 35, 57-60 (2008) (plurality op.). This Court then remanded. Case No. 06-4660, Doc.84. On April 21, 2009, following a four-day evidentiary hearing, the district court vacated the previously issued injunction. Order, Case No. 2:04-cv-1156, R.471.

In September 2009, Defendants were unable to carry out the execution of Rommell Broom, due to the inability to establish IV sites. On October 19, 2009, the district court again stayed Biros's execution. Order, Case No. 2:04-cv-1156, R.590. Defendants appealed again. *Cooey (Biros) v. Strickland*, 6th Cir. Case No. 09-4300. On November 13, 2009, Ohio announced a new one-drug method, effective November 30, 2009. *Cooey v. Strickland*, 588 F.3d 921, 922 (6th Cir.

2009) (*Cooey I*). Ohio submitted an affidavit from the Department's then-director Terry Collins explaining the changes that would go into effect on November 30 and indicating that he had the authority to bring them about. Aff. of Terry Collins (attached to Pls. Mot.), R.718-3, PageID#22390.

On November 25, citing the affidavit, this Court held that Biros's challenge to the *old* three-drug protocol was "now moot"—five days before the new protocol came into effect. *Cooey I*, 588 F.3d at 923. The Court rejected Biros's argument that the challenge was not moot because the issue was capable of repetition should the State "'revert'" to the old protocol and use it for his December 2009 execution. *Id*. at 923 (citation omitted). *First*, it was "by no means clear that the prior procedure was unconstitutional," so it was "by no means clear that a 'rever[sion]' will lead to . . . *violations*." *Id.* (emphasis added). *Second*, an issue must be capable of repetition as to the *same parties*. "[T]he question at hand is whether Ohio will use the old procedure, or the new one, in executing Biros." *Id*. And the Court suggested that "[t]here [was] no basis in the record or for that matter in common sense for assuming that the State will do anything other than what it has told us . . . apply the substantially modified protocol *to Biros*." *Id.* (emphasis added). Ohio issued its new protocol November 30, 2009. Biros's execution under that new protocol soon followed.

As the litigation continued after Biros's execution, the State carried out ten executions using that one-drug protocol between January 7, 2010 and February 17, 2011. During that time, the district court dismissed many of Plaintiffs' constitutional claims, including an Eighth Amendment claim. *See, e.g.*, Orders, Case No. 2:04-cv-01156, R.801-14, 873. From March 10, 2011 to September 25, 2013, Ohio executed another ten inmates with a massive dose of pentobarbital. Execution Protocol, R.521-1, PageID#14170-71. Since the fall of 2013, Ohio has been unable to obtain either barbiturate (sodium thiopental or pentobarbital) for executions. Tr., R.941, PageID#31942-44.

C. Following A Shortage In Barbiturates, The Supreme Court Upheld The Use Of A Midazolam Three-Drug Protocol, And Ohio Adopted A Protocol Using Those Drugs In October 2016.

Meanwhile, the unavailability of barbiturates across the United States led the Supreme Court to decide another method-of-execution case in 2015. *Glossip*, 135 S. Ct. at 2734 ("Unable to acquire either sodium thiopental or pentobarbital, some States have turned to midazolam . . . ."). *Glossip* upheld a midazolam three-drug protocol under both prongs of *Baze*'s method-of-execution rule. *Id*. at 2738-39. *Glossip* also rejected the argument that a State must use the "newest" method of execution. Carried to its conclusion, that argument meant that "if no drug that meets with the principal dissent's approval is available for use" then the death penalty is effectively unconstitutional. *Id*. at 2739. So States must be free to

"return to" methods "used in the past." *Id*.; *see also id.* at 2745 ("That argument, if accepted[,] . . . would prevent States from adapting to changes in the availability of suitable drugs.").

Thereafter, Ohio chose to use a method nearly identical to the one upheld in *Glossip*. Effective October 7, 2016, Ohio adopted a three-drug protocol (among others) that uses midazolam, potassium chloride, and rocuronium bromide. Execution Protocol, R.667-1, PageID#19812.

D. This Court Has Already Seen Interlocutory Appeals Arising Out Of This Litigation, And The Governor Has Already Pushed Back Phillips's Execution Once.

Also due to Ohio's inability to obtain execution drugs, the Ohio General Assembly enacted a privilege statute "to provide confidentiality and license protection for persons and entities involved in executing a sentence of capital punishment by lethal injection." Substitute H.B. 663, 130th Gen. Assembly, Reg. Sess. (Ohio 2014); *see also* R.C. 2949.221; 2949.222. The district court then issued a protective order for information that could reveal the identities of Ohio's suppliers of execution drugs. Order, R.629, PageID#19409-11. On December 30, 2016, this Court affirmed. *In re Ohio Execution Protocol Litig.*: *Fears v. Kasich*, 845 F.3d 231 (6th Cir. 2016). Plaintiffs then filed for en banc review.

Meanwhile, on December 19, 2016, the district court issued an order temporarily enjoining Plaintiffs' executions pending this Court's decision in

Fears. Order, R.834, PageID#24758-59. Defendants appealed. Ohio's Governor thereafter issued a reprieve further delaying Phillips's execution from January 12 to February 15 to give the courts more time to consider Ohio's midazolam three-drug protocol. Notice, R.848, PageID#25752. On December 31, 2016, following the Sixth Circuit's decision in the interlocutory appeal, the district court dissolved its previously issued injunction order. Order, R.892.

E. The District Court Issued A Preliminary Injunction Against Ohio's Midazolam Three-Drug Protocol On Two Grounds.

The district court conducted an evidentiary hearing from January 3 to January 9, 2017.

Defendants presented two experts. The first was Dr. Joseph Antognini, an anesthesiologist with many years of clinical experience and specific expertise with respect to the relationship of anesthetic drugs and noxious stimuli. Tr., R.924, PageID#31020-22, 31026. He described as "very, very low" the risk that persons administered 500 milligrams of midazolam—the dosage called for in Ohio's execution protocol—would feel pain. *Id*., PageID#31063-64. The second was Dr. Daniel Buffington, who has extensive experience as a consultant to clinical anesthesiologists. He described midazolam as a drug with a high potential for lethal side effects. He also opined that given the drug's potentially lethality, and the high dosage called for in executions, there was no substantial risk that a condemned inmate could suffer pain. Tr., R.941, PageID#31992, 32019.

On January 26, 2017, the district court enjoined Defendants from executing Plaintiffs Phillips, Otte, and Tibbetts using Ohio's midazolam three-drug protocol. Order, R.948, PageID#32124. It concluded that *Glossip* did not control because that decision had reviewed evidence only for clear error. *Id*., PageID#32150-51. After seventy pages summarizing the hearing testimony, *id.*, PageID#32151-32226, the court's next three pages analyzed that testimony and held that Ohio's protocol presents a constitutionally impermissible risk that Plaintiffs will suffer severe pain when compared to the use of a single, massive dose of a barbiturate, *id*., PageID#32226-30. Midazolam, it concluded, causes "deep sedation" such that a person may have "no awareness of what is happening," but the drug may still allow for "inflicted pain that is not remembered." *Id.*, PageID#32227. The court did not say what expert testimony supports this, or why it discounted directly contrary testimony of the defense experts. *See* Tr., R.924, PageID#31040. As for an alternative method, the court said "[t]here remains the possibility that" Ohio might acquire "an import license from the federal Drug Enforcement Administration" and get compounded pentobarbital overseas. Order, R.948, PageID#32229. "While compounded pentobarbital will not be available to Ohio to permit it to execute the above Plaintiffs on the dates now set," the court said that Plaintiffs "met their burden to identify a sufficiently available alternative method of execution." *Id*., PageID#32230.

Alternatively, the district court concluded that Plaintiffs were likely to prevail on their claim that Ohio was judicially estopped from using its current protocol based on the alleged "clearly inconsistent" statements made by Ohio in the 2009 *Biros* litigation. *Id.*, PageID#32235-37.

SUMMARY OF ARGUMENT

I. A challenger to a method of execution bears a "heavy burden" to show (A) that the method presents a substantial risk of serious harm that is objectively intolerable and subjectively blameworthy, and (B) that a known and available alternative method entails a lesser risk.

A. As to risk of harm, Ohio is a late adopter of this method, so the method's risks have been well aired. *First*, *Glossip* controls. It made clear that the State, not the judiciary, determines the safety of an execution method, and that courts review only for an objectively intolerable risk and subjective blameworthiness. Under this rubric, *Glossip* already upheld *this* protocol and its holdings are binding. The Eighth Amendment, as interpreted by the Supreme Court, cannot mean one thing in Oklahoma and another in Ohio. The district court's attempt to revert to a case-by-case analysis of every execution is precisely what *Baze* and *Glossip* instruct courts *not* to do. *Second*, Ohio presented substantial evidence from experts confirming that *Glossip* (and many other courts) reached the right result. Its evidence reasonably showed that, at the dosage required, midazolam renders a person insensate, unconscious, and incapable of feeling pain.

B. As to an available alternative, Plaintiffs have not met their burden to prove that their preferred alternatives are available. *First*, undisputed evidence

demonstrates that Ohio has been unable to purchase pentobarbital or the active pharmaceutical ingredient of pentobarbital despite good-faith efforts. It has been unable to procure the drug from domestic sources. And even if Ohio had identified a foreign supplier, it lacks a required federal registration to import pentobarbital. Its application for that registration has been pending for months without any indication that it will be approved. *Second*, the district court's holding that an alternative method of execution is "sufficiently available" if it "remains [a] possibility" conflicts with *Glossip* and *Baze*. Those cases require any "available" method to be both "feasible" and "readily implemented." Under the district court's own findings, pentobarbital is not legally available to Ohio.

II. Judicial estoppel ordinarily does not apply against the State because one government cannot bind the policy choices of future governments, or prevent them from enforcing the law. At the least, the waiver of sovereign power must be "unmistakable." But no judicial estoppel factors are met here. *First*, Ohio's 2009 litigating position is not "clearly inconsistent" with its current litigation; the prior 2009 statement was limited to a specific time, specific plaintiff, and specific protocol, and did not make "permanent" promises. *Second*, no court has been "misled." Any alleged change in position is due to intervening facts (the unavailability of specific drugs) and intervening law (*Glossip*). *Third*, Plaintiffs are not prejudiced. By adopting the method *Glossip* upheld, Ohio's amended 2016

protocol represents the opposite of the "cynical gamesmanship" targeted by estoppel. Ohio's switch ensures a *constitutional* method of execution.

III. The balance of the equities weighs in Ohio's favor. Ohio's ability to perform executions has been delayed *for years* as Ohio has struggled to obtain execution drugs. The district court's order now would impose a further *indefinite* delay on these sentences. The people of Ohio, including the victim's family members, have a compelling interest in the finality of these sentences. Ohio has the capability to perform what the Supreme Court has said are constitutionally sound executions. It should be permitted to do so.

ARGUMENT

I. THE EIGHTH AMENDMENT DOES NOT PROHIBIT OHIO'S MIDAZOLAM THREE-DRUG PROTOCOL.

The Supreme Court and appellate courts around the country have repeatedly rejected Plaintiffs' claim that a midazolam three-drug protocol of execution violates the Eighth Amendment's ban on cruel and unusual punishment. The district court offered no valid grounds for distinguishing that precedent.

A. The Supreme Court Has Placed A "Heavy Burden" On Convicted Murderers Who Seek To Challenge A Method Of Execution.

Any Eighth Amendment challenge to a State's chosen method of execution must begin with the premise that because capital punishment is constitutional, "'[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'" *Estate of Lockett v. Fallin*, __ F.3d __, 2016 WL 6695780, at *10 (10th Cir. Nov. 15, 2016) (quoting *Glossip v. Gross*, 135 S. Ct. 2726, 2732-33 (2015)). Starting from that premise, the Supreme Court has twice "outlined what a prisoner must establish to succeed on an Eighth Amendment method-of-execution claim." *Glossip*, 135 S. Ct. at 2737; *Baze v. Rees*, 553 U.S. 35, 49-52 (2008) (plurality op.). When doing so, that Court has clarified that a convicted murderer challenging a method of execution bears a "'heavy burden'" to prove this claim. *Baze*, 553 U.S. at 53 (citation omitted).

First, "prisoners must demonstrate that the challenged method of execution presents a risk that is '*sure or very likely* to cause serious illness and needless

suffering, and give rise to sufficiently *imminent* dangers.'" *Arthur v. Comm'r, Ala. Dep't of Corrs.*, 840 F.3d 1268, 1299 (11th Cir. 2016) (quoting *Glossip*, 135 S. Ct. at 2737), *stay granted pending cert. by* No. 16-602 (U.S. Nov. 3, 2016). This element is demanding. "[T]here must be 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.'" *Glossip*, 135 S. Ct. at 2737 (citation omitted). Conversely, "[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." *Baze*, 535 U.S. at 50 (plurality op.). Instead, "the risk of severe pain must be substantial and objectively intolerable *in comparison to* an alternative method that is feasible and readily implemented." *Arthur*, 840 F.3d at 1299.

Second, prisoners must "identify a known and available alternative method of execution that entails a lesser risk of pain" than the challenged method. *Glossip*, 135 S. Ct. at 2731. The alternative procedure must be "feasible" and "readily implemented" and must "significantly reduce a substantial risk of severe pain." *Baze*, 535 U.S. at 52 (plurality op.). In this respect, courts have rejected claims that an alternative drug was "feasible" or "readily implemented" simply because it "was available in [some] states at some point over the past two years." *Brooks v.*

Warden, 810 F.3d 812, 819 (11th Cir. 2016). Instead, a "State [must be] able to carry out the alternative method of execution relatively easily and reasonably quickly" *at the present time*. *Arthur*, 2016 WL 6500595, at *25.

B. A Midazolam Three-Drug Protocol of Execution Does Not Pose A Substantial Risk of Serious Harm.

Ohio, a *late adopter* of the midazolam three-drug protocol, carefully chose it only after it was embraced by several States, used in over a dozen prior executions, blessed by many courts, and upheld by the Supreme Court. Ohio's decision to adopt this protocol is constitutional (1) because lower courts are bound by *Glossip*'s decision upholding the protocol, and (2) because Ohio demonstrated its constitutionality through a multi-day hearing that confirmed *Glossip*.

1. *Lower courts are bound by* Glossip*'s conclusion that a midazolam three-drug protocol does not present a substantial risk of serious harm under the Eighth Amendment.*

Legislative and executive officials in many States have found that lethal injection is a more humane method of execution, and the Supreme Court has reviewed and affirmed that judgment repeatedly over the last forty years. *Glossip*, 135 S. Ct. at 2732.

The Supreme Court "has all but foreclosed" an Eighth Amendment challenge beyond that. *Cooey v. Strickland*, 589 F.3d 210, 225 (6th Cir. 2009). Reviewing a State's "lethal injection protocol[] test[s] the boundaries of the authority and competency of federal courts." *Glossip*, 135 S. Ct. at 2730. As to

authority, having approved lethal injection generally, federal courts are not "boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation." *Baze*, 135 S. Ct. at 1531 (plurality op.). As to *competency*, state officials are better equipped to make these judgments, so federal courts "should not 'embroil [themselves] in ongoing scientific controversies beyond their expertise.'" *Glossip*, 135 S. Ct. at 2740 (citation omitted); *see Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) ("[T]his Court has given . . . legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty"). That is why the judiciary defers to a State's chosen method unless it presents 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.'" *Glossip*, 135 S. Ct. at 2737 (citation omitted).

This case, however, is at a different level entirely. *Glossip* affirmed that a *nearly identical* midazolam three-drug protocol did *not* present an "objectively intolerable risk of harm," and found that Oklahoma officials *were* "subjectively blameless for purposes of the Eighth Amendment." *Id*. at 2739. Only then did Ohio adopt the protocol challenged here. If Oklahoma officials were "subjectively blameless for purposes of the Eighth Amendment" when they used a midazolam

three-drug protocol in 2015, Ohio officials are even more so using the same protocol in 2017.

a. *Legislative Facts.* There are two types of factfinding. *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014). The first are "adjudicative facts"—a "proposition about *these litigants*," *id*. (emphasis added), answering questions of "who did what, where, when, how, and why" as to the "immediate parties," 29 Am. Jur. 2d Evidence § 30. They are limited to "the facts of the particular case," not other cases, apart from judicial notice. *United States v. Wolny*, 133 F.3d 758, 764 (10th Cir. 1998); Fed. R. of Evid. 201. The second are "legislative facts" that apply universally. *Frank*, 768 F.3d at 750. Legislative facts are "proposition[s] about the state of the world, as opposed to a proposition about these litigants." *Id*. They '"have relevance to legal reasoning and the lawmaking process'" because they '"are established . . . facts . . . that do not change from case to case.'" *Wolny*, 133 F.3d at 764 (citations omitted); *see also Toth v. Grant Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002).

"On matters of legislative fact, courts accept the findings of legislatures and judges of the lower courts must accept findings by the Supreme Court." *Frank*, 768 F.3d at 750. Courts accept legislatures' findings (or here, state officials carrying out the legislative will) for the reasons *Baze* and *Carhart* identify: As a matter of authority and competency, the other branches are better equipped to

make these kind of decisions, so the courts often defer, particularly in areas of medical or scientific uncertainty.

Lower courts accept the Supreme Court's legislative fact findings because of our hierarchical judicial system. The Eighth Amendment, as interpreted by the Supreme Court, can have only *one* meaning when applied to the *same* practice. Take an example. The Supreme Court ruled that executing juveniles violates the Eighth Amendment, in part because juveniles convey a "lack of maturity and an underdeveloped sense of responsibility." *Roper v. Simmons*, 543 U.S. 551, 569 (2005). That fact does not change from case to case; no matter how many experts testify that a particular juvenile is sufficiently mature, a district court could never apply the death penalty.

Or take an example triggering both levels of deference. The Supreme Court upheld Indiana's voter-ID law, noting it promoted public confidence in the election system, and deferring to Indiana's finding in that regard. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 195 (2008). Analyzing Wisconsin's similar law, *Frank* explained that "[a]fter a majority of the Supreme Court has concluded that photo ID requirements promote confidence, a single district judge cannot say as a 'fact' that they do not, even if 20 political scientists disagree with the Supreme Court." 768 F.3d at 750. "Photo ID laws promote confidence, or they don't; there

is no way they could promote public confidence in Indiana . . . and not in Wisconsin." *Id.*

b. *Glossip decided legislative facts.* Both levels of deference to legislative fact finding come into play here as well. Plaintiffs' claims push the courts to jump back into the "ongoing scientific controvers[y]" with new experts and a new hearing each time a midazolam three-drug protocol is challenged, "with each ruling supplanted by another round of litigation." *Baze*, 553 U.S. at 51 (plurality op.). But the law is settled.

The efficacy of the particular drugs Ohio uses is a matter of legislative fact involving a medical judgment. Ohio adopted a midazolam three-drug protocol because the drugs were available, and the protocol has been safely used to carry out over a dozen prior executions in other states. *See Glossip*, 135 S. Ct. at 2734. "[N]umerous courts" have concluded it "is likely to render an inmate insensate to pain," *id.* at 2739, and the Supreme Court has upheld it, *id.* As Director Mohr testified, "he adopted Ohio's current protocol because he believed" it provided inmates with exactly what they seek in this suit: a "*per se* constitutional" method of execution. Order, R.948, PageID#32150 (citing Tr., R.941, PageID#31923). And as detailed below, Ohio presented extensive scientific evidence supporting its position.

Ohio's judgment that this method is constitutional cannot be "objectively intolerable" or "subjectively blame[worthy]" under the Eighth Amendment because the Supreme Court has *already* said it is not. "[T]here is no way [midazolam] could [be objectively tolerable and subjectively blameless] in [Oklahoma] . . . and not in [Ohio]." *Cf. Frank*, 768 F.3d at 750. The Supreme Court could, of course, overturn its earlier decision based on new or additional evidence. But *lower courts* cannot. "[I]n our hierarchical judicial system a district court cannot declare a [State's practice] unconstitutional just because he thinks (with or without the support of [an expert]) that the dissent was right and the majority wrong." *Id*.

Indeed, the Supreme Court has already made a similar point in this very context. *Baze* upheld Kentucky's sodium thiopental three-drug protocol based on the "extensive hearings" and "detailed findings of fact" made by the trial court. 553 U.S. at 41. *Glossip* then held that *Baze* "cleared any legal obstacle to" the use of a sodium thiopental three-drug protocol. 135 S. Ct. at 2732-33. That is, a party could not sidestep *Baze* and have a district court overturn its holding by presenting "better" evidence concerning the sodium thiopental three-drug protocol. So it stands to reason that *Glossip* "cleared any legal obstacle to" the use of a *midazolam* method just as *Baze* did for the *sodium thiopental* method.

Several appellate courts have rejected challenges on this very ground since *Glossip*. As the Fifth Circuit recently noted, "[t]he three-drug protocol and the particular drugs Mississippi proposes to use (midazolam, a paralytic, and potassium chloride) are typical for those states that use lethal injection and were recently upheld in the face of a constitutional challenge." *Jordan v. Fisher*, 823 F.3d 805, 812 (5th Cir. 2016). Or, as the Eleventh Circuit more recently found, "[b]oth this Court and the Supreme Court have upheld the midazolam-based execution protocol that Arthur challenges here." *Arthur*, 840 F.3d at 1303. And, as the Tenth Circuit recently noted, "Oklahoma's use of midazolam comports with the Eighth Amendment" under the *Glossip* decision. *Lockett*, 2016 WL 6695780, at *10. As recently as this January, the Fourth Circuit summarily denied a motion to stay a Virginia execution using a midazolam three-drug protocol. Order in *Gray v. McAuliffe, et al.*, R.931-1, PageID#31538. Indeed, this Court *itself* explained in this case that Ohio's "new protocol mirrors the Oklahoma protocol approbated by the Supreme Court" in *Glossip*, so Plaintiffs "challenge an execution method sanctioned by the Supreme Court." *In re: Ohio Execution Protocol Litigation: Fears v. Kasich*, 845 F.3d 231, 234, 240 (6th Cir. 2016).

2. *Ohio's evidence demonstrated why* Glossip *could conclude that a midazolam three-drug method does not pose a "substantial risk of serious harm."*

Ohio explained to the district court why, in its judgment, a midazolam three-drug protocol does not pose a substantial risk of serious harm through the testimony of two experts—Dr. Joseph Antognini and Dr. Daniel Buffington. Dr. Antognini is an anesthesiologist and taught at the University of California, Davis. His research focuses on how anesthetics produce immobility. Antognini's Curriculum Vitae, R.924, PageID#31022-23. He has published over 160 articles and served on the journal "Anesthesiology." *Id*., PageID#31020-33, 31102. Dr. Buffington received his Doctorate of Pharmacy at Mercer University. Tr., R.941, PageID#31988. He maintained a clinical practice, provided forensic consultation services, and taught at the University of South Florida College of Medicine, College of Pharmacy. *Id*., PageID#32029.

Midazolam is a sedative that produces unconsciousness even at the "low" therapeutic dose used for a colonoscopy, *Glossip*, 135 S. Ct. at 2741 (citing testimony), or 0.2 or 0.3 milligrams per kilogram. Tr., R.924, PageID#31051, 31086 (Dr. Antognini). It has been used for years in medical settings. Tr., R.941, PageID#32002 (Dr. Buffington). At these low dosages it produces sedation for a short duration of time and can be used alone for procedures like vasectomies, resetting bones, bone marrow aspiration, or placing tubes or other medical devices.

Id., PageID#32003, 32017, 32019-20 (Dr. Buffington). If it produces unconsciousness at these very low dosages, it certainly produces unconsciousness at the massive 500 milligram dose ordered by Ohio's protocol. Tr., R.924 PageID#31073-74 (Dr. Antognini). Indeed, an expert in *Glossip* opined that such a massive dose likely produces a coma. *Glossip*, 135 S. Ct. at 2742.

At that dosage level, Dr. Antognini explained, a person could not experience pain. *See id*., PageID#31063-64. Pain, he explained, is defined as "the conscious awareness or that unpleasant sensory and emotional experience associated with . . . noxious stimulation." *Id.*, PageID#31040. Pain is experienced by persons who are awake and conscious. *Id*. So midazolam produces unconsciousness and an unconscious person cannot feel pain from the second and third drugs, *id.*, PageID#31067, 31070-31071, or even realize that they are unable to breathe once they receive the second drug, *id.*, PageID#31072. Dr. Buffington agreed, explaining that a massive dose of midazolam renders an inmate sufficiently insensate to the second and third drugs in the protocol. Tr., R.941, PageID#32007-08. Any risk of pain would be "very, very low." Tr., R. 924, PageID#31063 (Dr. Antognini). As to awareness, the district court noted that even plaintiffs' expert Dr. Stevens "agreed that midazolam has an anterograde amnesic effect that can suppress a patient's ability to form memories while under the effect of midazolam." Order, R.948, PageID#32159 (citing Tr., R.923, PageID#30951-52).

This testimony aligns with other courts' findings. *See Glossip*, 135 S. Ct. at 2740-41 (citing testimony that a 500 mg dose places a person "at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs" and "'render[s] the person unconscious and 'insensate' during the remainder of the procedure'"); *Chavez v. Florida SP Warden*, 742 F.3d 1267, 1270 (11th Cir. 2014) (crediting testimony that a 500 mg dose would "induce a deep anesthetic state in which an inmate would be rendered insensate, unconscious, and incapable of feeling pain").

That ends the legal analysis because the Supreme Court's test requires '"a demonstrated risk of severe pain.'" *Glossip*, 135 S. Ct. at 2737 (citation omitted). Ohio's protocol presents no such risk. The experts went on to explain that 500 milligrams of midazolam might allow a physiological response to the "noxious stimulation" caused by the other drugs. Tr., R.924, PageID#31063-64 (Dr. Antognini). A noxious stimulation, he explained, is "a stimulus that is damaging or threatens damage to normal tissue." *Id.*, PageID#31039-40. But this response does not affect consciousness or cause pain. *Id.*, PageID#31063-64. A patient can react reflexively, but be unconscious. *Id.*, PageID#31094, 31190. This is because, on a time continuum, anesthetics affect memory and consciousness before mobility. *Id.*, PageID#31028, 31134. So an unconscious individual can still make complex movements. *Id.*, PageID#31037. As the district court noted, Plaintiffs'

expert Dr. Stevens agreed "that reflexive withdrawal from a noxious stimulus is not considered a purposeful movement." Order, R.948, PageID#32196. The American Society of Anesthesiologists suggests this is true even at general anesthesia levels. *Id.*; *see also*, *id.*, PageID#32157 ("On cross-examination, Dr. Stevens agreed that the ASA chart in his report states that, under a level of deep sedation/analgesia, 'reflex withdrawal from painful stimulus is NOT considered a purposeful response.'"). This explains reflexive movement witnessed during prior executions.

As for the supposed "ceiling effect" of midazolam—that is, the point where increasing the dosage has no additional effect—both experts believed it was speculative and not relevant. Dr. Buffington explained that the ceiling effect was a theoretical and inappropriate "attempt to opine human pharmacologic effect from animal or laboratory data that hasn't been tested or validated in humans." *Id.*, PageID#32006. More importantly, there was no evidence that it would occur before producing deep sedation and amnesia. *Id.*, PageID#31414. Dr. Antognini testified that midazolam might have a ceiling effect, but the dosage was unknown, R.924, PageID#31140, and not relevant because a very small dosage produces unconsciousness, *id.*, PageID#31086; *see also Warner v. Gross*, 776 F.3d 721, 730 (10th Cir. 2015) (crediting testimony that "there is no ceiling effect with respect to the ability of a 500 milligram dose of midazolam to effectively paralyze the

brain"). Ceiling effect is speculative because it can only be guessed at using inherently variable studies. Tr., R.924, PageID#31076-80, 31086. Plaintiffs' expert Dr. Bergese agreed that data extrapolations about high dosages could "[g]o either way." Tr., R.923, PageID#30909. Again, this comports with other courts' findings. *Glossip* found evidence about ceiling effect "speculative" at best, 135 S. Ct. at 2743, and noted it failed to "undermine the [expert's] central point" that a 500 mg dose "renders the recipient unable to feel pain," *id*. at 2744.

3. *The district court's contrary arguments fail to prove a substantial risk of serious harm.*

The district court's contrary arguments fail to show a substantial risk of serious harm.

a. *Glossip as legislative fact.* The district court mistakenly believed that *Glossip* says nothing about the constitutionality of a midazolam three-drug protocol, and held only "that the District Court was not clearly erroneous, not that it was clearly correct." Order, R.948, PageID#32151. A district court instead "must evaluate the evidence presented here, rather than the evidence the Oklahoma District Court heard in *Glossip*." *Id*., PageID#32150. This argument has three flaws: It mistakes legislative facts for adjudicative facts, it reads *Glossip* at the wrong level of generality, and it creates an unworkable rule.

A midazolam three-drug protocol's risk is a legislative fact, but the district court treated it as an adjudicative one. As explained above, this is a universal—not

case-specific—fact. The conclusion is a medical judgment first made by the State, then reviewed by the judiciary. And it is reviewed but once, not on a case-by-case basis "with each ruling supplanted by another round of litigation," *Baze*, 553 U.S. at 51 (plurality op.), as the district court would have it. Each of these reasons show it is a legislative fact. That is why *Glossip* read *Baze* to hold that a sodium thiopental three-drug protocol "does not violate the Eighth Amendment" and to "clear[] any legal obstacle to" its use not just in Kentucky, but in any State. *Glossip*, 135 S. Ct. at 2732-33.

And while the district court's specific fact findings were reviewed for clear error in *Glossip*, the Supreme Court's affirmance is more generally based on its conclusion that the protocol does not present a substantial and objectively intolerable risk. *That* is the legislative fact relevant here. That conclusion is based not just on the district court's fact finding that "midazolam is highly likely to render a person unable to feel pain," but also on "numerous [other] courts[']. . . conclu[sions] that the use of midazolam . . . is likely to render an inmate insensate to pain," and the petitioners' failure to show otherwise. *Glossip*, 135 S. Ct. at 2739-40. The Court did not limit itself to the district court's findings either, delving deeply into the transcript. *Id*. at 2740-46. Nor is the standard of review really relevant to its precedential value. The Supreme Court is always, to some degree, limited to the facts in the record. Just as *Baze*'s approval of another

protocol applies universally despite being based on the evidence and arguments presented to the trial court, so *Glossip*'s approval of *this* protocol applies universally.

The district court's emphasis on standard of review also creates an unworkable rule. Under its view, the Supreme Court could hold that Oklahoma's protocol is constitutional based on clear error review of the facts presented there, and *also* hold that Ohio's nearly-identical protocol is unconstitutional based on clear error review of the facts presented here. That outcome is unworkable. The Eighth Amendment, as interpreted by the Supreme Court, can have only one meaning. It should not depend on which district court is the one making "fact findings."

b. The district court gave several reasons why it believed the numerous courts that considered this issue earlier got it wrong. *See* Order, R.948, PageID#32226-28. These reasons are all mistaken, immaterial, or both.

First, the district court drew a distinction between what it terms "deep sedation" and "general anesthesia," suggesting that midazolam is only a sedative and thus only "prevent[s] the formation of . . . memories" of pain. *Id*., PageID#32227. "That," the district court reasoned, "does not mean that the pain was not inflicted." *Id*. Both the premises and the conclusion are mistaken.

The starting point is wrong because sedation and anesthesia are merely levels of consciousness on a spectrum, as both anesthesiologists explained below. Order, R.948, PageID#32171-72 (citing Tr., R.923, PageID#30830) ("[Dr. Bergese] not[ed] that consciousness is not an all-or-nothing proposition, but rather a spectrum of different grades."); Tr., R.924, PageID#31093; Tr., R.941, PageID#32000-01. As the *plaintiff's* expert in *Arthur* explained: "'sedation' is understood by [anesthesiologists] as a continuum. This can range from 'mild sedation in which a person can easily respond to verbal cues,' to moderate sedation, deep sedation, and, finally anesthesia, 'the deepest level of the continuum.'" *Arthur*, 840 F.3d at 1281. So a sharp distinction between the two is inappropriate, especially when it rests solely on testimony that was contradicted by one of the plaintiffs' own experts.

From there, the district court seemed to believe midazolam can only cause sedation. Not true. Midazolam's package insert says that, "even at small clinical dosage levels, midazolam can induce both sedation and anesthesia in as little as 2 minutes without narcotic premedication." *Id.* at 1297. Plaintiffs' expert Dr. Stevens acknowledged that midazolam induced that level of unconsciousness even at low dosages, questioning only whether it could "maintain[] general anesthesia." Order, R.948, PageID#32160. Dr. Buffington opined in *Arthur* that "a *rapid infusion* of midazolam could result in induction of anesthesia in as little as 30

seconds." *Id*. at 1293 (emphasis added). And even plaintiff's expert in that case admitted that midazolam "was approved for use in 'anesthesia.'" *Id*. at 1311; *see also, e.g.*, *Chavez*, 742 F.3d at 1270 (citing testimony that a 500 mg dose of midazolam would "induce a deep *anesthetic* state" such that "its effects would be 'quite similar to that of sodium thiopental or pentobarbital on consciousness'" (emphasis added and citation omitted)).

The district court concluded from its mistaken premises that midazolam may lead to "inflicted pain that is not remembered." Order, R.948, PageID#32227. Even if its premises were true, this conclusion is false, as it substitutes the district court's lay definition of pain for the medical definition offered by Dr. Antognini. *See* Tr., R.924, PageID#31040 (defining pain as "the conscious awareness or that unpleasant sensory and emotional experience associated with . . . noxious stimulation"). Dr. Antognini's definition of pain as *conscious* sensory experience reflects the terms used by both the majority and dissent in *Glossip*. *See* 135 S. Ct. at 2739-46 (majority op.) (repeatedly discussing whether midazolam renders a person "insensate to pain"); *id*. at 2789 (dissenting op.) (relying on majority's "insensate to pain" definition).

But even granting the district court's argument, it misses the point. "[T]he fact that a low dose of midazolam is not the *best* drug for maintaining unconsciousness during surgery says little about whether a 500-milligram dose of

midazolam is *constitutionally adequate* for purposes of conducting an execution." *Id.* at 2742. And it is irrelevant that "midazolam does not have the same pharmacologic effect on persons being executed as the barbiturates thiopental sodium and pentobarbital." Order, R.948, PageID#32227. The relevant question is whether it can render a person insensate to pain; Ohio (and other States) have provided substantial evidence that it can. As in *Glossip*, Plaintiffs' experts presented "no contrary scientific proof." *Glossip*, 135 S. Ct. at 2741.

Second, the district court suggests that there is a lack of evidence about the effect of a 500 mg midazolam dosage "[f]or obvious reasons." Order, R.948, PageID#32227. To some extent this is true, but the *lack* of evidence that midazolam causes a substantial risk of severe pain is a factor *against* granting an injunction, not in its favor. Plaintiffs, not the State, "bear the burden of persuasion on this issue." *Glossip*, 135 S. Ct. at 2739. And even without formal tests, both of Ohio's experts testified that 500 mg of midazolam would render an inmate unconscious and insensate to pain based on clinical data and their real-world experience with the drug. Tr., R.924, PageID#31059, 31063-64, 31070-71, 31086; Tr., R.941, PageID#32007-08. Even Dr. Bergese conceded that midazolam "appeared to 'work'" in some instances, and that his opinion about midazolam's effectiveness was predicated on the real-world data of "one or two isolated incidents" that constituted "unusual occurrences[.]" Order, R.948, PageID#32174

(citing Tr., R.924 PageID#30896-98). This testimony from Plaintiffs' experts undercuts the court's conclusion that Plaintiffs demonstrated the existence of a substantial risk of severe pain.

Third, the district court observed that Ohio no longer uses a two-drug midazolam protocol, and that Florida and Arizona have stopped conducting executions using midazolam. Order, R.948, PageID#32228. All true, but also incomplete. The protocol used by Ohio to execute Dennis McGuire was not the one at issue here; it used a much smaller 10 mg dose of midazolam administered with 40 mg of hydromorphone. Execution Protocol, R.323, PageID#9568-86. The district court points to Director Mohr's consultation with the medical team during that execution as cause for concern, but the medical team simply told Mohr there was nothing unusual about McGuire's movements. *See* Tr., R.941, PageID#31964-65; *see also* Tr., R.923, PageID#30997-98 (testimony of Medical Team Member 21 describing McGuire's movements as "similar" to other deaths he had observed).

Nor did Florida or Arizona change protocols due to midazolam concerns, as the district court implied. Order, R.948, PageID#32228. There is a much simpler explanation: Neither State can obtain midazolam. The Arizona settlement agreement said it did not have midazolam or a potential supplier of midazolam. Tr., R.940, PageID#31686-87. Florida, too, ran out of midazolam and switched to

an alternate drug. *See Florida Changes Lethal Injection Drugs*, CBS Miami (Jan. 5, 2017, 4:55 PM), http://miami.cbslocal.com/2017/01/05/florida-changes-lethal-injection-drugs/. The district court overlooked these explanations, even though it knew Ohio had had trouble obtaining execution drugs and had issued two protective orders here to assist those efforts. *Cf. Glossip*, 135 S. Ct. at 2733.

There is little support for the inference that these States were concerned about this particular protocol. Florida used it for thirteen executions without incident. *Glossip*, 135 S. Ct. at 2734; *Arthur*, 840 F.3d at 1304 ("midazolam has been repeatedly and successfully used without problems as the first drug"). A single witness to one Florida execution testified that she saw the inmate's eyes open, close, then open and remain open until he was pronounced dead. *See* Tr., R.924, PageID#31212-13. Dr. Antognini explained that patients commonly open their eyes while sedated for surgery. *Id.*, PageID#31044.

As for Arizona, the Order cited testimony about the 2014 Joseph Wood execution. Order, R.948, PageID32146. "[T]he Wood execution did not involve the protocol at issue here," so it has "little probative value" for determining the constitutionality of *Ohio*'s protocol. *Cf. Glossip*, 135 S. Ct. at 2746. Thus, the protocol changes in Ohio, Arizona, and Florida do not suggest, as the district court believed, that Ohio's midazolam protocol has fallen into disfavor. To the contrary,

Virginia used a similar protocol successfully just a few weeks ago. Order in *Gray v. McAuliffe, et al.*, R.931-1, PageID#31538.

C. Alternatively, Plaintiffs Have Also Failed To Establish A Known And Available Alternative Method That Entails A Lesser Risk Of Pain.

The district court erred in holding that Plaintiffs have established a "known and available" alternative to the State's protocol because "[t]here remains the possibility that Ohio can obtain the active pharmaceutical ingredient of pentobarbital and have it made into injectable form by a compounding pharmacy." *See* Order, R.948, PageID#32229. The district court so concluded even though it acknowledged that Ohio has been *unable* to purchase those ingredients domestically, and that Ohio *cannot* import them without a federal license, which it does not have. *See id.*; *see also* 21 U.S.C. § 957(a)(1); 958(a). It did so even though Ohio's application for that license has been pending for several months, with "no indication when a decision on that application might be made." *See id*. And it did so even though Plaintiffs' own theory of the case is that Defendants cannot lawfully obtain or use pentobarbital. *See, e.g.*, Tibbetts' 4th Am. Compl., R.691, PageID#20129-30, 20133, 20172. The district court's conclusion on this point was legal error, and forms an independent basis for reversal of the district court's Eighth Amendment analysis.

1. *Plaintiffs bear the burden of proving that a "known and available alternative" method of execution exists, and that alternative must be capable of ready implementation.*

"[A]ll Eighth Amendment method-of-execution claims" require a prisoner to "identify a *known and available* alternative method of execution that entails a lesser risk of pain." *Glossip*, 135 S. Ct. at 2731 (emphasis added). "The State need not make any showing" on this point, as it is the *plaintiff*'s "burden, not the State's, to plead and prove both a known and available alternative method of execution and that such alternative method significantly reduces a substantial risk of severe pain." *Arthur*, 840 F.3d at 1303; *Glossip*, 135 S. Ct. at 2739.

The Plaintiffs' alternative "must be feasible," capable of being "readily implemented," and also "significantly reduce a substantial risk of severe pain." *See Baze*, 553 U.S. at 52 (plurality op.); *Glossip*, 135 S. Ct. at 2737. When considering a proposed alternative's "feasibility and availability," "practical constraints" "must be taken into account." *See Baze*, 553 U.S. at 64-66 (Alito, J., concurring).

The Eleventh Circuit has developed the following test for determining whether an alternative is "known and available":

> [A] petitioner must prove that (1) the State actually has access to the alternative; (2) the State is able to carry out the alternative method of execution relatively easily and reasonably quickly; and (3) the requested alternative would 'in fact significantly reduce [ ] a substantial risk of severe pain' relative to the State's intended method of execution.

Arthur, 840 F.3d at 1300 (citations omitted). As the Eleventh Circuit reads *Glossip* and *Baze*, "[t]he evidentiary burden on [the plaintiff] is to show that 'there is *now* a source for pentobarbital *that would sell it to*'" the State "'for use in executions.'" *See id*. at 1302 (quoting *Brooks*, 810 F.3d at 820). That court rejected a proposed test "that if a drug is capable of being made and/or in use by other entities, then it is 'available'" under *Glossip*. *See id*. at 1301.

Glossip and *Arthur* illustrate when an alternative method is "available." *Glossip* observed that the plaintiffs could not "seriously contest" their failure to meet their burden, as "they [had] not identified any *available* drug or drugs that could be used in place of those that Oklahoma is *now* unable to obtain." *See* 135 S. Ct. at 2738 (emphasis added). And *Arthur* rejected an Eighth Amendment claim where the plaintiff could not "point to any source willing to compound pentobarbital" for Alabama, and where Alabama had been "unable to procure any compounded pentobarbital" from potential sources. *See* 840 F.3d at 1301. It concluded that "[a]n alternative drug that its manufacturer or compounding pharmacies refuse to supply for lethal injection 'is no drug at all for *Baze* purposes.'" *Id*. at 1302 (citation omitted). In both cases, an alternative method of lethal injection was not "available" when the State was unable to obtain the required drugs despite taking efforts to do so.

2. *A method of execution that is not available by a scheduled execution date is not a "known and available alternative."*

Plaintiffs have not satisfied their burden of proving that a qualifying "known and available alternative" exists to the State's execution protocol. Plaintiffs "have a preferred alternative in using pentobarbital or sodium thiopental." *See* Tr., R.940, PageID#31789. But they make no showing that those drugs are *available* for use by Ohio. In fact, Plaintiffs' expert Dr. Stevens testified that he "was unable to identify any manufacturers or suppliers of thiopental and/or pentobarbital who were willing to sell those drugs, or even those drugs' active pharmaceutical ingredients, to Ohio for the purposes of conducting lethal injection executions." Order, R.948, PageID#32163; *see also* Tr., R.923, PageID#30924-25. Indeed, Ohio has not been able to acquire pentobarbital or sodium thiopental since 2013. Gray Depo., R.905-1, PageID#30185-87, 30189. For the following reasons, just as in *Glossip*, the use of a barbiturate like pentobarbital is not a "known and available alternative method of execution." *See* 135 S. Ct. at 2738.

First, Ohio cannot purchase domestically produced pentobarbital due to distribution controls imposed by the manufacturer. *See* Gray Depo., R.905-1, PageID#30224-25; Theodore Depo., R.881-1, PageID#29111. And Ohio has been unable to obtain manufactured pentobarbital. Gray Depo., R.905-1, PageID#30311-12. Ohio contacted the departments of correction in Texas, Missouri, Georgia, Virginia, Alabama, Arizona, and Florida in an attempt to obtain

pentobarbital, but was rebuffed. *See id*., PageID#30313-14. None of those States agreed to provide pentobarbital to Ohio. *Id*.

Second, Ohio cannot now import pentobarbital, either in finished dosage form or the active pharmaceutical ingredient (API) necessary for compounding, from a foreign manufacturer. Its current importer license from the federal Drug Enforcement Administration (DEA) does not permit Ohio to import pentobarbital. *Id*., PageID#30224-25; Theodore Depo., R.881-1, PageID#29104, 29110-11. Ohio applied to update its current DEA importer registration to add pentobarbital in 2016; that application has been pending without apparent action by the federal government for over four months. Plaintiffs' Ex. 34, R.966-13, PageID#34505; Plaintiffs' Ex. 35, R.966-14, PageID#34511. The Department does not know whether the DEA will allow it to import pentobarbital, let alone when that agency will reach its decision. Theodore Depo., R.881-1, PageID#29104-05, 29171-72. Once Ohio's application to update its importer registration is published in the Federal Register, it generally takes at least six months before the DEA will approve or disapprove the application, although it can take longer. *Id*., PageID#29172.

Third, even if Ohio could *legally* import pentobarbital, it has no guarantee that it would be able to *actually* import and/or compound it. Ohio has "not established a relationship with a manufacturer who can provide" pentobarbital to it,

"even if [Ohio] were to have a proper licensure." Gray Depo., R.905-1, PageID#30226. In addition to trying to obtain finished doses of pentobarbital, Ohio is pursuing the option of obtaining the API necessary to compound pentobarbital. *See id.*, PageID#30257. But even *if* Ohio were approved and registered by the DEA to import pentobarbital, and *if* it were able to find a source to import the API for pentobarbital, Ohio does not have an entity "lined up" to compound pentobarbital. Theodore Depo., R.881-1, PageID#29174. Ohio's ability to import foreign pentobarbital is thus hampered by both legal and practical circumstances.

Fourth, Plaintiffs Tibbetts' and Otte's own theory of the case undercuts the notion that pentobarbital is "available" to Ohio. They allege that Defendants "have no legitimate or legal source of" domestically produced pentobarbital, *see, e.g.*, Tibbetts' 4th Am. Compl., R.691, PageID#20129, and that using compounded or imported execution drugs creates a substantial risk of harm, *see, e.g., id.*, PageID#20133, 20172. These allegations are not consistent with their argument that a qualifying "known and available" alternative of importing or compounding pentobarbital exists.

In sum, the undisputed evidence in the record demonstrates that Plaintiffs have not proved that pentobarbital is available to Ohio. It is not available in any logical sense of the word. "[T]he record shows that [Ohio] has been unable to

procure [pentobarbital] despite a good-faith effort to do so." *Cf. Glossip*, 135 S. Ct. at 2738. Plaintiffs' proffered alternative is thus not "feasible" or capable of being "readily implemented." *See Baze*, 553 U.S. at 52 (plurality op.). Too many uncertainties must be resolved in Ohio's favor before pentobarbital can be deemed "available" to Ohio for an execution.

3. *The district court erred in concluding that Plaintiffs have proven a "known and available alternative."*

The district court erred because the alternative it identified—importing and then compounding the pharmaceutical ingredients for pentobarbital—is *theoretical*, not *available*. The lower court misapplied the legal standard set forth in *Baze* and *Glossip*; as a result, its holding directly conflicts with both binding precedent and the Eleventh Circuit's *Arthur* decision.

The district court acknowledged that *Baze* and *Glossip* require Plaintiffs to "identify 'a known and available alternative method of execution that entails a lesser risk of pain.'" *See* Order, R.948, PageID#32228 (citation omitted). It identified ambiguity in the meaning of the word "available," however, observing that "the Supreme Court did not attempt to quantify how available the alternative method must be to qualify." *See id.*, PageID#32230. It concluded that an alternative method could be considered "sufficiently available" if it "remains [a] possibility," even though such method may not "be available immediately." *See id.*, PageID#32229-30. Applying that standard, it reasoned that even though

"Ohio's efforts to obtain the drug from other States and from non-State sources have not met with success," Ohio might one day be able to import and compound pentobarbital. *See id*. Thus, even though "compounded pentobarbital *will not be available*" for Plaintiffs' executions, the court deemed it "sufficiently available" under *Glossip*. *See id*., PageID#32230 (emphasis added).

This was error. *Glossip*'s "availability" requirement leaves little need for searching; a thing either *is* or *is not* available. To be "available" is to be "suitable or ready for use," "at hand," or "readily obtainable." *The Random House Dictionary of the English Language* 142 (2d ed. 1987); *see also Oxford Living Dictionaries*, "Available," https://en.oxforddictionaries.com/definition/available ("Able to be used or obtained; at someone's disposal."). Available does not mean the same thing as "possible." If a thing—like a library book or a seat on an airplane—*might* become available at some point, it is presently "unavailable." This ordinary understanding of the word "available" comports with how the standard has been described by the Supreme Court and applied by the Eleventh Circuit. *See Baze*, 553 U.S. at 52 (plurality op.) ("To qualify, the alternative procedure must be feasible" and "readily implemented . . . ."); *Arthur*, 840 F.3d at 1302 ("The evidentiary burden on [the plaintiff] is to show that 'there is *now* a source for pentobarbital *that would sell it to the* [*State*] for use in executions.'"

(citation omitted)). A method of execution that the State cannot readily obtain and use is thus not "available" under *Glossip*.

This is especially true when, as here, Ohio's inability to procure pentobarbital is not due to its own obstruction or delay, but rather due to forces entirely outside of its control. *Cf. Glossip*, 135 S. Ct. at 2738 (noting Oklahoma's "good-faith effort" to obtain pentobarbital and sodium thiopental). As the Supreme Court has detailed, pentobarbital has become "unavailable" in recent years due to lobbying by anti-death-penalty advocates. *See id*. at 2733-34. And although Ohio has taken steps to be able to import pentobarbital, the federal government has not acted on its application, and Ohio has not located a foreign supplier. Gray Depo, R.905-1, PageID#30226, 30257. This is not a case where the State is responsible for the unavailability of the alternative method.

The district court's factual findings support a legal conclusion that Plaintiffs have not proved a "known and available alternative method of execution." *Glossip*, 135 S. Ct. at 2738. The district court (correctly) found that Ohio has attempted to procure pentobarbital but that those efforts "have not met with success." *See* Order, R.948, PageID#32229. Although it found that importing the active pharmaceutical ingredient "remains [a] possibility," the court made *no* finding about the likelihood of success with regard to that option. *See id*. Indeed, the record shows that Ohio has no guarantee that the DEA will approve its

importer registration or that it will be able to obtain pentobarbital in any form. *See* Gray Depo., R.905-1, PageID#30226, 30257; Theodore Depo., R.881-1, PageID#29171-74. The district court's holding that Plaintiffs have proved a "sufficiently available alternative method of execution to satisfy *Baze* and *Glossip*," Order, R.948, PageID#32230, should therefore be reversed.

II. OHIO SHOULD NOT BE ESTOPPED FROM USING A THREE-DRUG EXECUTION PROTOCOL TO CARRY OUT PLAINTIFFS' SENTENCES.

In the alternative, the district court held that Plaintiffs' judicial-estoppel claim has a likelihood of success on the merits. *See* Order, R.948, PageID#32235-37. Not so.

A. Judicial-Estoppel Principles Strongly Disfavor, Or Even Bar, Its Application Against A State In The Public Policy Arena.

Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000). Its purpose is to prevent a party "'from abusing the judicial process through cynical gamesmanship'" by changing positions "'to suit an exigency of the moment.'" *Mirando v. U.S. Dep't of Treasury*, 766 F.3d 540, 545 (6th Cir. 2014) (citations omitted). This Court reviews de novo. *Id*.

Courts consider several factors when applying judicial estoppel: (1) whether a party's later position is "clearly inconsistent" with its earlier position;

(2) whether it "succeeded in persuading a court to accept [it's] earlier position, so that judicial acceptance of an inconsistent position . . . would create 'the perception that either the first or second court was misled'"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (citations omitted).

Both general and specific interpretive principles strongly disfavor, or even bar, application of judicial estoppel here. *Generally*, judicial estoppel requires "clearly inconsistent" statements. *Id.* at 750. '"[Caution]'" is needed because judicial estoppel potentially '"imping[es] on the truth-seeking function of the court.'" *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe*, 546 F.3d 752, 757 (6th Cir. 2008) (citations omitted). The modifier "clearly" places the burden on Plaintiffs to prove inconsistency, and bars ambiguous estoppel claims. *Compare Mirando*, 766 F.3d at 546, *with United States v. Hammon*, 277 F. App'x 560, 566 (6th Cir. 2008).

Specifically, "ordinarily the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is not applied to states." *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 369 (1946). It is a "centuries-old concept that one legislature may not bind the legislative authority of its successors," *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996), or one

executive limit the sovereign powers of future governments. A State's '"broad interests of public policy may make it important to allow a change of positions.'" *New Hampshire*, 532 U.S. at 755. And application of judicial estoppel could "compromise a governmental interest in enforcing the law." *Id.*

> "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant."

Heckler v. Cmty. Health Svcs. of Crawford Cnty., Inc., 467 U.S. 51, 60 (1984). Both Ohio's right to change public policy and its law-enforcement interests are implicated here.

Exceptions exist, like *New Hampshire v. Maine*, which involved two sovereigns, rather than one. 532 U.S. at 755 ("this is not a case where the shift in the government's position is 'the result of a change in public policy'") (citation omitted); *see also Reynolds v. Comm'r of Internal Rev.*, 861 F.2d 469, 474 (6th Cir. 1988) (noting "that courts should exercise special restraint in applying estoppel principles against the government" but applying it against IRS because of "knowing assault upon the integrity of the judicial system"). Those exceptions do not apply here, and, at the very least, "the rule of judicial estoppel, even when invoked" against a State, must be "construed narrowly . . . for the policy reasons stated in *Heckler*." *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995);

Winstar Corp., 518 U.S. at 877-78 (courts should not assume that a '"sovereign forever waives the right to exercise one of its sovereign powers'" unless the waiver is "unmistakable.").

Plaintiffs' reading of Ohio's 2009 statements, as detailed below, assumes a past administration can restrict the public-policy options of future administrations and future Ohio General Assemblies. But a past administration can no more waive Ohio's future right to use legal execution drugs than it could forever waive Ohio's right to enforce the death penalty.

B. Plaintiffs' Judicial-Estoppel Claim Fails To Meet *New Hampshire*'s Factors.

Plaintiffs' claim does not satisfy any of *New Hampshire*'s factors.

1. *The text and context of Ohio's prior statement was execution-specific, plaintiff-specific, and protocol-specific, not a "permanent renounce[ment]," so there is no clearly inconsistent statement.*

At the heart of Plaintiffs' estoppel claim is the factually *mistaken* assertion that Ohio "permanently renounced" the use of pancuronium bromide and potassium chloride in all future execution protocols. Order, R.948, PageID#32235. But both text and context of Ohio's 2009 statements show it made a representation about a specific time period, as to the execution of a specific inmate, and about a specific prior protocol, not a *generalized* and permanent statement about the use of

specific drugs for all future protocols. Ohio's 2009 position is in no way inconsistent with Ohio's 2016 protocol amendments.

a. *Specific Period*. Plaintiffs' claim originates from mootness proceedings before this Court in Kenneth Biros's execution and an affidavit in those proceedings from the Department's then-director Terry Collins. At the time, Biros's execution was scheduled for December 2009. *Cooey I*, 588 F.3d at 922. Ohio announced plans to change its protocol in early November 2009, effective November 30. *Id*. Collins's affidavit, dated November 12, represented that Ohio *planned* to make that change. Collins Aff., R.718-3, PageID#22391, ¶ 9. Thus, Collins assured the Court that he had authority to "enforce" and "modify" the lethal injection protocol, *id*. PageID#22390 ¶¶ 1-3, and outlined the new protocol, *id*. ¶¶ 4-8 ("I have given instructions to change the lethal injection procedures"). This was necessary for the Court to moot Ohio's appeal of the stay of Biros's execution under the old protocol, because the amended protocol did not take effect until five days after its November 25th opinion. *Cooey I*, 588 F.3d 921. Those representations were needed for only a limited time, from November 12 to November 30, 2009. After November 30, the State simply relied on its newly effective protocol to explain its plans. *Cooey II*, 589 F.3d at 218-219 (citing "the precise language of the new protocol" released November 30 and noting the accuracy of Collins's affidavit).

b. *Specific Plaintiff.* Ohio's prior position was also *plaintiff*-specific. Biros asserted that the appeal was not moot because Ohio might revert back to the old protocol, and the legal questions '"recur.'" *Cooey I*, 588 F.3d at 923 (citation omitted). But mootness requires an action be "capable of repetition" as to "the *same* complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (emphasis added). Thus, the narrow "question at hand [was] whether Ohio [would] use the old procedure, or the new one, *in executing Biros*." *Cooey*, 588 F.3d at 923 (emphasis added). All Ohio had to represent to answer that question, and all it did represent, was that it would use the new protocol to execute Biros. *Id.* (Ohio "has changed its execution protocol, and it intends to apply the substantially modified protocol to Biros"); Collins Aff., R.718-3, PageID#22391, ¶ 9. ("The changes will be implemented in sufficient time to conduct the execution of Kenneth Biros.").

c. *Specific Protocol.* And in fact Collins's affidavit made no promises about which drugs will be used in future protocols; it simply announced a move from one specific protocol to a new one by outlining the changes.

The affidavit says a change will be made and describes the old protocol. "The previous method used three drugs: thiopental sodium, pancuronium bromide, and potassium chloride." Collins Aff., R.718-3, PageID#22390, ¶ 4. "[T]wo changes" will be made. *Id.* ¶ 5.

Paragraphs 6-7, the crux of Plaintiffs' argument, describe "the first change" by reference to the old protocol:

> 6. For the first change, going forward, pancuronium bromide no longer will be used as part of the lethal injection process. Also, potassium chloride no longer will be used as part of that process.
> 7. Instead, as the first alternative, the execution procedures will use five (5) grams of thiopental sodium. . . .

Id. ¶ 6-7. In context, these paragraphs are only descriptive. They are not making promises about specific drugs, only describing the new protocol's amendments. One drug will continue to be used; the other two will not. This Court read it that way in *Cooey I*, asking whether Ohio would use its "old procedure" or its "new one." *Cooey I*, 588 F.3d at 923; *Cooey II*, 589 F.3d at 218-19 (the "new protocol closely resembles" the old protocol "other than the two alterations mentioned in the Collins affidavit").

In addition, the old early-2009 procedure is not the same as Ohio current protocol. Ohio's current protocol uses a three drug combination with a *different* sedative: midazolam. *See* 2016 Amended Protocol, R.667-1, PageID#19819-19820. Because the protocols are different, judicial estoppel does not apply. Yes, both protocols use a bromide and potassium chloride, *see* Order, R.948, PageID#32235, but it is the *sedative* and its dosage that matter most for Eighth Amendment claims, not the two later drugs, because a method-of-execution claim focuses on the risk of pain. *Glossip*, 135 S. Ct. at 2737.

d. *No "permanent" modifier*. But even if Ohio's earlier position is taken out of its specific context and read broadly, there is an enormous gap between that reading and Plaintiffs' position that "the State of Ohio *permanently* renounced" the drugs' use. Order, R.948, PageID#32235 (emphasis added). The addition of that strident modifier is unsupportable. The affidavit's use of the phrase "going forward" in paragraph six, Collins Aff. (Nov. 12, 2009), R.718-3, PageID#22390, hardly holds the weight the district court must put on them; the affidavit does not say "going forward and forevermore." Plaintiffs' reading is not just unsupported but also unlikely—the State did not have to make such an overbroad concession to moot the case (as explained above).

Plaintiffs' jump to the "permanently renounced" language also creates an elephant-in-mouseholes problem. Even congressional legislation is not read to "hide elephants in mouseholes," *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001); *Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002) ("mistake or inadvertence" is not a basis for judicial estoppel). But if Plaintiffs insert the adverb "permanently" to modify "no longer will be used" in paragraph six, then they must also modify the parallel verb "will use" in paragraph seven. Collins Aff., R.718-3, PageID#22390 at ¶ 7. If one paragraph is "permanently" binding, then Plaintiffs must explain why the rest would not be too. But even Plaintiffs do not argue that

Collins permanently bound Ohio to its 2009 protocol. Ohio has in fact amended its protocol several times since then.

2. *Ohio's 2016 protocol changes are due to intervening factual changes in drug availability and intervening legal precedent in* Glossip*, not to an attempt to mislead the Court.*

Plaintiffs also cannot satisfy the second factor, which was not discussed by the court below. Intervening factual and legal developments, not an attempt to mislead the Court, explain Ohio's 2016 protocol amendments.

a. *Intervening Facts*. Plaintiffs must show that acceptance of Ohio's current position "would create 'the perception that either the first or second court was misled.'" *New Hampshire*, 532 U.S. at 750 (citation omitted). A statement based on a good-faith attempt to describe the facts at the time is not misleading. *See Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 253 n.6 (3d Cir. 2010) ("One of the threshold requirements for judicial estoppel is a finding of bad faith on the part of the party against whom the doctrine is invoked."). Judicial estoppel does not penalize a party for taking a position based on "the best information available to them" at the time. *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1428 (7th Cir. 1993). And it does not prevent a party from revising an earlier statement based on "events that transpire[] after." *United States ex rel., Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1147 (9th Cir. 1998); *see New Hampshire*, 532 U.S. at 756. So even reading Ohio's 2009

position as a good-faith attempt to describe Ohio's protocol for *all* subsequent years and executions, Ohio may still revise that statement as circumstances change. *See Urbania v. Central States, SE. and SW. Areas Pension Fund*, 421 F.3d 580, 589 (7th Cir. 2005) (holding that for judicial estoppel to apply "'the facts at issue must . . . be the same in both cases'" and noting different facts); *Transamerica Leasing, Inc. v. Inst. of London Underwriters*, 430 F.3d 1326, 1336 (11th Cir. 2005).

This is precisely what happened here. In 2009 sodium thiopental was available; today it is not. Even if Ohio intended to use it for all future executions, facts have changed. As sodium thiopental became the drug of choice for "States to carry out the death penalty in a quick and painless fashion," "advocates pressured pharmaceutical companies to refuse to supply" it, and soon "efforts to procure sodium thiopental proved unsuccessful." *Glossip*, 135 S. Ct. at 2733. *That* practice—making sodium thiopental's acquisition impossible—caused States to move to midazolam-based protocols. Any alleged change in Ohio's position was not a cynical exercise to mislead the Court but a pragmatic response to shifting factual circumstances.

b. *Intervening Law*. A court is also not misled, and judicial estoppel does not apply, when new legal precedent motivates a later change in position. "[J]udicial estoppel is inappropriate when a party is merely changing its position in

response to a change in the law." *Longaberger Co. v. Kolt*, 586 F.3d 459, 470 (6th Cir. 2009) (collecting cases), *abrogated on other grounds by Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016). Again, this is precisely what happened here. Some States were early adopters of midazolam-based protocols and *Glossip* upheld that choice. 135 S. Ct. 2726. Ohio has every right to follow suit. Only in the method-of-execution context would Plaintiffs quarrel with a decision to adopt an indisputably-constitutional method of punishment.

3. *Ohio gained no unfair advantage over these Plaintiffs when it switched to a Supreme Court-approved method of execution.*

Finally, Ohio does not gain an unfair advantage or impose an unfair detriment by enforcing its 2016 protocol. *New Hampshire*, 532 U.S. at 751. *First*, the Sixth Circuit decision mooting the district court's 2009 stay had no effect on *these* Plaintiffs' executions. The stay was of *Biros's* execution. And the old protocol was constitutional anyway. *See Cooey II*, 589 F.3d at 215 ("the Supreme Court permitted this precise three-drug protocol"). *Second*, these Plaintiffs have had time to bring method-of-executions claims to the 2016 protocol and have done so. Plaintiffs received notice of the revision months in advance. Previous plaintiffs have litigated method-of-execution claims in significantly less time. *See Cooey II*, 589 F.3d at 218-19, 233-34. *Third*, Ohio has gained no unfair advantage and Plaintiffs no unfair detriment, by Ohio adopting the execution protocol upheld

by *Glossip*. To the contrary, it assures Plaintiffs of a constitutional method of execution.

C. The District Court's Contrary Arguments Fail To Show Estoppel Under *New Hampshire's* Three-Factor Test.

The district court's analysis of judicial estoppel is brief. Order, R.948, PageID#32235-32237. It quotes *Cooey* and concludes that Ohio's position today "is completely inconsistent with the position it took on appeal in *Cooey*." *Id.* But it acknowledges that only Biros's execution was stayed, *id.*, PageID#32236, and nowhere explains why it believes Ohio was making a "permanent" statement. It does not address *New Hampshire*'s second factor. As for the third, it says that Ohio "achieved two important litigation goals in 2009: the then-pending appeal was dismissed as moot and the Biros sentence was carried out." *Id.*, PageID#32237. But it was *Ohio* that took the appeal in 2009 not Biros. *See Cooey I*, 588 F.3d at 922. Nor does the court explain how Plaintiffs are disadvantaged by a constitutional protocol.

III. OTHER STAY FACTORS ALSO SUPPORT REVERSAL.

The balance of equities weighs heavily in Ohio's favor. Ohio's executions have been delayed for years as Ohio struggled to obtain execution drugs. As this Court recently noted, it is "[d]oubtless Ohio has been hindered in its efforts to execute inmates. Yet the law remains valid, and Ohio has an interest in following it through." *In re: Ohio Execution Protocol Litig.*, 845 F.3d 231.

Ohio has "an essential interest in carrying out a lawfully imposed sentence." *Thompson v. Bell*, 580 F.3d 423, 446 n. 1 (6th Cir. 2009); *see Moran v. Burbine*, 475 U.S. 412 (1986). This Court has already recognized that Ohio's citizens have a compelling interest in these cases' finality and the timely completion of lawfully ordered sentences. *Cooey (Beuke) v. Strickland*, 604 F.3d 939, 946 (6th Cir. 2010); *Nelson v. Campbell*, 541 U.S. 637, 644 (2004); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). As this Court recognized:

> "To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and the victims of crime alike." Importantly, these cases make this point in the context of habeas corpus review; how much more must this principle be respected when a last-minute stay of execution is sought in the context of a § 1983 action.

Cooey (Beuke), 604 F.3d at 946 (citations omitted). The district court has, essentially, *indefinitely* delayed Plaintiffs' sentences. "Each delay, for its span, is a commutation of a death sentence to one of imprisonment." *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir. 1983).

The delays imposed by appellate and habeas proceedings should not weigh against the State, as the district court appears to have done. *See* Order, R.948, PageID#32241 ("[W]hen executions are routinely delayed decades in Ohio, it is very debatable how much loss in deterrence there is from waiting until a case can be tried on the merits."). These delays are present in every capital case. Further delay is not just another drop in a bucket, it is another day that the sentences are

effectively commuted to terms of imprisonment in contravention of the will of the people of Ohio as expressed by the jury's verdict and the judge's sentence.

Earlier, the district court appeared to fault Ohio for the timeframe of these proceedings. Order, R.834, PageID#24758. Ohio informed the district court and Plaintiffs of a change to its execution protocol approximately three months before the first execution was scheduled. Order, R.658, PageID#19731-32. Before announcing the change, Ohio ensured that it could obtain all three drugs, updated its documentation to reflect that, and took care to ensure that its new protocol was sound and practicable. *Id.* Ohio should not be faulted for those efforts or for the delay that occurred as it attempted to obtain execution drugs. As this Court recognized, "Ohio has been hobbled in its efforts to perform executions." *In re: Ohio Execution Protocol Litig.*, 845 F.3d 231.

The district court now imposes further delay on the unsupported contention that more time will somehow allow Ohio to obtain *other* drugs. There is no timeframe for when Ohio could obtain pentobarbital, much less assurance that it will be able to do so. Such an indefinite stay is unwarranted. Ohio has the capability to perform constitutional executions now. It should be permitted to do so.

CONCLUSION

Defendants respectfully ask the Court to reverse the district court's preliminary injunction order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(B), that this *Appellant's Brief* complies with the type-volume requirements for a principle brief and contains 12,980 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February 2017, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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APPELLANTS' ADDENDUM OF RELEVANT DISTRICT COURT RECORDS

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