THIS IS A CAPITAL CASE
EXECUTION SET FOR OCTOBER 11, 2018 AT 7 PM

IN THE
SUPREME COURT OF THE UNITED STATES

No. 18-6238 & 18A376

EDMUND ZAGORSKI,
Petitioner,
v.

TONY PARKER, et al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

REPLY TO RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND REPLY TO RESPONSE TO MOTION TO STAY EXECUTION

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It is uncontested that the State of Tennessee deliberately bypassed the opportunity to purchase pentobarbital which could have been used for tonight's execution. The Tennessee Supreme Court held that this uncontested fact is irrelevant. This impermissible expansion of this Court's decision in *Glossip v. Gross*, 576 U.S. __, 135 S. Ct. 2726 (2015), transforms the readily implemented and feasible alternative prong of *Glossip* into a burden that is impossible to meet in any case. Thus, the Tennessee court's perverse interpretation of *Glossip* would eliminate any Eighth Amendment challenge to a method of execution, no matter how torturous. Further, the Tennessee Supreme Court's interpretation of *Glossip*, which

Respondent here adopts, that a state no longer has any obligation to search for a humane form of execution and that *Glossip* stands for the proposition that the burden to enforce the protections of the Eighth Amendment falls to the prisoner is a twisted and inappropriate reading of this Court's decision.

This case presents an excellent vehicle for the Court to settle these important issues and clear up the confusion resulting from Court's divided opinion in *Glossip*. The scientific facts that were in dispute in *Glossip*, are no longer disputed. Experts from both sides agree that the testimony this Court relied on in *Glossip* is wrong as a matter of science. Thus, the legal issues are straightforward and important.

Because the Tennessee Supreme Court has decided an important federal question in a manner that is in conflict with decisions of this Court, has decided an important federal question that should be settled by this Court, and has decided an important federal question in a way that conflicts with decisions of this court, there is a likelihood that certiorari will be granted. Supreme Court Rule 10. Further, there is a significant possibility that the lower court decision will be reversed where five justices of this Court already have expressed concerns about the feasible and readily implemented prong of *Glossip* and where the decision of the lower court is in conflict with the opinions of at least seven current members of this Court that if a three-drug protocol fails to protect an inmate from the second and third drugs, that protocol is

constitutionally intolerable.[1] *Baze v. Rees*, 553 U.S. 35, 53 (2008). The undisputed record here shows that this protocol not only fails to protect the inmate, but that it also gratuitously and unnecessarily (and knowingly) adds to the inmate's pain and anguish because of the pulmonary edema caused by the midazolam.

Respondents elide this Court's holding in *Baze* that such a protocol would be unconstitutional by dismissing it as dicta. Resp. at 16. It was not. The statement by Chief Justice Roberts that the two-drug protocol without an anesthetic would be unconstitutional is the premise of the holding. No justice has ever disagreed with it.

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[1] Respondents' citation to this Court's denial of a stay application for Billy Ray Irick is inapt. Resp. at 20. Irick's case was in a completely different procedural posture, as the Tennessee Supreme Court had not decided the appeal and no petition for writ of certiorari was pending. Indeed, Justice Sotomayor stated that if the record supported the allegations made by Irick in his stay application, she would grant certiorari.

> As to the prediction that this Court would deem up to 18 minutes of needless torture anything less than cruel, unusual, and unconstitutional, I fervently hope the state courts were mistaken. At a minimum, their conclusion that the Constitution tolerates what the State plans to do to Irick is not compelled by *Glossip*, which did not categorically determine whether a lethal injection protocol using midazolam is a constitutional method of execution. See *Arthur*, 580 U.S., at ——, 137 S. Ct., at 731 (opinion of SOTOMAYOR, J.). *Glossip*'s majority concluded only that, based on the evidence presented in that case, there was no clear error in the District Court's factual finding that midazolam was highly likely to prevent a person from feeling pain. *Ibid.* (citing *Glossip*, 576 U.S., at ——, 135 S. Ct., at 2739). As noted, the trial court here came to a different factual conclusion based on a different factual record, as have others. See *McGehee*, 581 U.S., at ——, 137 S. Ct., at 1276 (opinion of SOTOMAYOR, J.) (noting a district court's "well-supported finding that midazolam creates a substantial risk of severe pain"); *Otte v. Morgan*, 582 U.S. ——, 137 S. Ct. 2238, 198 L.Ed.2d 761 (2017) (SOTOMAYOR, J., dissenting from denial of application for a stay and denial of certiorari) (similar).
>
> If it turns out upon more sober appellate review that this case presents the question, I would grant certiorari to decide the important question whether the Constitution truly tolerates executions carried out by such quite possibly torturous means.

Irick v. Tennessee, No. 18A142, 2018 WL 3767151, at *3 (U.S. Aug. 9, 2018). This exact issue is presented in this case and supported by the factual record.

Yet, here, the lower court did not even acknowledge it. This Court should accept certiorari to secure uniformity of case law.

Respondents' recitation of the legal history of other lethal injection challenges is a red herring and has nothing to do with the merits of the petition or application for stay.[2] That litigation was sanctioned as necessary by the Tennessee courts. *See e.g., State v. West, No.* M1987-000130-SC-DPE-DD (Tenn. Nov. 29, 2010) ("[P]rinciples of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges to acts of the Executive and Legislative. Branches be considered in light of a fully developed record addressing the specific merits of the challenge."). The Constitution does not punish an inmate for exercising his right to access the courts.

What is more important to this Court's equitable analysis is Zagorski's extreme diligence in prosecuting this case from complaint to appellate decision in less than eight months. Yet, Zagorski is punished for complying with a rocket docket not of his making by holding him to a pleading standard rendered impossible because procedural roadblocks erected by state law.

Respondents mislead this Court as to Zagorski's argument regarding those roadblocks. He does not suggest that this Court can, or should, review the propriety of the State's secrecy laws or hyper-technical applications of rules of civil procedure.

[2] It bears noting that the previous litigation always resulted in the Department being forced to change its protocol because of deficiencies brought to light in those proceedings.

What Zagorski asks is: where he plainly presented two alternatives to the three drug protocol but was prevented from receiving a full and fair hearing on either through no fault of his own, can he be executed in a manner which is sure to cause 10-18 minutes of unnecessary severe pain and mental anguish. If so, then this Court's Eighth Amendment jurisprudence is devolving, not evolving.

Respondents argue that *Bucklew v. Precythe*, No. 17-8151, is inapplicable here because it relates to (1) as-applied constitutional challenges based on an individual inmate's medical condition and (2) the proof required to compare the risk of harm from the State's method of execution and the inmate's proposed alternative. Response at 16-17. Respondents are mistaken.

First, *Bucklew* will consider whether an inmate must have independent evidence to show that his identified alternative will significantly reduce a substantial risk of severe pain as required by the second prong of *Glossip* or can, instead, rely on the record as a whole—including the state's evidence—to satisfy his burden. *Bucklew* Petition Question 2. Here, Respondents have maintained throughout this litigation that Petitioners must have independent evidence to show that their identified alternative—pentobarbital—is available to the State (i.e., feasible and readily implemented), rather than relying on information in possession of the State. The Tennessee Supreme Court accepted that erroneous position by holding that "the Plaintiffs offered no direct proof as to availability of this alternative method of execution." A-022. Thus, the Court's clarification of the nature

and quantum of proof necessary for an inmate to meet the burden on the comparative-risk-of-harm component of *Glossip* prong 2 will be instructive as to Petitioners' burden to show the feasible-and-readily-implemented component of prong 2.

Second, although Bucklew framed his petition for certiorari in as constrained a way as possible in order to encourage this Court to grant certiorari, the Court's ruling on the legal issues presented in the case will necessarily clarify the burden of proof for all Eighth Amendment challenges, including Petitioners' facial challenge. The Court added a question to be briefed and addressed by the parties—whether Bucklew met his burden under *Glossip* prong 2 "to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the State's method of execution." Order Granting Cert. It is hard to know the Court's intention in adding this question, but it could be to consider whether the Eighth Amendment requires proof of an alternative when a state seeks to execute an inmate using an excruciatingly painful method. Although such a ruling in *Bucklew* would be in the context of an as-applied challenge based on unique medical problems of an inmate, it would be equally applicable in the context of a facial challenge to a torturous execution method. Because Petitioners proved that a midazolam execution is excruciatingly painful—just as Bucklew's execution is likely to be excruciatingly painful—Plaintiffs would be similarly excused from showing an alternative.

Respectfully Submitted,

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BY: */s/ Kelley J. Henry*
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CERTIFICATE OF SERIVCE

I, Kelley J. Henry, hereby certify that a true and correct copy of the foregoing document was electronically filed and sent to the following via email on this the 11th day of October, 2018, to:

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