SUPREME COURT OF THE UNITED STATES

THOMAS D. ARTHUR *v.* JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.

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

No. 16–602. Decided February 21, 2017

The motion of Certain Medical Professionals and Medical Ethicists for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, dissenting from the denial of certiorari.

Nearly two years ago in *Glossip* v. *Gross*, 576 U. S. ___ (2015), the Court issued a macabre challenge. In order to successfully attack a State's method of execution as cruel and unusual under the Eighth Amendment, a condemned prisoner must not only prove that the State's chosen method risks severe pain, but must also propose a "known and available" alternative method for his own execution. *Id.*, at ___, ___ (slip op., at 13, 15).

Petitioner Thomas Arthur, a prisoner on Alabama's death row, has met this challenge. He has amassed significant evidence that Alabama's current lethal-injection protocol will result in intolerable and needless agony, and he has proposed an alternative—death by firing squad. The Court of Appeals, without considering any of the evidence regarding the risk posed by the current protocol, denied Arthur's claim because Alabama law does not expressly permit execution by firing squad, and so it cannot be a "known and available" alternative under *Glossip*. Because this decision permits States to immunize their methods of execution—no matter how cruel or how unusual—from judicial review and thus permits state law to subvert the Federal Constitution, I would grant certiorari

and reverse. I dissent from my colleagues' decision not to do so.

I

A

Execution by lethal injection is generally accomplished through serial administration of three drugs. First, a fast-acting sedative such as sodium thiopental induces "a deep, comalike unconsciousness." *Baze* v. *Rees*, 553 U. S. 35, 44 (2008) (plurality opinion). Second, a paralytic agent—most often pancuronium bromide—"inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration." *Ibid*. Third, potassium chloride induces fatal cardiac arrest. *Ibid*.

The first drug is critical; without it, the prisoner faces the unadulterated agony of the second and third drugs. The second drug causes "an extremely painful sensation of crushing and suffocation," see Denno, When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us, 63 Ohio St. L. J. 63, 109, n. 321 (2002); but paralyzes the prisoner so as to "mas[k] any outward sign of distress," thus serving States' interest "'in preserving the dignity of the procedure,'" *Baze*, 553 U. S., at 71, 73 (Stevens, J., concurring in judgment). And the third drug causes an "excruciating burning sensation" that is "equivalent to the sensation of a hot poker being inserted into the arm" and traveling "with the chemical up the prisoner's arm and . . . across his chest until it reaches his heart." Denno, *supra*, at 109, n. 321.

Execution absent an adequate sedative thus produces a nightmarish death: The condemned prisoner is conscious but entirely paralyzed, unable to move or scream his agony, as he suffers "what may well be the chemical equivalent of being burned at the stake." *Glossip*, 576 U. S., at ___ (SOTOMAYOR, J., dissenting) (slip op., at 2).

B

For many years, the barbiturate sodium thiopental seemed up to this task.[1] In 2009, however, the sole American manufacturer of sodium thiopental suspended domestic production and later left the market altogether. *Id.*, at ___–___ (majority opinion) (slip op., at 4–5). States then began to use another barbiturate, pentobarbital. *Id.,* at ___ (slip op., at 5). But in 2013, it also became unavailable. *Id.,* at ___–___ (slip op., at 5–6). Only then did States turn to midazolam, the drug at the center of this case.

Midazolam, like Valium and Xanax, belongs to a class of medicines known as benzodiazepines and has some anesthetic effect. *Id.*, at ___ (SOTOMAYOR, J., dissenting) (slip op., at 5). Generally, anesthetics can cause a level of sedation and depression of electrical brain activity sufficient to block *all* sensation, including pain. App. to Pet. for Cert. 283a–290a. But it is not clear that midazolam adequately serves this purpose. This is because midazolam, unlike barbiturates such as pentobarbital, has no analgesic—pain-relieving—effects. *Id.,* at 307a; see also *Glossip*, 576 U. S., at ___ (SOTOMAYOR, J., dissenting) (slip op., at 5). Thus, "for midazolam to maintain unconsciousness through application of a particular stimulus, it would need to depress electrical activity *to a deeper level* than would be required of, for example, pentobarbital." App. to

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[1] We examined the constitutionality of lethal injection in *Baze* v. *Rees*, 553 U. S. 35 (2008). There, the parties did not dispute that "proper administration of . . . sodium thiopental . . . eliminates any meaningful risk that a prisoner would experience pain" and results in a humane death. *Id.*, at 49 (plurality opinion). The petitioners nonetheless challenged Kentucky's three-drug protocol on the ground that, if prison executioners failed to follow the mandated procedures, an unconstitutional risk of significant pain would result. *Ibid.* A plurality of the Court concluded that "petitioners ha[d] not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol" would violate the prohibition on cruel and unusual punishments. *Id.*, at 41.

Pet. for Cert. 307a.[2] Although it can be used to render individuals unconscious, midazolam is not used on its own to *maintain* anesthesia—complete obliviousness to physical sensation—in surgical procedures, and indeed, the Food and Drug Administration has not approved the drug for this purpose. *Glossip*, 576 U. S., at ___ (SOTOMAYOR, J., dissenting) (slip op., at 5).

Like the experts in *Glossip*, the experts in this case agree that midazolam is subject to a ceiling effect, which means that there is a point at which increasing the dose of the drug does not result in any greater effect. *Ibid.* The main dispute with respect to midazolam relates to how this ceiling effect operates—if the ceiling on midazolam's sedative effect is reached before complete unconsciousness can be achieved, it may be incapable of keeping individuals insensate to the extreme pain and discomfort associated with administration of the second and third drugs in lethal-injection protocols. *Ibid.*

After the horrific execution of Clayton Lockett, who, notwithstanding administration of midazolam, awoke during his execution and appeared to be in great pain, we agreed to hear the case of death row inmates seeking to avoid the same fate. In *Glossip*, these inmates alleged that because midazolam is incapable of rendering prisoners unconscious and insensate to pain during lethal injection, Oklahoma's intended use of the drug in their execu-

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[2] Because "midazolam is not an analgesic drug, any painful stimulus applied to an inmate will generate and transmit full intensity pain signals to the brain without interference." App. to Pet. for Cert. 309a. Arthur's expert witness provides "a rough analogy":

"[I]f being sedated is like being asleep, analgesia is like wearing earplugs. If two people are sleeping equally deeply, but only one is wearing earplugs, it will be much easier to shout and wake the person who is not wearing earplugs. If two people are sedated to equivalent levels of electrical brain activity, but only one has analgesia, the person sedated without analgesia will be much more easily aroused to consciousness by the application of pain." *Ibid.*

tions would violate the Eighth Amendment. The Court rejected this claim for two reasons.

First, the Court found that the District Court had not clearly erred in determining that "midazolam is highly likely to render a person unable to feel pain during an execution." *Id.*, at ___ (slip op., at 16). Second, the Court held that the petitioners had failed to satisfy the novel requirement of pleading and proving a "known and available alternative" method of execution. *Id.*, at ___ (slip op., at 15).

Post-*Glossip*, in order to prevail in an Eighth Amendment challenge to a State's method of execution, prisoners first must prove the State's current method "entails a substantial risk of severe pain," *id.*, at ___ (slip op., at 2), and second, must "identify a known and available alternative method of execution that entails a lesser risk of pain," *id.*, at ___ (slip op., at 1).

II

This case centers on whether Thomas Arthur has met these requirements with respect to Alabama's lethal-injection protocol.

A

Alabama adopted lethal injection as its default method of execution in 2002. Ala. Code §15–18–82.1(a) (2011); see also *Ex parte Borden*, 60 So. 3d 940, 941 (Ala. 2007). The State's capital punishment statute delegates the task of prescribing the drugs necessary to compound a lethal injection to the Department of Corrections. §15–18–82.1(f). Consistent with the practice in other States following the national shortage of sodium thiopental and pentobarbital, the department has adopted a protocol involving the same three drugs considered in *Glossip*. See *Brooks* v. *Warden*, 810 F. 3d 812, 823 (CA11 2016).

Perhaps anticipating constitutional challenges, Ala-

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