

THIS IS A CAPITAL CASE

No. 16-6496

In the Supreme Court of the United States

STACEY JOHNSON, JASON McGEHEE, BRUCE WARD,
TERRICK NOONER, JACK JONES, MARCEL WILLIAMS,
KENNETH WILLIAMS, DON DAVIS, and LEDELL LEE

Petitioners

v.

WENDY KELLEY, in her official capacity
as Director, Arkansas Department of Correction,
and ARKANSAS DEPARTMENT OF CORRECTION

Respondents

On Petition for a Writ of Certiorari to the
Supreme Court of Arkansas

**SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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SUPPLEMENTAL BRIEF

Petitioners respectfully submit this supplemental brief to apprise the Court of a new case that has arisen since their last filing on December 22, 2016.

On January 26, 2017, the United States District Court for the Southern District of Ohio granted a preliminary injunction staying the executions of prisoners Ohio intends to execute using a midazolam-based protocol. *See In re Ohio Execution Protocol Litigation*, No. 11-1016 (S.D. Ohio Jan. 26, 2017) (attached as Addendum).¹ The court concluded the plaintiffs will likely show that Ohio's midazolam-based execution protocol—which is substantially equivalent to the protocols at issue both here and in *Arthur v. Dunn*, No. 16-602—violates the Eighth Amendment.

To reach that conclusion, the district court first determined, after a thorough 90-page discussion of the evidence, that “use of midazolam as the first drug in Ohio’s present three-drug protocol will create a ‘substantial risk of serious harm’ or an ‘objectively intolerable risk of harm’ as required by *Baze* [*v. Rees*, 553 U.S. 35 (2008)] and *Glossip* [*v. Gross*, 135 S. Ct. 2726 (2015)].” Add. 105a. The district court then discussed the availability of alternatives, finding that the plaintiffs had met their burden at the preliminary-injunction stage to show that compounded pentobarbital is an available alternative to Ohio’s current, constitutionally deficient protocol. The district court applied a practical standard for availability, noting that

¹ Ohio had been scheduled to conduct executions in February, March, and April of this year. In light of the district court’s ruling and the State’s appeal to the Sixth Circuit (discussed below), Ohio has rescheduled those executions; its next execution is now set for May 10, 2017. *See* Notice of Reprieve, *In re Ohio Execution Protocol Litigation*, No. 11-1016 (S.D. Ohio Feb. 10, 2017).

Ohio has sought FDA approval for the ingredients needed and is awaiting decision. Add. 106a. The court would not permit Ohio to moot the plaintiffs' claims by conducting executions absent adequate efforts to acquire a substantially safer drug that several other states have obtained—especially as Ohio has attempted to facilitate procurement by passing a law to shield drug suppliers. Add. 107a.

Ohio has appealed to the United States Court of Appeals for the Sixth Circuit. That court has expedited the appeal. Briefing is scheduled to be completed on February 17, 2017. The court will hear oral argument on February 21, 2017, and a decision is expected soon. However, the case will not be decided before the Court's next conference on February 17, 2017, at which the petitions in this case and in *Arthur* will be considered. The Sixth Circuit's decision is likely to further develop the lower courts' interpretation of what it means to plead and prove an available alternative method of execution—a question that has caused much confusion and that is ripe for consideration.

These developments heighten the need for review in this case for at least two reasons. First, the Ohio district court's detailed findings show that, in light of additional scientific scrutiny since the Court's decision in *Glossip*, midazolam does not render a condemned prisoner insensate to the intolerable pain that the second and third drugs in the protocol will undisputedly cause. Petitioners both here and in *Arthur* were prepared to make this showing, but the lower courts barred them from making it. Accordingly, they will be subjected to constitutionally intolerable suffering if the Court does not intervene. Second, the conflict between the district

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