**CAPITAL CASE**
**No. 17-**

IN THE
# Supreme Court of the United States

GARY OTTE, RONALD PHILLIPS, AND RAYMOND TIBBETTS,

*Petitioners,*

v.

RONALD ERDOS, *et al.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

## EXECUTION OF RONALD PHILLIPS SCHEDULED FOR JULY 26, 2017


DEBORAH WILLIAMS
FEDERAL PUBLIC DEFENDER
BY
ALLEN L. BOHNERT (OH 0081544)
ERIN G. BARNHART (OH 0079681)
ADAM M. RUSNAK (OH 0086893)
NADIA WOOD (MN 0391334)
OFFICE OF THE FEDERAL PUBLIC DEFENDER, SOUTHERN DISTRICT OF OHIO
10 W. Broad Street, Suite 1020
Columbus, OH 43215-3469
(614) 469-2999

*Co-Counsel for Raymond Tibbetts*

MARK E. HADDAD*
ALYCIA A. DEGEN
JOSHUA E. ANDERSON
KATHERINE A. ROBERTS
COLLIN P. WEDEL
ADAM P. MICALE
SIDLEY AUSTIN LLP
555 W. Fifth Street
40th Floor
Los Angeles, CA 90013
(213) 896-6000
mhaddad@sidley.com

*Counsel for all Petitioners*

* Counsel of Record


July 17, 2017

[Additional Counsel on Following Page]

DEBORAH WILLIAMS
FEDERAL PUBLIC DEFENDER
BY
LISA M. LAGOS (OH 0089299)
OFFICE OF THE FEDERAL PUBLIC DEFENDER, SOUTHERN DISTRICT OF OHIO
10 W. Broad Street, Suite 1020
Columbus, OH 43215-3469
(614) 469-2999

*Co-Counsel for Ronald Phillips*

TIMOTHY F. SWEENEY
LAW OFFICE OF TIMOTHY FARRELL SWEENEY
The 820 Building, Suite 430
820 West Superior Ave.
Cleveland, Ohio 44113-1800
216-241-5003

*Co-Counsel for Ronald Phillips*

JAMES A. KING
PORTER, WRIGHT, MORRIS & ARTHUR LLP
41 South High Street
Columbus, Ohio 43215
614-227-2051

*Co-Counsel for Raymond Tibbetts*

STEVE NEWMAN
FEDERAL PUBLIC DEFENDER
BY
VICKI WERNEKE (OH 0088560)
OFFICE OF THE FEDERAL PUBLIC DEFENDER, NORTHERN DISTRICT OF OHIO
1660 West 2nd Street
Suite 750
Cleveland, OH 44113
(216) 522-4856

*Co-Counsel for Gary Otte*

**CAPITAL CASE**

## QUESTIONS PRESENTED

Following a five-day preliminary hearing that included testimony from fourteen witnesses, the district court found that petitioners were likely to succeed on both their Eighth Amendment and judicial estoppel claims. The court then entered two independent preliminary injunctions corresponding to each claim, either one of which would have preserved the status quo for a full trial. The panel affirmed both injunctions but the Sixth Circuit, en banc, reversed.

The questions presented are:

1. Whether a district court's findings that a capital plaintiff has shown a likelihood of success in proving a "'substantial risk of serious harm' . . . as required by *Baze* and *Glossip*" and in "identify[ing] a sufficiently available alternative method of execution to satisfy *Baze* and *Glossip*" are subject to review for clear error, or whether, as the en banc Sixth Circuit held, findings under those standards constitute legal error and are subject to de novo review because Eighth Amendment plaintiffs must instead "prove their allegations to a high[er] level of certainty."

2. Whether the application of judicial estoppel is reviewed for abuse of discretion, as eleven circuits hold, or whether it is reviewed de novo, as the Sixth Circuit held.

## PARTIES TO THE PROCEEDING

Petitioners Gary Otte, Raymond Tibbetts, and Ronald Phillips are inmates currently imprisoned at the Chillicothe Correctional Institution.

Respondents are Ronald Erdos, Warden of the Southern Ohio Correctional Facility; John Kasich, Governor of the State of Ohio; Gary C. Mohr, Director of the Ohio Department of Rehabilitation and Correction; and Anonymous Execution Team Members 1-50, all sued in their official capacities.

There are no corporate parties involved in this case.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued



CONSTITUTION AND STATUTE



OTHER AUTHORITIES

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Gary Otte, Ronald Phillips, and Raymond Tibbetts respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS AND ORDERS BELOW

The opinion of the en banc United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-24a) is reported at — F.3d —, 2017 WL 2784503 (June 28, 2017). The order granting rehearing and vacating the panel opinion (Pet. App. 25a) is reported at 855 F.3d 702 (6th Cir. 2017). The vacated panel opinion (Pet. App. 26a-69a) is not reported. The order of the United States District Court for the Southern District of Ohio granting preliminary injunctions (Pet. App. 70a-123a) is reported at — F. Supp. 3d —, 2017 WL 378690 (Jan. 26, 2017).

## STATEMENT OF JURISDICTION

The Court of Appeals entered its en banc decision on June 28, 2017. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Section 1983 of Title 42 of the U.S. Code provides:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any

> citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

## INTRODUCTION

The district court distilled the core Eighth Amendment issue as whether "Ohio's present three-drug protocol will create a 'substantial risk of serious harm' . . . as required by *Baze* and *Glossip*." Pet. App. 117a. Relying on expert testimony that Ohio's protocol was virtually certain to impose severe pain, the district court held that petitioners were likely to succeed in their claim.

In the en banc majority's view, the district court's articulation of the applicable standard was legal error. The Sixth Circuit held that the district court should have applied a "more rigorous" standard, "requir[ing] plaintiffs to prove their allegations to a high level of certainty." Pet. App. 6a-7a. Having identified a legal error, the majority proceeded to re-weigh the evidence de novo, to make its own credibility findings, and to substitute its assessment of the record for that of the district court.

The majority's holding that it is legal error to base an injunction upon a finding that a method of execution creates a 'substantial risk of serious harm' . . . as required by *Baze* and *Glossip*" is irreconcilable with *Glossip* itself, and conflicts with the Eighth Amendment cases on which *Glossip* is based. Those cases do not support the majority's view that *Glossip*'s reference to a "risk that is '*sure or very likely* to cause serious illness and needless suffering,'" *Glossip* v. *Gross*,

135 S. Ct. 2726, 2737 (2015) (quoting *Baze* v. *Rees*, 553 U.S. 35, 50 (2008)), created a separate, materially more rigorous standard than, in the district court's phrasing, a "'substantial risk of serious harm' . . . as required by *Baze* and *Glossip*." Instead, the controlling opinions in *Baze* and *Glossip* pervasively refer to the "substantial risk" standard.

Had the Sixth Circuit accepted the legal standard as articulated in *Glossip* and in the district court's decision, it would have reviewed the decision under the clear error standard that *Glossip* also applied and that this Court has confirmed is applicable to constitutional challenges, see *Cooper* v. *Harris*, 137 S. Ct. 1455 (2017). Under that standard of review, the district court's findings are plausible, and so the preliminary injunction would and should have been affirmed.

That a sharply divided en banc court imposed a new and higher standard of proof than this Court has ever imposed in an Eighth Amendment case is reason enough to grant the petition. But the Sixth Circuit's decision also deepens a circuit split on another important issue—the standard of review for judicial estoppel. The district court separately enjoined the State from using two painful drugs based on judicial estoppel. By deciding to adopt the three-drug protocol, Ohio broke its prior and unequivocal promises never again to use a paralytic or potassium chloride in its executions, even though these promises had enabled Ohio to moot challenges to Ohio's prior use of those same two drugs. See *Already, LLC* v. *Nike, Inc.*, 568 U.S. 65, 93 (2013) ("formidable burden" of mootness met only by showing that voluntary change is "irrevocable"). Because the district court applied the same three factors that this Court has identified as most typically appropriate for consideration of judicial estoppel, it did not abuse its discretion. By applying de novo review to this

aspect of the district court's ruling as well, the Sixth Circuit deepened its isolation as the only circuit firmly committed to reviewing judicial estoppel de novo.

The effect of the Sixth Circuit's estoppel ruling, no less than its Eighth Amendment ruling, is to deny petitioners a full trial on the merits. A full trial on the midazolam protocol is long overdue and desperately needed. In *Glossip*, this Court did not enshrine the preliminary factual findings of a single district judge in Oklahoma as enduring constitutional law; it merely found that those findings did not constitute clear error. Since *Glossip*, the evidence that the midazolam protocol inflicts severe pain on the condemned inmates has grown more compelling; two district court judges (in Ohio and Arkansas) have heard different experts and new evidence and concluded that the protocol is likely unconstitutional. The Sixth Circuit's decision to substitute its reading of the record for that of the trial judge who heard live testimony has no basis in *Glossip* or appellate procedure, and forecloses a capital litigant from obtaining the basic procedural fairness afforded other litigants. As this Court has elsewhere held, where "the underlying constitutional question is [at least] close," the harm is irreparable, and a trial will allow for presentation of evolving science, a court should affirm a preliminary injunction. *Ashcroft* v. *ACLU*, 542 U.S. 656, 664-65 (2004).

## STATEMENT OF THE CASE

1. In 2009, Ohio was facing a trial in this case about the constitutionality of using two indisputably painful drugs—a paralytic that suffocates a person yet restricts their ability to move or express pain, and potassium chloride, which causes excruciating pain and stops the heart. Shortly before the trial was to begin,

Ohio abruptly removed those two drugs from its execution protocol, becoming the first State to rely solely on a large dose of a barbiturate.

Ohio then invoked that change to argue that then-pending challenges to the constitutionality of its three-drug method and indeed the "entire case by all inmates was moot." Ohio Supp. Br. at 21-22, No. 17-3076 (May 10, 2017) (ECF No. 62). Ohio based this argument on its unequivocal promise, supported by the sworn declaration of "the highest official," R. 982, PageID 37099 (quoting the Director of the Ohio Department of Rehabilitation and Correction), that "pancuronium bromide and potassium chloride no longer will be used in Ohio's lethal injection process." R. 966-2, PageID 34330; see *id.* at 34329 (asserting that "[t]here [wa]s absolutely no reason to believe" the State would revert "if the plaintiffs' suits were dismissed"); see also R. 966-3, PageID 34335; R. 966-4, PageID 34358.

Based upon these promises, the Sixth Circuit and the district court concluded that all claims challenging Ohio's use of a paralytic and potassium chloride were moot. See *Cooey* v. *Strickland* 588 F.3d 921, 923 (6th Cir. 2009) (per curiam) (holding Ohio's promises met the "heavy burden of showing that this voluntary change in procedure" was permanent, the challenged conduct would not recur, and "any challenge to Ohio's three-drug execution protocol is now moot"); R. 966-10, PageID 34454, 34471-74 (district court observing that all prisoners' motions likely "moot" in the wake of the Sixth Circuit's mootness ruling, and asking parties to withdraw pending motions). The Sixth Circuit then repeatedly reaffirmed that Ohio's promise to abandon those drugs made further litigation about them moot. *E.g.*, *Reynolds* v. *Strickland*, No. 08-4144 (6th Cir. Feb. 8, 2010) (ECF No. 180-1). By promising that it no longer would use a paralytic and potassium chloride,

Ohio succeeded in clearing all Eighth Amendment challenges to those drugs, and thereafter carried out twenty lethal injections.

2. On October 3, 2016, Ohio announced that it would renege on its prior promises and return to using a paralytic and potassium chloride. The only difference between Ohio's present proposed lethal injection method and the one it abandoned in 2009 is that instead of using a barbiturate as the first drug, Ohio intends to use what all agree is a less effective drug, midazolam.

Ohio's announcement surprised petitioners because other States continue to use pentobarbital to execute inmates. Pet. App. 113a. And Ohio itself carried out an execution in 2014 without the abandoned drugs; it executed Dennis McGuire with midazolam and hydromorphone. Ohio also has taken key steps toward acquiring compounded pentobarbital, including passing statutes to protect the anonymity of sources, successfully defending those statutes in litigation, obtaining a broad protective order in the district court, and applying for the license required to buy the drug's active ingredient. *Id.* at 118a.

Testimony later revealed that Ohio devised its plan to renege nearly six months before disclosing it. Respondents admitted making a "strategic decision" to "conceal the switch" until last October, forcing petitioners to challenge the method on a rushed basis. Pet. App. 20a (Moore, J., dissenting); see R. 941, PageID 31862-63. At that time, petitioners' execution dates were scheduled for January 12, 2017 (Phillips), February 15, 2017 (Tibbetts), and March 15, 2017 (Otte).

3. In response to Ohio's new protocol, petitioners filed motions for preliminary injunctions. The district court held a five-day evidentiary hearing on those motions, beginning on January 3, 2017. The district court

heard testimony from fourteen witnesses, including two experts for each side.

On January 26, 2017, the court issued a 119-page decision, granting petitioners two preliminary injunctions, one enjoining the State under the Eighth Amendment from using its proposed three-drug method, and the other enjoining the State under judicial estoppel from using a paralytic or potassium chloride.

a. To support its conclusion 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* and *Glossip*," Pet. App. 117a, the district court began by "find[ing] that administration of a paralytic drug and potassium chloride will cause a person severe pain." *Id.* With respect to the paralytic, which causes severe pain distinct from that caused by potassium chloride, the court found "that realizing one is unable to breathe and is therefore likely to be terrified and equating that phenomenon with severe suffering has not been refuted." *Id.*

The district court then explained its finding, "from both the expert opinions and the lay descriptions," that "deep sedation" (which midazolam can produce) and "general anesthesia" (which barbiturates, but not midazolam, produce) "are distinct." Pet. App. 117a. As the court summarized the expert testimony, "if a person who is sedated is exposed to increasingly severe stimulation, that person will eventually respond, but a person under general anesthesia would not respond to even the most painful stimulus." *Id.* at 88a. "[B]ecause the 'responsiveness' associated with general anesthesia is 'unarousable even with painful stimulus,' that is the state in which you would want a condemned inmate to be." *Id.*

To counter the inadequacy of midazolam to render an inmate insensate to the pain of the other two drugs, Ohio argued that midazolam obscures the memory of pain. But, while deep sedation may prevent *remembrance* of "inflicted pain," the court explained, "[t]hat does not mean the pain was not inflicted." Pet. App. 117a. The court acknowledged that the lack of peer-reviewed human studies of the quantities of midazolam used in executions meant it was hard to know "precisely why" midazolam operates differently than a barbiturate. *Id.* But it found those differences exist and are evident in inmates executed with midazolam. *Id.*

Petitioners' experts provided ample testimony, to which the district court referred at length, to explain why using midazolam as the first drug would cause severe pain. Dr. Craig Stevens, a Professor of Pharmacology at the Oklahoma State University, explained that midazolam works by helping a neurotransmitter called "GABA" bind to a receptor site on a neuron, depressing neural activity. Pet. App. 86a-87a. Midazolam can affect receptors only in tandem with GABA. *Id.* Because midazolam's effect is limited by the amount of GABA present, there is a "ceiling" on midazolam's effect. *Id.* at 87a-88a. Barbiturates, like pentobarbital, do not need GABA to be effective. Thus, unlike midazolam, the effectiveness of barbiturates increases with additional doses, from sedation, to sleep, to anesthesia, to coma, to death. *Id.* at 88a.

Dr. Sergio Bergese, Professor of Anesthesiology and Neurological Surgery at the Ohio State University, has practiced as an anesthesiologist for 25 years, is internationally recognized as an expert in human consciousness, and has only rarely agreed to provide expert testimony in any litigation, let alone capital litigation. Pet. App. 91a; R. 923, PageID 30812-18; R. 844-

1, PageID 24992-5161. Dr. Bergese is not an opponent of capital punishment; his concern for what is occurring in midazolam-protocol executions, however, persuaded him to participate here. R. 923, PageID 30845. According to Dr. Bergese, physical activity such as movement under sedation with midazolam, Pet. App. 94a, and purposeful movements such as fist clenching and unclenching, opening and closing of eyes, and inmates appearing to be speaking, indicates that the prisoners were not insensate at the time the second and third drugs were injected, *id.* at 95a-96a. Dr. Bergese testified that a prisoner's purposeful movement, such as the clenching and unclenching of fists, requires a more active brain and indicates a higher level of consciousness. *Id.* at 95a-97a. Other activity, such as the speech observed during recent executions, indicates a higher level of consciousness. *Id.* at 96a.

Dr. Bergese also explained that movement signals a patient is on the path to regaining consciousness and thus experiencing pain; such occurrence would be addressed in a medical setting by "immediately giv[ing] more anesthetic." *Id.* at 94a. Respondents' expert, Dr. Joseph Antognini, agreed with that point. *Id.* at 102a. The district court credited the testimony that differentiated "between involuntary movement and voluntary movement, [which] requires a much higher state of consciousness." Pet. App. 95a.

Dr. Bergese based portions of his testimony on the observations of eyewitnesses to several recent midazolam-based executions. Ohio had challenged such testimony because as biased in favor of the prisoners. But the district court found that these eyewitnesses were credible despite the potential for bias. Pet. App. 84a. The court noted that "their testimony was carefully confined to observations rather than opinions," in "contrast[] with some press characterizations of some of

these executions as 'botched,' 'horrendous,' 'barbaric,' and so forth. These witnesses were carefully professional in not adding advocatory characterizations to their observations." *Id.*

Petitioners' experts both concluded that Ohio's protocol was virtually certain to cause prisoners to suffer severe pain and suffering. Dr. Stevens testified that "[u]se of midazolam as the first drug in the State's three-drug lethal injection protocol *is highly likely to cause intolerable and severe pain* and suffering in the condemned inmate." Pet. App. 86a (emphasis added and citation omitted); see also *id.* ("Midazolam in any amount cannot render and maintain the condemned inmate unaware and insensate to pain."). Dr. Stevens reaffirmed that conclusion at the hearing to a "reasonable degree of scientific certainty." *Id.* at 91a.

Likewise, Dr. Bergese opined that "it is a virtual certainty, based on the only data from real-world applications of midazolam of the amounts used in lethal injection executions," that Ohio's three-drug protocol will subject prisoners to "a severely painful, torturous death process." Pet. App. 92a; see also *id.* ("No amount of midazolam can" "induce and maintain a state of being unaware and insensate deep enough to withstand" the "pain associated with the second and third" drugs, which "would be excruciating, equivalent or worse than the pain associated with a major surgical intervention with no anesthesia."); *id.* ("Leading medical texts, pharmacological references, and research papers confirm midazolam cannot induce and maintain a sufficiently deep state of unawareness and being insensate in the presence of painful stimuli."). Like Dr. Stevens, Dr. Bergese also testified at the hearing that he "absolutely" agreed, also "to a reasonable degree of medical certainty," that Ohio's three-drug protocol will inflict "a substantial risk of pain and suffering." *Id.* at

97a. Asked to quantify the level of risk posed by Ohio's procedures here, Dr. Bergese testified that he was "100 percent certain that the dosage level of midazolam called for in Ohio's execution protocol will not render the inmate insensate to the noxious stimuli of the second and third drugs in the protocol." *Id.*

Based on this written and oral testimony, and on "reasonable inferences" from the decisions of both Florida and Arizona to abandon the use of midazolam-based execution protocols, the Court found that petitioners are likely to succeed in showing that there is a substantial risk that they will suffer serious harm from the State's three-drug protocol. Pet. App. 117a.

b. The district court also found that petitioners were likely to succeed in showing that pentobarbital is available to Ohio. Pet. App. 118a. The district court witnessed the live testimony of Ohio's expert, who "maintain[ed] [his] belief that there are pharmacists in the United States that are able to compound pentobarbital for use in lethal injections," R. 925, PageID 31440-41, who observed that "other states . . . have obtained compounded pentobarbital for use in executions," Pet. App. 113a, and who affirmed his belief that pentobarbital "could be obtained," *id.* Ohio argued that its prior, failed attempts to obtain pentobarbital proved that it was unavailable to the State. But the district court acknowledged those past attempts and found them unpersuasive, particularly given the confidentiality that Ohio provides to those who would compound pentobarbital and Ohio's pending application for a license to import the active ingredients. *Id.* at 118a.

The court also was aware that Ohio's efforts to obtain pentobarbital have been exceptionally meager. Ohio asserted it did not have an entity lined up to com-

pound pentobarbital for it, but the district court presided over the testimony of the Ohio official responsible for obtaining execution drugs, who testified that Ohio had never even asked its compounding pharmacy if it would compound execution drugs once Ohio obtained the requisite ingredients. See R. 905-1, PageID 30226-27, 30257. Further, since announcing its decision to switch to the midazolam method, Ohio has had no contact with that compounder. *Id.* Finally, respondents claimed to have asked three other States that use pentobarbital in executions if they would provide it to Ohio, and reported only that each State said it would not do so. *Id.* at 30313-14. Respondents also asked the same limited question to four States that do not use pentobarbital. *Id.*

Petitioners separately showed that, regardless of pentobarbital's availability, another less-painful alternative to the three-drug protocol was immediately available to Ohio, which is a two-drug protocol of midazolam and potassium chloride. The method is immediately available and less painful because it omits one of the two painful drugs that Ohio otherwise would use and thus eliminates any risk of experiencing suffocation, and because it refrains from administering the remaining painful drug unless and until the midazolam has rendered the inmate insensate to pain through the use of monitoring equipment that is readily available and routinely used. See, *e.g.*, R. 784, PageID 23750-51; R. 868-1, PageID 28016-22; R. 941, PageID 31858-61; R. 940, PageID 31607-08; R. 923, PageID 30872-73. Because the district court enjoined Ohio from using potassium chloride as part of the separate injunctive relief for estoppel, however, the district court did not reach this alternative.

c. The district court also preliminarily enjoined the State, on the basis of judicial estoppel, from using "any

lethal injection method which employs either a paralytic agent or potassium chloride." Pet. App. 123a. The district court found that Ohio's unequivocal promise, in 2009, never again to use a paralytic or potassium chloride, was "completely inconsistent" with its present intention to revert to those drugs. *Id.* at 121a-122a. Those promises had enabled Ohio to persuade the Sixth Circuit that Ohio had met its "heavy burden of showing that this voluntary change in procedure" was permanent, and that the challenged conduct would not recur. *Id.* at 121a (citing *Cooey*, 588 F.3d at 923). Consequently, the district court found that petitioners were likely to succeed on the merits of their judicial estoppel claim, and enjoined respondents on that basis as well.

4. On April 6, 2017, a divided Sixth Circuit panel upheld both preliminary injunctions. Pet. App. 26a-55a. Judge Kethledge dissented. *Id.* at 58a-69a. On April 25, 2017, the Court of Appeals vacated the panel opinion and voted to rehear the case en banc. Pet. App. 25a. The parties filed 25-page supplemental briefs, and the en banc court heard oral argument on June 14, 2017. *Id.*

On June 28, 2017, eight of the fourteen judges on the en banc panel voted to reverse the district court and to dissolve both of its injunctions. Pet. App. 1a-24a. Judge Kethledge, writing for the majority, held that the district court committed legal error by finding that petitioners had established only a "substantial risk of serious harm," rather than the "more rigorous showing" that "the method of execution is *sure or very likely* to cause serious pain," a standard that, according to the majority, "requires the plaintiffs to prove their allegations to a high level of certainty." *Id.* at 6a-7a. Based on that purported legal error, the majority pro-

ceeded to review the record de novo. The majority concluded that petitioners "have shown some risk that Ohio's execution protocol may cause some degree of pain," *id.* at 9a, but found, upon de novo review, that petitioners' "evidence is far from compelling" and did not meet the high level of certainty that *Glossip* ostensibly requires, *id.*

The Sixth Circuit also held that the district court's standard for assessing the availability of pentobarbital was "seriously mistaken," and again reviewed its findings de novo. Pet. App. 9a. In the majority's reweighing of the evidence, it found that pentobarbital was not "available" to Ohio under *Glossip*, and did not discuss petitioners' second alternative.

Finally, nine judges[1] concluded that petitioners' judicial estoppel claims were "meritless." Pet. App. 10a. Despite acknowledging the Sixth Circuit's split from eleven other courts of appeals on the proper standard of review, the majority reaffirmed the Sixth Circuit's anomalous commitment to de novo review, rather than abuse of discretion. *Id.* The majority did not dispute either that Ohio's past promises were contrary to its present positions or that Ohio succeeded in convincing the courts to accept the permanence of those promises. Instead, the majority held that petitioners did not show how "they have been harmed" by Ohio's past promises to moot the prior case, and that Ohio's claimed—but unproven—inability to obtain other drugs immunized it from the consequences of estoppel. *Id.*

Six judges dissented from the majority's opinion on the Eighth Amendment. Writing for the dissenters,

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[1] Judge White, who joined the dissenters as to the Eighth Amendment claim, joined the majority's judicial estoppel ruling. Pet. App. 1a.

Judge Moore emphasized the majority's failure to apply the proper standard of review to the district court's factual findings, its failure to address this Court's controlling decisions in *Cooper* and *Ashcroft*, and its construction of an inappropriately arduous legal standard for proving likelihood of experiencing severe pain. Pet. App. 14a. As to estoppel, Judge Moore criticized the majority for "reward[ing]" Ohio for "strategic" litigation representations that "undermine[d] the integrity of this litigation." Pet. App. 23a. The dissent also criticized the majority for failing to correct the Sixth Circuit's split from its sister circuits as to the proper standard of review for judicial estoppel. *Id.* at 21a & n.1. The dissent would have upheld both of the district court's injunctions.

5. Petitioner Phillips is the first prisoner Ohio is set to execute using the three-drug protocol, on July 26, 2017. Ohio's governor selected this date and can move it at his sole discretion, as he has repeatedly done in the past, including three times since the new protocol was announced last October.[2] The governor has scheduled the executions of petitioners Otte and Tibbetts for September 13, 2017, and October 18, respectively. Petitioners have separately filed an application to stay those executions—but only to the extent Ohio intends to use the methods enjoined by the district court—pending this Court's disposition of this petition.

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[2] *See, e.g.*, Ohio Rev. Code Ann. § 2967.08 ("The governor may grant a reprieve for a definite time to a person under sentence of death, with or without notices or application.").

## REASONS FOR GRANTING THE PETITION

The standard of review for a district court's findings of a "substantial risk of serious harm" is "the deferential 'clear error' standard." *Glossip*, 135 S. Ct. at 2731, 2737, 2739. This Court recently removed any doubt that, under that standard of review, a court's "plausible" findings must be affirmed. *Cooper*, 137 S. Ct. at 1465, 1468.

The en banc majority did not apply clear error review because it found a legal error below—a failure to find a risk of harm at "a high level of certainty." Pet. App. 6a-7a. The announcement of this new and even more rigorous standard than what *Glossip* applied was outcome determinative. It allowed the en banc majority to review the record de novo, and thus to substitute its own views of the evidence for those of the district court.

This Court's decisions strongly suggest that the Sixth Circuit erred. Nothing in *Glossip* or in *Baze* supports isolating the phrase "'*sure or very likely* to cause serious illness and needless suffering,'" *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 50), as the majority did here, to create a more rigorous standard that is materially different than, and cannot be satisfied by showing, a "substantial risk of serious harm." To the contrary, this Court's Eighth Amendment jurisprudence has long held that a showing of "substantial risk of serious harm," as the district court found here, suffices to establish an Eighth Amendment claim. Under that standard, which the district court expressly applied, its plausible findings would and should have been affirmed.

It is especially important for the Court to address the Sixth Circuit's unwarranted revision of the legal standard for challenging the constitutionality of a method of execution, because the stakes are high.

There have been a number of troubling midazolam-related executions recently, including several since *Glossip* and the district court's ruling. Two states have formally abandoned midazolam. And two district courts—the court below and a district court in Arkansas—now have found plaintiffs likely to succeed in challenging midazolam's constitutional adequacy. The judges who have heard the witnesses have found their concerns about the severe pain that a midazolam-based protocol will cause to be compelling.

Unlike the plaintiffs in the Arkansas cases, petitioners here have not been dilatory in litigating their claims. And, unlike Arkansas, Ohio has not argued that its midazolam is about to expire. Ohio also remains free, even under the injunctions, to carry out executions using other available methods. Here, too, there is a separate basis under judicial estoppel for enjoining Ohio from using the two painful drugs in the protocol. The en banc court overturned that separate injunction only by applying a de novo standard of review of estoppel rulings that eleven other circuits reject. The issues presented here are of exceptional importance, and the Court should grant review to resolve them.

## I. THE SIXTH CIRCUIT'S REFUSAL TO REVIEW FOR CLEAR ERROR THE DISTRICT COURT'S FACTUAL FINDINGS UNDERLYING PETITIONERS' EIGHTH AMENDMENT CLAIM CONFLICTS WITH THIS COURT'S DECISIONS.

An Eighth Amendment method-of-execution challenge has two elements. Plaintiffs must show both: (1) a "substantial risk of serious harm" or "severe pain," and (2) "an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Glossip*, 135 S. Ct. at 2737

(quoting *Baze*, 553 U.S. at 50, 52). The "deferential 'clear error' standard" applies to a district court's findings for both elements. *Id.* at 2739.

### A. The Sixth Circuit Improperly Rejected *Glossip* And *Baze*'s "Substantial Risk Of Serious Harm" Standard.

1. Absent an error in the legal standard, the consequence of *Glossip*'s clear error requirement for a method-of-execution challenge is plain: When, as here, "a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 575 (1985). Review for clear error requires an appellate court to affirm even if the reviewing court "is convinced that it would have decided the [matter] differently." *Id.* at 573.

Any doubt about the level of constraint that clear error review imposes upon appellate courts was dispelled in *Cooper*. In *Cooper*, the State of North Carolina asked this Court to conduct a "searching review" of the record, rather than a review for clear error, in deference to the holdings of North Carolina's state courts that rejected the same constitutional challenge to the same two congressional districts. 137 S. Ct. at 1467. This Court refused to do so, however, explaining that "the very premise of clear error review is that there are often 'two permissible'—because two 'plausible'—views of the evidence." *Id.* at 1468 (quoting *Anderson*, 470 U.S. at 574). A reviewing court should be "even less likely to disturb a factual determination when 'multiple trial courts have reached the same finding.'" *Id.* (quoting *Glossip*, 135 S. Ct. at 2740). But

review for clear error "contains no exception for findings that diverge from those made in another court." *Id.* "A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Id.* at 1465.

2. The Sixth Circuit avoided the deferential review that *Glossip* and *Cooper* otherwise required by holding that the district court committed a legal error. The court acknowledged the district court's finding of "a 'substantial risk of serious harm' . . . as required by *Baze* and *Glossip*." Pet. App. 6a. The en banc majority nevertheless deemed that standard constitutionally insufficient, and found that the district court erred by not expressly finding that petitioners had made even a "more rigorous showing—that the method of execution is *sure or very likely to* cause serious pain," *id.* at 6a. According to the majority, the "sure or very likely" language from *Baze* and *Glossip* creates a materially separate standard that renders irrelevant a showing that the risk of serious harm is "substantial," and instead "requires the plaintiffs to prove their allegations to a high level of certainty." *Id.* at 7a.

This finding of legal error was outcome determinative. The majority conducted a de novo reweighing of the evidence and an appellate reassessment of witness credibility. The majority's de novo review gives great weight to evidence favorable to the State, Pet. App. 8a-9a (citing testimony about observations of movements from patients under anesthesia), attacks the credibility of petitioners' experts, see *id.* at 7a (characterizing test results as "highly speculative" and questioning the strength of data), ignores the district court's findings of the credibility of petitioners' witnesses, *e.g.*, *id.* at 15a-16a (Moore, J., dissenting), ignores or denigrates other evidence favorable to petitioners, *id.* at 9a (calling evidence of consciousness in other executions

"far from compelling"), criticizes the district court for failing to "offer much reasoning in support of its decision," *id.* at 6a, and faults the district court for reaching findings that are different from those reached by other courts faced with similar evidence, *id.* at 6a-9a (discounting executions that predated *Glossip* as having "little probative value").

This independent appellate fact-finding would have been impermissible under review for clear error. The district court's findings were based on extensive lay and expert testimony and grounded expressly in *Glossip*'s language. At the very least, the district court's findings were "plausible" and such findings "must govern." *Cooper*, 137 S. Ct. at 1465.

3. The en banc majority's imposition of a new standard that "[f]airly or not, . . . requires the plaintiffs to prove their allegations to a high level of certainty," Pet. App. 7a, misrepresents what this Court held in Glossip and cannot be squared with this Court's earlier Eighth Amendment jurisprudence.

*Glossip* held that a district court "did not commit clear error when it found that the prisoners failed to establish . . . a substantial risk of severe pain." 135 S. Ct. at 2731. The Court drew that standard from *Baze*, in which a plurality "reject[ed] [a] proposed 'unnecessary risk' standard" in favor of requiring prisoners to show a "substantial risk of serious harm." 553 U.S. at 51-52. *Baze* and *Glossip* express the applicable standard in slightly different terms, with both decisions holding that "[a] stay of execution may not be granted . . . [without] a demonstrated risk of severe pain." *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 61).

Although both *Baze* and *Glossip* use the phrase "sure or very likely" when discussing the level of risk required when a claim involves merely "serious *illness* or *needless* suffering," see *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 50) (emphasis added), neither decision requires a plaintiff facing excruciating pain to establish that risk to a "high level of certainty," Pet. App. 7a, or, at least not to a degree that is materially distinct from showing a "substantial risk of serious harm." The phrase "sure or very likely" appears in *Baze*'s plurality opinion only once, whereas the plurality uses "substantial risk" (or a variant, like "the risk is substantial") twelve times. Similarly, *Glossip* uses "sure or very likely" only four times, but refers to a "substantial" risk eleven times. It is inconceivable that this Court would have discussed, at such length, the standard of "substantial risk" if it meant to convey, as the Sixth Circuit now holds, that a district court commits clear error when it finds that a plaintiff has shown a "'substantial risk of serious harm' . . . as described in *Baze* and *Glossip*."

The new "high certainty" requirement also distorts the earlier Eighth Amendment cases from which *Baze* and *Glossip* derived the applicable standard. In *Helling* v. *McKinney*, 509 U.S. 25 (1993), a prisoner sued about a risk of harm from second-hand smoke. *Id.* at 28. This Court noted that it was clear that an official could not "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year." *Id.* at 33. There, however, the evidence of harm was weak and the science was equivocal. *Id.* Nevertheless, this Court declined the United States' request to reverse because the risk was "speculative," and held that the Eighth Amendment is satisfied by showing that defendants

"have, with deliberate indifference, exposed [a plaintiff] to levels of [second-hand smoke] that pose an *unreasonable risk* of serious damage to his future health." *Id.* at 34-35 (emphasis added).

In the following term, in *Farmer* v. *Brennan*, 511 U.S. 825 (1994), this Court rejected a standard nearly identical to the en banc majority's here. *Farmer* involved the claims of a transgender prisoner about the risk of abuse by other prisoners, and asked this Court to define "deliberate indifference" to risk. *Id.* at 828, 834-35. The Court explained that the harm "must be[] objectively 'sufficiently serious,'" and the risk must be "substantial." *Id.* at 834. Although *Farmer* declined to address "[a]t what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes," *id.* at 834 n.3, it made clear, contrary to the Sixth Circuit's holding here, that "an Eighth Amendment claimant *need not show* that a prison official acted or failed to act believing *that harm actually would befall an inmate*; it is enough that the official acted or failed to act despite his knowledge of *a substantial risk of serious harm*." *Id.* at 842 (emphases added). Further confirming the rejection of a rule requiring certainty, in discussing that "substantial risk" standard, the *Farmer* opinion repeatedly cited *Helling* without ever once repeating the phrase "sure or very likely."

The Sixth Circuit's newly announced standard thus conflicts with this Court's prior decisions, which require a plaintiff to show a "substantial risk" of serious harm or severe pain and reject a standard of near-certainty. A heightened standard of likelihood is particularly inappropriate where, as here, the consequence at issue is not merely needless suffering but excruciating pain. A district court does not commit reversible error

by issuing an injunction based upon a finding of a "substantial risk of serious harm" when that is precisely the standard this Court's decisions direct the lower courts to apply.

4. This Court's clarification of the proper Eighth Amendment standard for challenges to methods of execution is imperative because the stakes here are high. There is mounting evidence that the three-drug protocol Ohio seeks to use is unconstitutionally painful. See Frank Green, *Pathologist Says Ricky Gray's Autopsy Suggests Problems with Virginia's Execution Procedure*, Rich. Times-Dispatch, July 7, 2017, https://goo.gl/grwsvU (describing autopsy results from execution of Ricky Gray, according to a pathologist, as "more often seen in the aftermath of a sarin gas attack than in a routine hospital autopsy," and indicating possibly "severe" and "unbearable" "panic and terror"); Ed Pilkington & Jacob Rosenberg, *Fourth and Final Arkansas Inmate Kenneth Williams Executed*, Guardian, Apr. 28, 2017, https://goo.gl/E2KPZ7 ("Eyewitnesses . . . reported that his whole body shook with 15 or 20 convulsions * * * in which his body was described as 'shaking,' he lurched forwards quickly multiple times, and he moaned and groaned."). Whether the midazolam protocol carries a substantial risk of imposing this level of pain is an extraordinarily important question, not simply for the individual petitioners, but for the nation.

Two states—Arizona and Florida—have now abandoned use of midazolam, Pet. App. 84a, 117a, and Arizona has further abandoned use of a paralytic, see *First Amend. Coal. of Ariz.* v *Ryan*, No. 2:14-cv-01447-NVW (D. Ariz. June 22, 2017) (ECF No. 186). Also since the district court here entered its preliminary injunction, another federal court found a likelihood of success based on similar evidence. See *McGehee* v.

*Hutchinson*, No. 4:17-CV-00179 KGB, 2017 WL 1399554, at *49 (E.D. Ark. Apr. 15), *vacated*, 854 F.3d 488 (8th Cir.), *cert. denied*, 137 S. Ct. 1275 (2017). Although the ruling in the Arkansas challenge was later overturned, the circumstances here are different: Ohio has not argued that its midazolam is about to expire, and it remains free to carry out executions using other methods. Unlike in Arkansas, there is no concern here that a temporary stay would effectively decide the case, and no question about petitioners' diligence in bringing this challenge. And here, petitioners' experts testified that severe pain was "highly likely" and a "virtual certainty," Pet. App. 7a, 91a, 92a, 93a, which alone would support upholding the injunction even under the "more rigorous" standard imposed by the en banc majority, *id.* at 6a. Accordingly, this Court should grant review to resolve these exceptionally important issues.

### B. The Sixth Circuit Improperly Substituted Its Judgment On Availability For That Of The District Court.

The Sixth Circuit also erred, in two independent respects, in overturning the district court's finding that petitioners were likely to succeed in showing the availability of an alternative method of execution. Pet. App. 118a.

1. *Glossip* did not have occasion to fully define "availability" because there the petitioners "d[id] not seriously contest" that pentobarbital was unavailable, and "[i]nstead . . . argue[d] that they need not identify a known and available" alternative. 135 S. Ct. at 2738. As a result, the definition of availability has led to some division among lower courts. The Eleventh Circuit holds, for instance, that an alternative must be ready to use immediately, its seller specifically identified and willing to sell it to the state, and the method

expressly authorized by statute. *Arthur* v. *Comm'r, Ala. Dep't of Corrs.*, 840 F.3d 1268, 1301-02 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 725 (2017). The Eighth Circuit rejected the Eleventh Circuit's approach as too extreme, and held that "the State must have access to the alternative and be able to carry out the alternative method relatively easily and reasonably quickly." *McGehee* v. *Hutchinson*, 854 F.3d 488, 493 (8th Cir.) (per curiam), *cert. denied*, 137 S. Ct. 1275 (2017). And the Sixth Circuit's holding here—that a State "need not already have the drugs on hand," but "should be able to obtain the drugs with ordinary transactional effort," Pet. App. 10a—provides yet another articulation of "availability." This division alone would merit this Court's clarification.

The Sixth Circuit did not evaluate whether the district court's findings could plausibly satisfy the majority's "ordinary transactional effort" standard, but simply reassessed the record de novo. Pet. App. 9a-10a. A district court's findings of fact as to availability should not be lightly overturned, however, where, as here, they are not ineluctably tethered to an improper legal standard and where they are based on witness credibility.

The district court found, based on the testimony of one of the State's own expert, that pentobarbital "could be obtained." Pet. App. 113a. That conclusion is plausible because pentobarbital continues to be used in executions in other States. *Id.* The district court acknowledged Ohio's past difficulties in obtaining pentobarbital, but found that history unpersuasive given recent developments that have cleared several prior impediments to obtaining the drug. *Id.* at 118a. It would also be plausible to conclude, based on the district court's observation of the testimony of the official charged with obtaining drugs for Ohio, see R. 905-1,

PageID 30226-27, 30257, that the district court would view respondents' meager attempts to obtain pentobarbital as insufficient to constitute "ordinary transactional effort." See *Anderson*, 470 U.S. at 575 ("[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."). Under the proper standard of review, the district court's preliminary findings were entitled to deference and should have been affirmed.

2. Even if this Court were to conclude that the district court erred in finding a likelihood of success in proving that pentobarbital was an available alternative, the en banc majority's ruling on the risk-of-harm standard would still warrant plenary review. This is because petitioners separately established below that Ohio has immediate access to another significantly less painful alternative, and one that meets any conceivable standard of availability.

This alternative is a two-drug protocol of midazolam and potassium chloride. Because this alternative involves two of the three drugs that Ohio plans to use, it unquestionably is available. This alternative also would be significantly less painful than Ohio's current protocol, because it would omit use of the paralytic and because it would provide additional prophylactic measures to ensure that midazolam would have its claimed maximum effect before administration of the potassium chloride.

The district court had no reason to address this alternative given its other findings. But the injunction based on the Eighth Amendment plainly cannot be overturned on availability grounds without addressing this independent alternative. See Pet. App. 16a-17a (Moore, J., dissenting). If, as the en banc majority held, pentobarbital is *not* available to Ohio, then petitioners

"are entitled to a finding" as to whether this available alternative "satisfies the *Baze*/*Glossip* standard," *id.*, as one other district court has held it may, see *First Amend. Coal. of Ariz.* v. *Ryan*, 188 F. Supp. 3d 940, 950 (D. Ariz. 2016).

* * *

Where, as here, "the potential harms from reversing the injunction outweigh those of leaving it in place by mistake," then this Court's guidance is clear: "If the underlying constitutional question is close, [courts] should uphold the injunction and remand for trial on the merits." *Ashcroft*, 542 U.S. at 664-65, 670; see also *Brown* v. *Chote*, 411 U.S. 452, 457 (1973) (providing that courts should be cautious in reversing a preliminary injunction where, as here, "grave, far-reaching constitutional questions [are] presented," because the initial order is often reached on a limited record produced by rushed litigation, and does not resolve "the ultimate merits"). The constitutionality of the midazolam protocol is a profoundly important constitutional question, and the Court should require that the lower courts consider that question under established principles of Eighth Amendment and appellate review.

## II. THE SIXTH CIRCUIT'S DE NOVO REVIEW OF JUDICIAL ESTOPPEL EXACERBATES A SPLIT WITH ELEVEN OTHER CIRCUIT COURTS OF APPEALS.

The majority's decision to review de novo the district court's separate injunction for judicial estoppel conflicts with the standard of review that eleven other circuits would have applied. This Court also should grant review to resolve that split.

1. In *New Hampshire* v. *Maine*, this Court held that "judicial estoppel is an equitable doctrine invoked by a court at its discretion," 532 U.S. 742, 750 (2001). A

court may invoke judicial estoppel based on factors that "are probably not reducible to any general formulation." *Id.* at 749-50. Matters consigned to a trial court's discretion generally are reviewed for an abuse of discretion. See *Pierce* v. *Underwood,* 487 U.S. 552, 558, 562 (1988); *Miller* v. *Fenton,* 474 U.S. 104, 114 (1985).

Consistent with *New Hampshire* and *Pierce*, eleven circuits have held that a district court's judicial estoppel determinations may be reversed only for an abuse of discretion. See *Guay* v. *Burack*, 677 F.3d 10, 15-16 (1st Cir. 2012); *McNemar* v. *Disney Store, Inc.*, 91 F.3d 610, 613 (3d Cir. 1996); *King* v. *Herbert J. Thomas Mem'l Hosp.*, 159 F.3d 192, 196, 198 (4th Cir. 1998); *Jethroe* v. *Omnova Sols., Inc.*, 412 F.3d 598, 599-600 (5th Cir. 2005); *In re Knight-Celotex, LLC*, 695 F.3d 714, 721 (7th Cir. 2012); *EEOC* v. *CRST Van Expedited, Inc.*, 679 F.3d 657, 678 (8th Cir. 2012); *Engquist* v. *Or. Dep't of Agric.*, 478 F.3d 985, 1000 (9th Cir. 2007); *Eastman* v. *Union Pac. R.R.*, 493 F.3d 1151, 1155-56 (10th Cir. 2007); *Talavera* v. *Sch. Bd.*, 129 F.3d 1214, 1216 (11th Cir. 1997); *Marshall* v. *Honeywell Tech. Sys. Inc.*, 828 F.3d 923, 927-28 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 830 (2017); *Data Gen. Corp.* v. *Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996); cf. *Chevron Corp.* v. *Donziger*, 833 F.3d 74, 128 (2d Cir. 2016) (acknowledging but reserving the question as not yet sufficiently presented), *cert. denied*, 85 U.S.L.W. 3586 (2017).

These courts explain that a trial court's discretionary application of judicial estoppel should be reviewed no differently than other exercises of discretion. *E.g.*, *Alternative Sys. Concepts, Inc.* v. *Synopsys, Inc.*, 374 F.3d 23, 30-31 (1st Cir. 2004). They observe that de novo appellate review of a lower court's exercise of dis-

cretion would make "no sense" because such a rule allows the appellate court to substitute its own discretion for that of the district court. *Marshall*, 828 F.3d at 927-28. Disturbing a court's exercise of its inherent power under Article III "to protect the integrity of the court's processes," *Klein* v. *Stahl GMBH & Co.*, 185 F.3d 98, 109 (3d Cir. 1999) (construing *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 44, (1991)), also would violate important principles of judicial comity; it would place responsibility for balancing the equities on appellate courts that lack the sort of "first-hand observations of . . . litigation strategies" that often support judicial estoppel. *Alternative Sys. Concepts*, 374 F.3d at 31.

In the face of this authority, the en banc majority refused to align the Sixth Circuit with its sister circuits. Pet. App. 10a. Instead, the court "rejected th[e] argument" for adopting an abuse-of-discretion standard without elaboration and held that the Sixth Circuit would "continue[] to apply de novo review." *Id.* (citations omitted).

2. Under an abuse of discretion standard, the court of appeals should have affirmed the preliminary injunction that rests upon judicial estoppel. Nowhere does the majority state that the district court made clearly erroneous findings of fact. Citing *New Hampshire*, the district court found that petitioners were likely to succeed on the merits of their estoppel claim based on a balancing of three considerations that are typical for estoppel: a "clearly inconsistent" later position, success at persuading a court to accept the earlier position, and "an unfair advantage" gained or "unfair

detriment" imposed in the absence of estoppel. *New Hampshire*, 532 U.S. at 750-51.[3]

The district court was within its discretion to find that Ohio's reversion to using a paralytic and potassium chloride was "clearly inconsistent" with its prior promises that "pancuronium bromide and potassium chloride no longer will be used in Ohio's lethal injection process," R. 966-2, PageID 34329-30 (asserting that "[t]here [wa]s absolutely no reason to believe" the State would revert "if the plaintiffs' suits were dismissed"). Ohio prominently featured these promises in filings in this litigation, arguing that it met the "formidable burden" governing mootness by voluntary cessation. *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs.*, 528 U.S. 167, 190 (2000).

The district court also reasonably concluded that Ohio succeeded in persuading courts to accept its earlier position. Ohio convinced the Sixth Circuit and the district court that "*any challenge* to Ohio's three-drug execution protocol is now moot," *Cooey*, 588 F.3d at 923, and on that basis avoided the impending trial challenging those drugs, R. 966-10, PageID 34454, 34471-74.

There also is no question that Ohio's change in position allowed it to derive an unfair advantage and to impose on petitioners an unfair detriment. A litigant's successful efforts to moot pending claims satisfy the fairness consideration if that litigant later reneges, especially when, as here, it does so in the same litigation.

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[3] Further deference was due because the district court's applied this inherently equitable doctrine in the context of a preliminary injunction; in that context, the injunction should have been affirmed absent a clear error of fact, which Ohio never alleged. This is another reason that the preliminary injunction for judicial estoppel should have been affirmed.

See *Already*, 568 U.S. at 94 (suggesting that the considerations of judicial estoppel are met when a mootness-inducing litigant later seeks to undo its past promises). In this respect, mootness by voluntary cessation and judicial estoppel are opposite sides of the same coin. When a party invokes and succeeds in establishing mootness, as Ohio did, it also implicitly accepts estoppel.

Apart from mootness, judicial estoppel's "unfairness" consideration is satisfied in two further respects. At the time Ohio made its disavowal, the district court had scheduled a full trial on the constitutionality of the second and third drugs. The case would have been tried before a judge with deep knowledge of the litigation, and plaintiffs would have called the since-deceased director of Ohio's Department of Rehabilitation and Corrections to testify about his decision to abandon the three-drug protocol. Ohio's past promise foreclosed that opportunity.

Ohio added to the prejudice by concealing its recent change of position for nearly six months. It decided to revert in early 2016, when petitioners' execution dates were still a year away. R. 941, PageID 31862-63. But it did not reveal that decision until October 3, 2016, three months before the first of petitioners' executions was then scheduled. That delay was intentional and "strategic." *Id.* at 31862-65. It prejudiced petitioners by leaving them only a matter of weeks to draft their pleadings, conduct discovery, and retain experts. The district court was then forced to resolve multiple complex issues in haste.

Through its strategic delay, Ohio foreclosed any practical possibility of having a full trial and created the time pressures that led to the perceived shortcomings in the district court's rushed opinion. See Pet. App. 22a (Moore, J., dissenting) ("The upshot of the

State's behavior . . . has been to thwart Plaintiffs' efforts to litigate the constitutionality of Ohio's use of a three-drug protocol or the question whether a two-drug protocol is an available alternative that significantly reduces a substantial risk of severe pain.").

Unable to attack these findings, the majority suggests that estoppel is inappropriate because of "unforeseen circumstances." Pet. App. 11a. But this was not the focus of Ohio's argument in the district court, and understandably so. The unavailability of barbiturates would not constitute changed circumstances here, because it would not leave Ohio "unable to enforce the law." *New Hampshire*, 532 U.S. at 755. To the contrary, Ohio executed Dennis McGuire in 2014 without using a barbiturate or either of the disavowed drugs, and other States permit other methods.

Under the proper standard of review, the district court's finding, resting as it did on the consideration of factors pertinent to estoppel, was entitled to deference. *Id.* at 751; see also *Ardese* v. *DCT, Inc.*, 280 F. App'x 691, 696 (10th Cir. 2008) (Gorsuch, J.) ("[T]hat another judge in another case might have made a different decision about applying an equitable doctrine does not suggest that the district court in this case abused its discretion.").

## III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THESE QUESTIONS.

This case is an ideal vehicle for resolving the questions presented. The issues were squarely presented below, the Sixth Circuit considered the matter en banc, and the record is settled and well-developed for the purposes of this petition.

The petition also warrants review because it raises profoundly important constitutional issues that no court has tried to judgment. Each of the recent lethal

injection challenges this Court has considered, for example, has been litigated under an emergency, preliminary injunction posture, with the petitioners being executed before a full trial. Given the successive decisions of the Eighth Circuit and now the Sixth Circuit to overturn plausible district court findings of a substantial risk of severe pain, this Court should grant plenary review to clarify the applicable standards and ensure that appellate courts provide the same deference to district courts in capital cases that they provide in other cases.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DEBORAH WILLIAMS
FEDERAL PUBLIC DEFENDER
BY
ALLEN L. BOHNERT (OH 0081544)
ERIN G. BARNHART (OH 0079681)
ADAM M. RUSNAK (OH 0086893)
NADIA WOOD (MN 0391334)
OFFICE OF THE FEDERAL PUBLIC DEFENDER, SOUTHERN DISTRICT OF OHIO
10 W. Broad Street, Suite 1020
Columbus, OH 43215-3469
(614) 469-2999

*Co-Counsel for Raymond Tibbetts*

MARK E. HADDAD*
ALYCIA A. DEGEN
JOSHUA E. ANDERSON
KATHERINE A. ROBERTS
COLLIN P. WEDEL
ADAM P. MICALE
SIDLEY AUSTIN LLP
555 W. Fifth Street
40th Floor
Los Angeles, CA 90013
(213) 896-6000
mhaddad@sidley.com

*Counsel for all Petitioners*

DEBORAH WILLIAMS
FEDERAL PUBLIC DEFENDER
BY
LISA M. LAGOS (OH 0089299)
OFFICE OF THE FEDERAL PUBLIC DEFENDER, SOUTHERN DISTRICT OF OHIO
10 W. Broad Street, Suite 1020
Columbus, OH 43215-3469
(614) 469-2999

*Co-Counsel for Ronald Phillips*

TIMOTHY F. SWEENEY
LAW OFFICE OF TIMOTHY FARRELL SWEENEY
The 820 Building, Suite 430
820 West Superior Ave.
Cleveland, Ohio 44113-1800
216-241-5003

*Co-Counsel for Ronald Phillips*

JAMES A. KING
PORTER, WRIGHT, MORRIS & ARTHUR LLP
41 South High Street
Columbus, Ohio 43215
614-227-2051

*Co-Counsel for Raymond Tibbetts*

STEVE NEWMAN
FEDERAL PUBLIC DEFENDER
BY
VICKI WERNEKE (OH 0088560)
OFFICE OF THE FEDERAL PUBLIC DEFENDER, NORTHERN DISTRICT OF OHIO
1660 West 2nd Street
Suite 750
Cleveland, OH 44113
(216) 522-4856

*Co-Counsel for Gary Otte*

* Counsel of Record

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