IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

ABU-ALI ABDUR'RAHMAN, *et al.*,	)	
Appellants,	)	
	)	
v.	)	**No. M2018-01385-SC-RDO-CV**
	)	
TONY PARKER, et al.,	)	
Appellees.	)	

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE DAVIDSON COUNTY CHANCERY COURT

BRIEF OF THE APPELLEES

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The Abdur'Rahman Appellants have listed the following issues as those they are presenting for review:

I.

Whether Tennessee's lethal injection protocol violates the Eighth Amendment to the United States Constitution or article I, section 16 of the Tennessee Constitution.

II.

Whether the Chancery Court erred in finding that Appellants failed to show that a single-drug pentobarbital lethal injection protocol was a known, feasible, and readily available alternative.

III.

Whether the Chancery Court erred in refusing to consider Appellants' second alternative lethal injection protocol: a two-drug protocol, which eliminates vecuronium bromide.

IV.

Whether the Appellees waived the pleading requirement of a known, feasible, and readily available alternative by "refusing to produce the only source of information" regarding Appellees' efforts to obtain pentobarbital.

V.

Whether the Chancery Court erred in denying discovery requests designed to discover evidence of the availability of pentobarbital to the State of Tennessee given that Texas and Georgia continue to use pentobarbital in executions.

VI.

Whether Tennessee's "secrecy statute" excuses Appellants from the burden of establishing the availability of an alternative lethal injection protocol.

VII.

Whether the lethal injection protocol violates Appellees' right to access to the courts.

VIII.

Whether the lethal injection protocol violates substantive due process under article 1, section 8 of the Tennessee Constitution and the Fourteenth Amendment of the United States Constitution.

IX.

Whether the lethal injection protocol violates Appellants' "right to dignity" under article 1, section 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution.

X.

Whether the lethal injection protocol violates the "dignity of man" by using lethal injection chemicals prohibited for use in non-livestock animal euthanasia in violation of article 1, section 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution.

XI.

Whether the Chancery Court erred in denying Appellants' pre-trial motion to amend the Complaint to add an as-applied challenge regarding the credentials and qualifications of the State's source of lethal injection chemicals.

XII.

Whether the Chancery Court erred in permitting Appellees' expert Dr. Feng Li to testify out of order.

XIII.

Whether the Chancery Court erred in failing to exclude the testimony of Appellees' expert witnesses under *McDaniel v. CSX Transportation, Inc*., 955 S.W.2d 257 (Tenn. 1997).

XIV.

Whether this Court's expedited appellate schedule violates the Appellants' right to "appellate due process."

The Miller Appellants present the following additional issues for review:

I.

Whether the Chancery Court erred in relying on factual findings from other cases in addressing the first element of *Glossip*.

II.

Whether the Appellants were denied notice and an opportunity to be heard on the second element of *Glossip*.

STATEMENT OF THE CASE

This case presents a facial challenge to the constitutionality of Tennessee's three-drug midazolam-based lethal injection protocol. The case was initiated on February 20, 2018, by thirty-three death row inmates, who filed a sixteen-count Complaint for Declaratory Judgment in the Davidson County Chancery Court. I, 1-95.

The Chancery Court dismissed most of Appellants' claims before trial, IV, 574-611, and it heard proof on the remaining claims in Appellants' Second Amended Complaint at a trial beginning on July 9, 2018 and ending on July 24, 2018. XVI, 2235-36.

After considering the pleadings and evidence and correctly applying the controlling legal principles, the Chancery Court dismissed Appellants' Second Amended Complaint with prejudice because they failed to prove that there exists a known and available alternative to the lethal-injection method they are challenging, proof of which is an essential element—a *sine qua non*—of any Eighth Amendment method-of-execution claim. XVI, 2232, 2239. The Chancery Court specifically observed that Appellants presented "none of their own witnesses to show that their proposed method of execution—pentobarbital—is available to the State." XVI, 2239.

> Of the four expert witnesses the Inmates retained in this case, none were retained to investigate sources of pentobarbital to report to the Court the results of their search, e.g. whether they were rebuffed, whether the sources exist, etc., and none were able to provide any information on this critical element of the trial. . . . No good reason was provided to the Court as to why the Inmates failed to provide such important proof.

XVI, 2241.

The Chancery Court thus found that "the greater weight and preponderance of the evidence is that pentobarbital is not available to the Defendants." XVI, 2249. The Court specifically accredited the testimony of State officials that the Department Correction "does not have access to and/or is unable to obtain pentobarbital through ordinary transactional efforts." XVI, 2242. On that basis alone, the Chancery Court dismissed Appellants' claims in Count I of the Second Amended Complaint. XVI, 2249.[1]

The Chancery Court's final order was filed July 26, 2018. XVI, 2229-79. The Abdur'Rahman Appellants filed a notice of appeal on July 30, 2018. XVI, 2280. On August 13, 2018, this Court entered an order sua sponte assuming jurisdiction over the case pursuant to Tenn. Code Ann. § 16-3-201(d)(1) and expediting appeal proceedings. XVII, 2341. The Miller Appellants filed a timely notice of appeal on August 23, 2018.

STATEMENT OF THE FACTS

The death penalty is constitutional means of punishment in capital cases, *Glossip*, 135 S.Ct. at 2732-33, and the Tennessee General Assembly has made lethal injection the default method of execution in Tennessee. Tenn. Code Ann. § 40-23-114(a) (for persons sentenced to the punishment of death, the method of carrying out the sentence "shall be

[1] The Chancery Court also found no merit to any of the remaining three Counts, rulings which flowed, in large part, from its determination that the lethal injection protocol did not amount to cruel and unusual punishment. XVI, 2264-78.

by lethal injection"). The Department of Correction is charged with implementing state law mandating lethal injection. Tenn. Code Ann. § 40-23-114(c).

In 2017, this Court held that the Department's lethal injection protocol using the single drug pentobarbital did not violate the Eighth Amendment to the United States Constitution or article I, section 16 of the Tennessee Constitution. *West v. Schofield*, 519 S.W.3d 550 (Tenn.), *cert. denied, West v. Parker*, 138 S.Ct. 476 (2017), *cert. denied, Abdur'Rahman v. Parker*, 138 S.Ct. 647 (2018) (*West II*).

But, because of drug-supply issues, the Department eventually was unable to implement the method it had successfully defended in that lengthy litigation. The drug supply issues forced it to identify an alternative drug combination to ensure it could carry out judicially-imposed death sentences when ordered to do so by this Court. XXXVII, 1321, 1338-39, 1353-55.

On January 8, 2018, the Commissioner of Correction approved a revised lethal injection protocol, which added, as an alternative to the existing single-drug protocol using pentobarbital, a protocol using a three-drug combination, consisting of midazolam, vecuronium bromide, and potassium chloride.[2] Trial Exhibit 1, 34. Again, because of drug

[2] On February 15, 2018, before this lawsuit was commenced, the State of Tennessee filed in this Court a Motion to Set Execution Dates, which explained the protocol revision and requested execution dates for eight inmates on or before June 1, 2018, precisely due to drug supply issues. *See, e.g., State v. David Earl Miller*, No. E1982-00075-SC-DDT-DD (Tenn., Motion, Feb. 15, 2018). The State informed the Court that its ability to carry out death sentences by lethal injection after June 1, 2018,

supply issues, the Department later eliminated pentobarbital from the protocol altogether. XXII, 1592; Trial Exhibit 2, 140.

The difficulty in obtaining drugs for use in executions is not unique to Tennessee. Indeed, it reflects the phenomenon found to exist by the Supreme Court in *Glossip*.

> *Baze* [*v. Rees*, 553 U.S. 35 (2008)] cleared any legal obstacle to use of the most common three-drug protocol [using sodium thiopental] that had enabled States to carry out the death penalty in a quick and painless fashion. But a practical obstacle soon emerged, as anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences. . . . After other efforts to procure sodium thiopental proved unsuccessful, States sought an alternative, and they eventually replaced sodium thiopental with pentobarbital, another barbiturate. . . . Before long, however, pentobarbital also became unavailable. Anti-death-penalty advocates lobbied the Danish manufacturer of the drug to stop selling it for use in executions. . . . Unable to acquire either sodium thiopental or pentobarbital, some States have turned to midazolam, a sedative in the benzodiazepine family of drugs.

Glossip, 135 S.Ct. at 2733-34.

The Department's current protocol now calls for the administration of high doses of the sedative midazolam, following by a paralytic agent vecuronium bromide, followed by potassium chloride. Trial Exhibit 2, 140. The protocol is substantially the same as the one approved by the

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"is uncertain due to ongoing difficulty in obtaining the necessary lethal injection chemicals." Motion at 1. The State further asserted, "Despite continuing efforts to identify an alternate source of pentobarbital, the Department currently has none on hand and no known source to obtain more." Motion at 2.

United States Supreme Court in *Glossip*, 135 S.Ct. at 2734-35.

ARGUMENT

I. Tennessee's Lethal Injection Protocol Does Not Violate Appellants' Rights Under the Eighth Amendment to the United States Constitution or Article 1, Section 16 of the Tennessee Constitution. (Abdur'Rahman Issues 1 & 2)[3]

The Chancery Court dismissed Appellants' method-of-execution claim because they failed to prove an essential element of their claim, namely, "that their proposed alternative of pentobarbital is available to the State of Tennessee for their executions." XVI, 2229-79, 2239, 2264. That determination is entirely consistent with governing authority, is fully supported by the record, and should be affirmed.

A. Standard of review

This Court reviews the Chancery Court's findings of fact *de novo* on the record, with a presumption of correctness, and should not reverse those findings unless the evidence preponderates against them. Tenn. R. App. P. 13(d); *Cross v. City of Memphis*, 20 S.W.3d 642, 644 (Tenn. 2000). Conclusions of law are reviewed *de novo* with no presumption of correctness. *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005). Likewise, this Court reviews a trial court's application of law to the facts *de novo*

[3] Appellees address issues as they are listed in Appellants' Statement of the Issues and in that order. Abdur'Rahman Appellants' Brief, at 10-13; Miller Appellants' Brief, at 1. *See Hodge v. Craig*, 382 S.W.3d 325, 334 (Tenn. 2012) ("[I]ssues are properly raised on appeal to this Court when they have been raised and preserved at trial and . . . when they have been presented in the manner prescribed by Tenn. R. App. P. 27.").

with no presumption of correctness. *State v. Davis*, 354 S.W.3d 718 (Tenn. 2011).

B. Legal standard for method-of-execution challenges

Capital punishment is constitutional, and "[i]t necessarily follows that there must be a [constitutional] means of carrying it out." *Glossip v. Gross*, 135 S.Ct. at 2732-33 (quoting *Baze v. Rees*, 553 U.S. 35, 47 (2008)); *West v. Schofield*, 460 S.W.3d 113, 117 (2015) (*West I*). An inmate must plead and prove two essential elements to prevail on a claim that a method of execution violates the Eighth Amendment: (1) that the method creates a "demonstrated risk of severe pain," or a "substantial risk of serious harm," where the risk is sure or very likely to cause severe pain and needless suffering; *and* (2) an identified alternative that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip*, 135 S.Ct. at 2737-39 (quoting *Baze v. Rees*, 553 U.S. 35, 50, 52 (2008)); *see also West II,* 519 S.W.3d at 563-64. Failure to establish *either* element defeats an inmate's Eighth Amendment challenge. *Glossip*, 135 S.Ct. at 2738.

The Constitution does not require a painless death, as there is some risk of pain inherent in any method of execution. *Glossip*, 135 S.Ct. at 2733. The type of harm prohibited by the Eighth Amendment in the context of capital punishment are "punishments of torture" and others "in the same line of unnecessary cruelty," such as public disembowelment, public dissection, or burning alive. *Baze*, 553 U.S. at 48 (citing *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879)). The plurality in *Baze* summarized this core Eighth Amendment concern, explaining that

"[w]hat each of the forbidden [capital] punishments had in common was the deliberate infliction of pain for the sake of pain—'superadd[ing]' pain to the death sentence through torture and the like." *Id.*

But it is not enough to show a risk of pain. A prisoner also has the burden of identifying a feasible, readily implemented alternative that effectively addresses and in fact significantly reduces a substantial risk of serious harm or severe pain. *Baze*, 553 U.S. at 52; *Glossip*, 135 S.Ct. at 2739 ("*Baze* . . . made clear that the Eighth Amendment requires a prisoner to *plead and prove* a known and available alternative.") (emphasis added). This is "a requirement of *all* Eighth Amendment method-of-execution claims." *Glossip*, 135 S.Ct. at 2731 (emphasis added). Indeed, the Court made clear in *Glossip* that Oklahoma's inability to obtain pentobarbital, and the inmate's failure to identify any available alternative to Oklahoma's midazolam-based protocol was an independent basis for affirmance of the lower court's decision denying the inmate's motion to enjoin the use of midazolam. *Glossip*, 135 S.Ct. at 2738.

This Court may not construe the Eighth Amendment in a way contrary to the United States Supreme Court's construction. *West*, 519 S.W.3d at 566. Moreover, this Court has held that the two-prong test in *Baze* and *Glossip* applies equally to a challenge under article 1, section 16 of the Tennessee Constitution. *Id.* at 567-68.

C. Appellants failed to identify a known and available alternative method of execution that entails a substantially lesser risk of harm.

In the proceeding below, the Appellants affirmatively pled that a single-drug protocol using pentobarbital is a feasible and readily implemented alternative to the State's midazolam-based three-drug method. "Protocol A [using the single drug pentobarbital] is a 'known and available alternative method of execution . . . [that is] feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" III, 343-44. But they presented *no proof* that pentobarbital is available to the State of Tennessee for use in executions. XVI, 2239.

Glossip made clear that Oklahoma's inability to obtain pentobarbital and the inmate's failure to identify any available alternative to Oklahoma's midazolam-based protocol was an independent basis for affirmance of the lower court's decision denying the inmate's motion to enjoin the use of midazolam. *Glossip*, 135 S.Ct. at 2738.

Appellants' identical failure here is equally dispositive of this case. As the Chancery Court correctly concluded: "[T]he Appellants have failed to prove the essential element that there exists an available alternative. On this basis alone, by United States law, this lawsuit must be dismissed." XVI, 2239.

Glossip did not define "feasible and readily implemented." But numerous courts since *Glossip* have discussed an inmate's burden of proving this element. The Sixth Circuit held that an alternative is "available" and "readily implemented" if a State is able to obtain drugs

with "*ordinary transactional effort*." *In re Ohio Execution Protocol* 860 F.3d 881, 890-91 (6th Cir. 2017) (emphasis added). The Sixth Circuit concluded that pentobarbital was no more available to Ohio than it was to Oklahoma in *Glossip*, because Ohio could not obtain pentobarbital with ordinary transactional effort. *Id.*

The Eleventh Circuit concluded that *Glossip* requires that an inmate prove "(1) the State actually has access to the alternative; [and] (2) the State is able to carry out the alternative method of execution relatively easily and reasonably quickly; . . . ." *Arthur v. Commissioner, Alabama Department of Corrections*, 840 F.3d 1268, 1300 (11th Cir. 2016), *cert. denied sub nom*., *Arthur v. Dunn*, 137 S.Ct. 725 (2017); *see also Brooks v. Warden*, 810 F.3d 812, 819-23 (11th Cir. 2016). The ability of *other* States to procure a drug does not mean that that drug is available to all States for use in lethal injection executions. Rather, the burden is on the inmate to show that "there is *now* a source for pentobarbital *that would sell it to the [Department of Correction]* for use in executions." *Id.* at 1302 (emphasis in original). "An 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 (quoting *Chavez v. Florida S.P. Warden*, 742 F.3d 1267, 1275 (11th Cir. 2014) (Carnes, C.J., conc.)).

The Chancery Court here determined that "pentobarbital is not available to the Defendants." XVI, 2249. That ruling is fully supported by the record. First, the Court accredited the testimony of the State officials describing the Department's unsuccessful efforts to obtain the drug. XVI, 2242. Commissioner of Correction Tony Parker testified that,

despite exhaustive efforts—including contacting nearly 100 potential sources including three major U.S. chemical wholesalers—the Department was not able to obtain pentobarbital for use in executions. XXXVII, 1338, 1353-54. Deputy Commissioner and General Counsel Debra Inglis testified that the Department had been unable to obtain pentobarbital in any form since 2016. XLI, 1673.

When a trial court has seen and heard witnesses, a reviewing court will afford considerable deference to the trial court's findings of credibility and the weight it has assessed to the witnesses' testimony. *Lambdin v. Goodyear Tire & Rubber Co*., 468 S.W.3d 1, 9 (Tenn. 2015). The Chancery Court's order provides well-reasoned bases for its credibility determinations, including the witnesses' demeanor, tone, and substance of their testimony, which was corroborated by evidence presented by Appellants themselves. XVI, 2241-45; Trial Exh. 105, X, 1468.

Second, Appellants presented no evidence to the contrary. Appellants' experts—Dr. Stevens, Dr. Greenblatt, Dr. Edgar, and Dr. Lubarsky—all testified that they have no knowledge of a source from which Tennessee could purchase pentobarbital or its active ingredients. XXV, 169 (Stevens), XXVIII, 550-51 (Greenblatt), XXXIX, 1458 (Edgar), XLIII, 1883-84 (Lubarsky). The Chancery Court specifically observed that Appellants presented "none of their own witnesses to show that their proposed method of execution—pentobarbital—is available to the State." XVI, 2239.

> Of the four expert witnesses the Inmates retained in this case, none were retained to investigate sources of pentobarbital to

> report to the Court the results of their search, e.g. whether they were rebuffed, whether the sources exist, etc., and none were able to provide any information on this critical element of the trial. . . . No good reason was provided to the Court as to why the Inmates failed to provide such important proof.

XVI, 2241.

Third, the Chancery Court's determination that "pentobarbital is not available to the Defendants," XVI, 2249, is entirely consistent with the experience of other States, as outlined in *Glossip*. "Unable to acquire either sodium thiopental or pentobarbital, some States have turned to midazolam, a sedative in the benzodiazepine family of drugs." *Glossip*, 135 S.Ct. at 2734.

Appellants' contention that "uncontroverted proof" shows that multiple pharmacies were willing to sell pentobarbital to the Department at the time Commissioner Parker chose to adopt a three-drug midazolam protocol, Abdur'Rahman Brief, 205-11, is plainly unsupported by the record, was rejected by the Chancery Court, and is legally irrelevant.

Commissioner Parker affirmatively testified that the Department was unable to obtain pentobarbital, and he had no reason to believe that the Department could obtain it in the future. XXXVVII, 1354-55. Commissioner Parker further testified that if the Department had a source of Pentobarbital, it would be used." XXXVII, 1355. Commissioner Parker's testimony was credited by the trial court. And, as the trial court pointedly noted, it "defies common sense that the State would not make the effort to locate pentobarbital," since this Court has already upheld its use. XVI, 2247.

Appellants point to *no* evidence that shows a supplier willing to sell pentobarbital to the Department *for use in executions.* And they presented not one iota of proof in the Chancery Court on the availability of pentobarbital for executions, despite assembling multiple experts in the field of pharmacology and anesthesiology. XVI, 2241, 2245-46.

Moreover, Appellants' emphasis on the Department's *efforts* to obtain pentobarbital is a red herring. *Glossip* requires the *inmate* challenging a State's method of execution to identify a known and available alternative method of execution; it places no burden on the *State* to show that it exhausted all avenues of supply. *See Arthur v. Comm'r, Alabama Dept of Corr.*, 840 F.3d 1268, 1303 (11th Cir. 2016), cert. denied, 137 S.Ct. 725 (2017) ("[I]t is not the State's burden to plead and prove 'that it cannot acquire the drug.'").

In short, Appellants' attempt to place on the State a burden to make any showing as to the availability of their proposed alternative is patently irrelevant. "The State need not make any showing because it is [the inmate's] burden, not the State's, to plead and prove both and known and available alternative method of execution and that such alternative method significantly reduces a substantial risk of severe pain." *Id.*

This Court outlined in *West II* the burden of proof that a condemned inmate must satisfy in Eighth Amendment challenges to a lethal injection protocol. 519 S.W.3d at 563-64. And, just as in *West II*, the Appellants did not meet that burden in this case.

> [T]he United States Supreme Court requires inmates, challenging a State's method of execution as unconstitutional, to prove that there is a known and available alternative method of execution. With the realities of the supply of lethal

> injection drugs diminishing and drug options narrowing for prisons, requiring inmates, seeking to halt executions, to prove other alternatives exist addresses these realities. In this case the Inmates have not done this. They have not demonstrated that their proposed alternative of pentobarbital is available to the State of Tennessee for their executions. Under these circumstances, the law of the United States requires Count I of the Second Amended Complaint to be dismissed, and that use of the July 5, 2018 three-drug protocol may proceed.

XVI, 2264.

The Chancery Court's order of dismissal should be affirmed for the simple and sole reason that Appellants did not prove that their proposed alternative of pentobarbital is available to the State for their executions. Because such proof is an essential element of their Eighth Amendment claim, the lack of that proof alone is dispositive and requires dismissal of their case. There is no need, therefore, for this Court to address any other issues.

D. Appellants failed to show a substantial risk of severe pain and suffering.

Although not necessary to its disposition of Appellants' Eighth Amendment claim, the Chancery Court also found that the Appellants failed to prove the other element of *Glossip*—that the protocol creates a substantial risk of severe pain. *Glossip*, 135 S.Ct. at 2731, 2740. XVI, 2258 ("[T]he Inmates have not established the other *Glossip* prong that with the use of midazolam there is an objectively intolerable risk of harm.").

A prisoner cannot successfully challenge a method of execution unless he shows that the method presents a risk that is "'sure or very likely to cause *serious illness and needless suffering*,' and will give rise to 'sufficiently imminent dangers.'" *Baze*, 553 U.S. at 50 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993)) (emphasis supplied). *See also Baze*, 553 U.S. at 61, 128 S.Ct. 1520 (stating that an inmate asserting an Eighth Amendment challenge to a State's lethal injection protocol must establish "that the State's lethal injection protocol creates a demonstrated risk of severe pain" and "that the risk is substantial when compared to the known and available alternatives").

The United States 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," *Glossip*, 135 S.Ct. at 2732, including the method that is being challenged in this case and which is essentially the same as the method that was upheld in *Glossip*. The Court in *Glossip* declined to enjoin the use of midazolam in Oklahoma because the inmate failed to show that "any risk of harm was substantial when compared to a *known and available* alternative method of execution." *Id.* at 2738 (emphasis added).

The Chancery Court observed that "17 executions using a midazolam three-drug protocol have taken place since the United States Supreme Court decided *Glossip* on June 29, 2015, and none of those executions have been stopped from proceeding by the United States Supreme Court. Of the six states that have conducted an execution using a three-drug midazolam protocol, the United States Supreme Court has never held their protocol unconstitutional." XVI, 2257.

And since the Chancery Court made those observations, there is now a seventh instance in which the Supreme Court did not hold the three-drug midazolam protocol unconstitutional. It again declined to do so when it declined to enjoin the execution of Billy Ray Irick using the Department's three-drug midazolam method *on the same record* and presented with many of the same arguments now before this Court. *Irick v. Tennessee*, __ S.Ct. __, 2018 WL 3767151 (Aug. 9, 2018).

"[N]umerous courts have concluded that the use of midazolam as the first drug in a three-drug protocol is likely to render an inmate insensate to pain that might result from administration of the paralytic and potassium chloride." *Glossip*, 135 S.Ct. at 2739-40 (listing case citations). *See also In re: Ohio Execution Protocol*, 860 F.3d 881 (6th Cir.), *cert. denied*, 137 S.Ct. 2238 (2017) (reversing order enjoining three-drug protocol using midazolam: "[Ohio's] chosen procedure here is the same procedure (so far as the combination of drugs is concerned) that the Supreme Court upheld in *Glossip*."); *McGehee v. Hutchison*, 854 F.3d 488, 492 (8th Cir.), *cert. denied*, 137 S.Ct. 1275 (2017) (evidence falls short of showing a significant possibility that Arkansas' protocol is "sure or very likely" to cause severe pain and needless suffering); *Arthur v. Commissioner, Ala. Dep't of Corr.*, 840 F.3d 1268 (11th Cir. 2016), *cert. denied*, 137 S.Ct. 725 (2017) (inmate "has not carried his heavy burden to show that Alabama's current three-drug protocol—which is the same as the protocol in *Glossip*—is 'sure or very likely to cause' [inmate] serious illness, needless suffering, or a substantial risk of serious harm").

The proof in these cases, and some of the witnesses themselves, have been similar, if not identical. *See, e.g., Glossip*, 135 S.Ct. at 2739-

40 (listing cases). Appellants insist, however, that the Court should reach a different result in this case because they presented proof of an additional physical reaction to midazolam and testimony from witnesses who observed executions in other states. But that provides no basis for the departure Appellants seek.

The Chancery Court heard conflicting expert testimony on the efficacy of midazolam to render and keep an inmate insensate to pain after the administration of the second and third drugs and made one finding: "The Court finds that [Appellants'] experts established that midazolam does not elicit *strong* analgesic effects and the inmate being executed *may* be able to feel pain from the administration of the second and third drugs." XVI, 2251 (emphasis added). In short, the Chancery Court recognized that there may be a risk of pain using a midazolam-based three-drug protocol.

But the Constitution does not require a painless death, as there is *some risk of pain* inherent in any method of execution. *Glossip*, 135 S.Ct. at 2733. And Tennessee's protocol includes at least two safeguards designed to reduce that risk: (1) a two-minute wait time following the administration of midazolam prior to conducting a consciousness check; and (2) a consciousness check procedure before the administration of vecuronium bromide. XII, 1657, XXXIV, 1058-59, 1066.

The Chancery Court examined several factors to determine whether the risk was "objectively intolerable" under the Eighth Amendment: (1) case law examining the use of midazolam; (2) official documentation and demonstrative evidence submitted by both parties of twenty executions using midazolam performed by the Departments of

Correction of Florida, Arkansas, and Ohio, which established an average duration of executions using a midazolam-based three-drug protocol of 13.55 minutes; and (3) eyewitness accounts of lethal injection executions performed in other States. XVI, 2252-58. These considerations informed the Court's legal conclusion that the risk of harm from the use of a midazolam-based lethal injection protocol is not "sure or very likely to result in *needless suffering*." *Glossip*, 135 S.Ct. at 2739 (emphasis added).

The Eighth Amendment does not require general anesthesia before an execution. *In re Ohio Execution Protocol Litigation*, 2017 WL 5020138, at *17 (S.D. Ohio Nov. 3, 2017), aff'd, 881 F.3d 447 (6th Cir. 2018). An inmate challenging a method of execution must demonstrate that the method creates an "objectively intolerable risk of harm." *Glossip*, 135 S.Ct. at 2737. Appellants surely cannot meet that requirement in the face of uniform toleration of the use of midazolam by the Supreme Court and numerous other courts that have examined it.

Appellants' use of extreme rhetoric to describe an execution method, *e.g.*, burning at the stake, being buried alive, and the like, adds nothing to the constitutional analysis. Although those are surely forms of torture, the incidental physical consequences of an execution are not. *See Glossip*, 135 S.Ct. at 2746 ("[W]e find it appropriate to respond to the principal dissent's groundless suggestion that our decision is tantamount to allowing prisoners to be "drawn and quartered, slowly tortured to death, or actually burned at the stake." . . . That is simply not true, and the principal dissent's resort to this outlandish rhetoric reveals the weakness of its legal arguments.").

The Eighth Amendment prohibits only those "[m]ethods of execution" that are "deliberately designed to inflict pain." *Baze*, 553 U.S. at 35. There is no proof in this record of any action by any Defendant to deliberately torture any death row inmate.

The Appellants failed to demonstrate that the Department's protocol creates an "objectively intolerable" risk of serious harm, the second of the two separate and mandatory, substantive elements of their method-of-execution challenge. For this reason as well, the Court should affirm the Chancery Court's order of dismissal.

II. The Chancery Court Did Not Abuse Its Discretion in Denying Appellants' Eleventh-Hour Request to Amend Their Complaint. (Abdur'Rahman Issue 3)

Appellants argue that the Chancery Court erred by disallowing their post-trial motion to amend their Second Amended Complaint under Tenn. R. Civ. P. 15.02 to assert that the removal of vecuronium bromide from the three-drug protocol is a known, feasible, and available alternative method of execution. But the Chancery Court did not err.

The Court denied the Rule 15.02 motion because the alleged two-drug alternative "was known or could have been known by the Appellants upon the filing of the lawsuit" and because the two-drug alternative "ha[d] not been tried by express or implied consent." XV, 2137.

Those conclusions were correct. An unpled issue cannot serve as the basis for a judgment in favor of the plaintiff absent trial by consent. *Randolph v. Meduri*, 416 S.W.3d 378, 384-85 (Tenn. Ct. App. 2011) (perm. app. denied Aug. 26, 2011). Nothing prevented Appellants from

pleading the removal of vecuronium bromide as an alternative under *Glossip* in their initial, first, or second amended complaints.

Appellants amended their complaint twice. Their first Amended Complaint for Declaratory Judgment was in fact crafted for the very purpose of meeting the requirement under *Glossip* that a prisoner "plead and prove a known and available alternative" method of execution. 135 S.Ct. 2726, 2739 (2015). XX, 31-36. Through that amendment, Appellants supplied the theretofore missing allegation that a single-drug protocol using pentobarbital (then referred to as Protocol A) is a "known and available alternative method of execution . . . [that is] feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." III, 343-44.

The Chancery Court later permitted the Appellants to file a second amendment just six days before the start of trial to add allegations concerning compounding of midazolam to supplement their existing facial constitutional challenge to the lethal injection protocol. X, 1353-62. And again, the *Glossip* alternative the Appellants pleaded in that filing was "Protocol A," the single-drug pentobarbital protocol not a two-drug alternative. XI, 1466-70.

Appellants' insistence that they gave "adequate notice" of their intention to raise additional alternatives is beside the point. Abdur'Rahman Brief, at 226-27. The question under Rule 15.02 is not notice, but consent of an adverse party to try an unpled issue. *Randolph*, 416 S.W.3d at 384-85. The Chancery Court found that "the issue of removal of Vecuronium Bromide as an alternative protocol under Glossip was not tried by express or implied consent of the parties." XLV, 1991.

Moreover, the Court found specifically that "[t]he Defendants didn't have notice that you were saying the alternative is for us to eliminate the Vecuronium Bromide. They had notice that your alternative was Pentobarbital." XLV, 1965.

This Court made clear in *Zack Cheek Builders, Inc. v. McLeod* that the real question under Rule 15.02 is "whether or not the parties *actually tried* the issue delineated by the amendment." 597 S.W.2d 888, 890 (1980) (emphasis added). The Chancery Court explained at the hearing on the Rule 15.02 motion why *Zack Cheek* provides no relief here; the two-drug alternative was never actually tried:

> In this case, the Vecuronium Bromide pertains to a number of causes of action. And now that it's being asserted as a claim for an alternative under *Glossip* alternative feasibility requirement, I'm just going to call it that, it's problematic, because it's never been viewed that way. The case wasn't set up that way. . . . [W]e've all looked at the *Glossip* alternative as the Plaintiffs alleging Pentobarbital was the alternative. We've known about Vecuronium Bromide, but it hasn't been put in the slot of an alternative. So the case was never focused that way.

XLV, 1963-64.

Trial courts have broad discretion to decide motions to amend pleadings and will not be reversed absent an abuse of discretion. An appellate court cannot substitute its judgment for that of the trial court. *Pratcher v. Methodist Healthcare Memphis Hospitals*, 407 S.W.3d 727, 741- 42 (Tenn. 2013). A court abuses that discretion only if it applies an incorrect legal standard, reaches a conclusion that is not logical, bases its decision on a clearly erroneous assessment of the evidence, or uses

reasoning that causes an injustice to the complaining party. *State v. Davidson,* 509 S.W.3d 156, 193-94 (Tenn. 2016).

Glossip requires that a prisoner "*plead and prove* a known and available alternative." 135 S.Ct. at 2739 (emphasis added). Appellants affirmatively pled pentobarbital as their one chosen alternative, and the case was tried on that point. The Chancery Court did not abuse its discretion in denying Appellees' belated effort to vivify an unproven Eighth Amendment claim.[4]

III. There Was No "Waiver" of *Glossip's* Requirement That Appellants Prove a Feasible, Readily Implemented Alternative Method of Execution. (Abdur'Rahman Issue 4)

Appellants list as Issue 4 whether the Appellees "waive[d] the pleading requirement of a known, feasible, and readily available alternative by refusing to produce the only source of information regarding Appellees' efforts to obtain Pentobarbital." Abdur'Rahman Brief, at 11. But there is nothing further in Appellants' brief, other than the listing of the issue, for Appellees to respond to. Appellees are unable to locate any argument or citation to authority in Appellants' brief, as required by Tenn. R. App. 27(a)(7), discussing that issue or supporting

[4] Appellees further note that the Supreme Court found that Kentucky's decision to include a paralytic in its three-drug protocol in *Baze* did not offend the Eighth Amendment. "The Commonwealth has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress. Second, pancuronium stops respiration, hastening death. *Ibid.* Kentucky's decision to include the drug does not offend the Eighth Amendment." *Baze*, 553 U.S. at 57-58.

that claim of a "waiver" by Appellees of the Appellants' burden to prove an essential element their claim. And, in any event, *Glossip* makes clear that identification and proof of a known and available alternative method of execution is "a requirement of *all* Eighth Amendment method-of-execution claims." *Glossip,* 135 S.Ct. at 2731 (emphasis added).

IV. The Chancery Court Did Not Abuse Its Discretion in Denying Appellants' Request for Discovery. (Abdur'Rahman Issue 5)

Appellants next contend that the Chancery Court abused its discretion in denying their efforts to discover the identities of individuals and entities involved in the procurement or provision of chemicals for use in carrying out a death sentence. Abdur'Rahman Appellants' Brief, at 308.

This is a non-issue. The Court did not abuse its discretion but instead hewed closely to this Court's directive in *West I* that, in a facial challenge to the protocol, the "identities of the persons who may facilitate or carry out the Protocol are not relevant to the determination of whether the Protocol passes constitutional muster." 460 S.W.3d at 126.

The "basic positive touchstone" for the permissible scope of discovery is relevance. *Johnson v. Nissan North America, Inc.*, 146 S.W.3d 600, 605 (Tenn. Ct. App. 2004); *see also West I,* 460 S.W.3d at 125. To be discoverable under Rule 26.02(1), a matter must be "relevant to the subject matter involved in the pending action." Tenn. R. Civ. P. 26.02(1). Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of

the action more probable or less probable that it would be without the evidence." Tenn. R. Evid. 401. Information sought by a plaintiff "must have some logical connection to proving his case and/or obtaining his prayed-for relief." *West I*, 460 S.W.3d at 125. Thus, the "crucial issue" in assessing the discoverability of information under Rule 26 is to determine what is included in "the subject matter involved in the pending action." *Id*.

Even if a trial court determines that the information sought is relevant to the subject matter and not otherwise privileged, the court must further "balance the specific need for the information against the harm that could result from disclosure." *Id*., at 127-28. This is particularly so when disclosure of "sensitive information" may subject a party or person to "annoyance, embarrassment, oppression, or undue burden or expense." *Id*., at 128. Because capital punishment "remains a highly divisive and emotionally charged topic in Tennessee," *West I*, 460 S.W.3d at 128, the declared public policy favoring anonymity of those involved in the process of capital punishment, which is articulated in Tenn. Code Ann. § 10-7-504(h), is a valid and weighty consideration.

The Chancery Court applied these principles in its analysis of Appellants' discovery requests, and its orders—which carefully balanced the interests of both parties—were well within the bounds of its discretion.

The Chancery Court's May 7, 2018 order denied Appellants' request to obtain the identities of individuals with knowledge of an email from a third-party drug supplier or manufacturer to a State employee, which indicated that midazolam "does not elicit strong analgesic effects." V,

626. The Court found that the material was potentially relevant to three areas: (1) Defendants' knowledge of the email and their actions; (2) the availability of pentobarbital; and (3) the efficacy of midazolam. V, 627. Applying the balancing required by *West I,* the Chancery Court found that any information Appellants may obtain concerning the efficacy of midazolam would be cumulative of their own experts' testimony. But the Court directed Appellees Parker and Mays to provide information about when and how they first learned of the email in question, the actions they took concerning that information, and *their knowledge of the availability of pentobarbital and, without revealing identities, the source and basis of that knowledge*. V, 628.

The Chancery Court's May 24, 2017 order is sealed but is contained in the record before this Court. *See* Sealed Order, May 24, 2017, at 18-23. The Chancery Court's June 13, 2018 order permitted Appellants to depose the Department's General Counsel to the same extent described in the sealed order. VI, 739.

None of these rulings "restrict[ed]" the Appellants from investigating or presenting evidence on the availability of pentobarbital. Abdur'Rahman Brief, at 310. The Chancery Court also did not prevent them from presenting evidence from their own witnesses about the availability of the drug. But, despite marshaling four "eminent," "world-class experts," *id.* at 9, 124, and 185 n.49, in the medical and pharmacological fields, Appellants presented "none of their own witnesses to show that their proposed method of execution—pentobarbital—is available to the State." XVI, 2239. In fact, the testimony of Appellants' experts revealed that Appellants did not even

request that information from them. XXV, 169 (Stevens), XXVIII, 550-51 (Greenblatt), XXXIX, 1458 (Edgar), XLIII, 1883-84 (Lubarsky). And there is no indication in this record the Appellants were impeded from contacting potential drug manufacturers and suppliers themselves, just as the Department had done, to determine the availability of pentobarbital for use in executions.[5]

Beyond that, the extent of the Department's efforts to obtain pentobarbital, whether through contact with drug manufacturers, suppliers, or other States, is not the question. *Glossip* requires the inmate challenging a State's method of execution to identify a known and available alternative method of execution; it places no burden on the State to show that it exhausted all avenues of supply. *See Arthur v. Comm'r, Alabama Dept of Corr.*, 840 F.3d 1268, 1303 (11th Cir. 2016), cert. denied, 137 S.Ct. 725 (2017).

What is clear from this record—just as in *Glossip* and *Arthur* and *In re Ohio Execution Protocol*—is that "pentobarbital is not available to the Defendants." XVI, 2249. Appellants have not demonstrated how the discovery they sought would have altered that fact, and they made no attempt to identify a source for the drug despite ample independent resources.

This issue is meritless.

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[5] In fact, logic and common sense dictate that, had Appellants located a source for their preferred alternative, the Department would have gone to that source to obtain the pentobarbital. As Commissioner Parker testified, "if the Department had a source of Pentobarbital, it would be used." XXXVII, 1355.

V. Tennessee's Confidentiality Laws Protecting the Identities of Individuals Involved in the Execution Process Do Not Excuse Appellants from Proving the Essential Elements of an Eighth Amendment Claim Under *Glossip*. (Abdur'Rahman Issue 6)

Appellants list as Issue 6 whether Tennessee's confidentiality provisions related to the identifies of individuals involved in the execution process "excuse" Appellants from their burden under *Glossip* to establish the availability of an alternative lethal injection protocol. Abdur'Rahman Brief, at 11. But there is nothing further in Appellants' brief, other than the listing of the issue, for Appellees to respond to. Appellees are unable to locate any argument or citation to authority in Appellants' brief, as required by Tenn. R. App. 27(a)(7), discussing that issue or supporting the claim that this Court should "excuse" the Appellants from their burden to prove an essential element their claim. In any event, *Glossip* makes clear that identification of a known and available alternative method of execution is "a requirement of *all* Eighth Amendment method-of-execution claims." *Glossip,* 135 S.Ct. at 2731 (emphasis added). And this Court emphasized the significant public interest underlying laws designed to protect the identities of individuals and entities involved with executions in *West v. Schofield*, 460 S.W.3d 113 (Tenn. 2015).

VI. The Lethal Injection Protocol Does Not Violate Appellants' Right to Access to the Courts. (Abdur'Rahman Issue 7)

Appellants next assert that the lethal injection protocol violates their right to counsel and access to the courts by placing limits on the number of defense counsel witnesses, their sight lines to the execution procedure, and their access to a telephone during the execution. Abdur'Rahman Brief, at 285-86. But the Chancery Court correctly dismissed this claim because it is premised on speculation that something will go wrong during the execution and is thus beyond the scope of a facial challenge to the protocol. *See West I*, 519 S.W.3d at 556 ("A facial challenge does not involve a consideration of the Plaintiffs' list of things that *might* go wrong if the Protocol is not followed.") (emphasis in original). *See also Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 310 (Tenn. 2005) (rejecting inmate's access-to-courts claim because "he has failed to show evidence that a scenario involving unnecessary pain and suffering is anything other than speculation").

The right of access to the courts is a component of the First Amendment right to petition the government for redress of grievances. *See Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983). But there can be no deprivation of that right without a relevant actual injury. *See Lewis v. Casey*, 518 U.S. 343, 351 (1996) (explaining, by way of comparison, that a healthy inmate cannot claim a constitutional violation because of the inadequacy of the prison infirmary). And "the injury requirement is not satisfied by just any type of frustrated legal claim." *Lewis*, 518 U.S. at 354. To have meaningful access to courts, inmates

need only be given the tools necessary to attack their sentences. "Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Id*. at 355.

In *Whitaker v. Collier*, the Fifth Circuit held that "the possibility of 'botched executions' that access to counsel could address . . . is just the kind of 'isolated mishap' that is not cognizable via a method-of-execution claim." 862 F.3d 490, 501 (5th Cir. 2017) (citing *Baze*, 553 U.S. at 50). Moreover, the Sixth Amendment right to counsel only extends to the first appeal of right and not further. *Id*. (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)). Thus, without succeeding on an underlying claim, there could be no denial of the right to counsel on a speculative method-of-execution claim. *Id*.

Moreover, the Chancery Court correctly deferred to the Department in establishing security measures under the authority delegated to it in Tenn. Code Ann. § 40-23-114(c) ("The department of correction is authorized to promulgate necessary rules and regulations to facilitate the implementation of this section.").

The Chancery Court correctly dismissed this claim.

VII. The Lethal Injection Protocol Does Not Violate Substantive Due Process. (Abdur'Rahman Issue 8)

Appellants contend that the Department's promulgation of the lethal injection protocol to include midazolam as the first drug in the three-drug protocol violates substantive due process guarantees of the federal and state Constitutions. Abdur'Rahman Appellants' Brief at 276.

They insist that this claim "does not challenge the *use* of Midazolam" but only the "*process*" by which it was selected. *Id.* at 282 (emphasis in original). The Chancery Court correctly dismissed this claim.

Substantive due process is implicated when an executive agency of government acts in a manner that is either: (1) arbitrary, irrational, or improperly motivated; or, (2) is "so egregious that it shocks the conscience." *Abdur'Rahman*, 181 S.W.3d at 310 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998)). The notion of a cognizable level of executive abuse of power that "shocks the conscience" was articulated in *Rochin v. California*, 342 U.S. 165, 169, 209-10 (1952) (holding that pumping a criminal suspect's stomach in search of evidence "shocked the conscience" and violated substantive due process).

The "operative inquiry confronting a court considering a substantive due process claim premised on the alleged 'conscience shocking' behavior of some state official is whether her power is wielded egregiously or as an 'instrument of oppression.'" *Hines v. State*, No. M2006-02447-CCA-R3-PC, 2008 WL 271941, at *7 (Tenn. Crim. App. Jan. 29, 2008), *perm. app. denied* (Tenn. Dec. 8, 2008) (quoting *Alley v. Key*, 431 F.Supp.2d 790, 801 (W.D. Tenn. 2006)). Merely acting in accordance with state and federal laws cannot rise to "conscience shocking" levels of behavior. *Hines*, 2008 WL 271941, at *8.

The General Assembly has selected lethal injection to be the primary method of execution in Tennessee. Tenn. Code Ann. § 40-23-114(a). Concomitant with that selection, the General Assembly gave the Department of Correction broad statutory authority to implement this policy. Tenn. Code Ann. § 40-23-114(c). There is surely nothing shocking

about a decision to adopt a method of execution approved by the United States Supreme Court and implemented more than 17 times by various States since that decision. *Glossip*, 135 S.Ct. at 2739-40. XVI, 2257.

Indeed, this Court similarly rejected an inmate's substantive due process claim in *Abdur'Rahman v. Bredesen*:

> [T]here is nothing arbitrary, irrational, improper or egregious in the Department of Correction following the legislative mandate to implement lethal injection as a method of punishment. Second, there is nothing arbitrary, irrational, improper or egregious in the manner in which the Department implemented a lethal injection protocol, *i.e.*, by studying the lethal injection protocols of other states and the federal government and by using those protocols as models for the creation of Tennessee's protocol. Finally, as fully explained in our analysis of the cruel and unusual punishment issue, there is no evidence that the Tennessee lethal injection protocol creates an unreasonable risk of unnecessary pain and suffering.

Abdur'Rahman, 181 S.W.3d at 310.

Moreover, when "a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing the claims." *Partin v. Davis*, 675 Fed. Appx. 575, 581, 2017 WL 128559 (6th Cir. 2017) (quoting *County of Sacramento*, 523 U.S. at 842). The Chancery Court correctly recognized that the Eighth Amendment is an explicit textual source of constitutional protection on the Appellants' claim challenging the State's implementation of a death sentence. XVI, 2264. Accordingly, that Amendment, not the more generalized notion of substantive due

process, provides the appropriate analytical framework for Appellants' claims. And as demonstrated above, Tennessee's lethal injection protocol satisfies Eighth Amendment requirements.

Appellants' claim that the process by which the Department chose to use a constitutional method of execution shocks the conscience is meritless.

VIII. The Lethal Injection Protocol Does Not Violate Appellants' "Right to Dignity." (Abdur'Rahman Issue 9)

Appellants contend that the lethal injection protocol violates the Eighth and Fourteenth Amendments and article I, section 16 of the Tennessee Constitution because it "violates evolving standards of decency." The Chancery Court correctly dismissed this claim before trial under Tenn. R. Civ. P. 12.02(6) because it fails to state a claim on which relief may be granted. IV, 584-86.

The Eighth Amendment's "cruel and unusual punishment" prohibition "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Gregg v. Georgia*, 428 U.S. 153, 172-73 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). A penalty must also accord with "the dignity of man." *Id.* The Supreme Court explained that this means, at least, that a punishment may not be "excessive," which is understood in two aspects: first, the punishment must not involve the unnecessary and wanton infliction of pain; and second, the punishment must not be grossly out of proportion to the severity of the crime. *Id.*

But those considerations provide no independent basis for an Eighth Amendment method-of-execution claim because they are already encompassed within the *Baze*/*Glossip* analysis, which governs when assessing whether a particular method of execution is forbidden. *Baze*, 553 U.S. at 48-49 (outlining Eighth Amendment jurisprudence relevant to a method-of-execution claim); *Glossip*, 135 S.Ct. at 2731-33 (same).[6]

It is well established that the death penalty as a means of punishment does not violate the Eighth Amendment. *Id.*, at 187 ("We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it."). Each of the Appellants has separately been sentenced to death for offenses and under procedures that satisfy Eighth Amendment considerations, including the "evolving standards of decency" and the "dignity of man."

Glossip made clear what an inmate must demonstrate to prevail on an Eighth Amendment method-of-execution claim. *Glossip*, 135 S.Ct. at 2737-39 (quoting *Baze v. Rees*, 553 U.S. 35, 50, 52 (2008)). Since Appellants did not and cannot prevail on that claim, the Chancery Court correctly dismissed their claim that the lethal injection protocol violates "evolving standards of decency."

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[6] The Court's 2005 decision in *Abdur'Rahman*, which pre-dates both governing cases, requires no different result. And to the extent the Eighth Amendment analysis in that case is different or inconsistent with *Baze*/*Glossip*, it has been superseded.

IX. The Lethal Injection Protocol Does Not Violate Appellants' Constitutional Rights by Using Chemicals Prohibited for Use in Non-livestock Animal Euthanasia. (Abdur'Rahman Issue 10)

Appellants contend that the lethal injection protocol violates the "dignity of all persons" by using drugs not sanctioned for animal euthanasia in violation of the Eighth Amendment of the United States Constitution and article I, section 16 of the Tennessee Constitution. Abdur'Rahman Brief, at 306. The Chancery Court correctly dismissed this claim before trial under Tenn. R. Civ. P. 12.02(6) because it fails to state a claim on which relief may be granted. IV, 586-87.

For the same reasons stated above in the discussion of Issue VIII, considerations of the "dignity of man" provide no independent basis for relief under the Eighth Amendment.

Moreover, this Court has previously ruled that the Non-Livestock Humane Death Act is inapplicable to the Tennessee Department of Correction in the context of executions and is inapplicable on its face to human beings.

> In our view, the lethal injection protocol does not violate this Act for numerous reasons. The plain language of the Act is applicable only to certain public and private agencies set out in section 44–17–302, which group does not include the Department of Correction. The plain language in the statutory definition of a nonlivestock animal as provided in section 39–14–201(3) does not include human beings. Likewise, there is no language in the Act or elsewhere that plainly states or otherwise suggests its applicability to inmates in the Department of Correction. Finally, there is no language in the lethal injection statute or elsewhere that

> would indicate it is to be construed or interpreted in conjunction with the Nonlivestock Animal Humane Death Act. Tenn. Code Ann. § 40–23–114.

Abdur'Rahman, 181 S.W.3d at 313.

To prevail on an Eighth Amendment challenge to a method of execution, a prisoner must establish that the method is "sure or very likely to cause serious illness and needless suffering" and that there is a "feasible, readily implemented" alternative that significantly reduces the substantial risk to severe pain. *Glossip*, 135 S.Ct. at 2737 (quoting *Baze v. Rees*, 553 U.S. 35, 128 (2008)). *See also West II,* 519 S.W.3d at 568 (establishing the standard for article I, § 16 of the Tennessee Constitution). Since Appellants did not and cannot prevail on that claim, the Chancery Court correctly dismissed this "dignity of all persons" claim that Appellants have attempted to tease out of the Non-Livestock Humane Death Act.

X. The Chancery Court Did Not Abuse Its Discretion in Denying Appellants' Eleventh-Hour Request to Add an As-Applied Challenge Regarding the Credentials and Qualifications of the State's Source of Lethal Injection Chemicals. (Abdur'Rahman Issue 11)

Appellants contend that the Chancery Court abused its discretion in denying their motion to raise an as-applied challenge to the qualifications of the Department's drug supplier/compounder. Abdur'Rahman Appellants' Brief, at 294. Appellants made that motion on June 28, 2018, just eleven days before the start of trial. TR X, 1275.

A court abuses its discretion only if it applies an incorrect legal standard, reaches a conclusion that is not logical, bases its decision on a clearly erroneous assessment of the evidence, or uses reasoning that causes an injustice to the complaining party. *Davidson,* 509 S.W.3d at 193-94. None of these circumstances is present here, and the Chancery Court's reasoned decision was well within the bounds of its discretion. TR X, 1353-62.

Tennessee Rule of Civil Procedure 15.01 provides that "[a] party may amend his pleadings once as a matter of course at any time before a responsive pleading is served . . . otherwise a party may amend his pleadings only by written consent of the adverse party or by leave of court; and leave shall be freely given *when justice so requires*." (Emphasis supplied.)

The decision whether to permit an amendment is discretionary but guided by a number of circumstances that, singly or in combination, could warrant denying a motion to amend a pleading. *Hardcastle v. Harris*, 170 S.W.3d 67, 80 (Tenn. Ct. App. 2004). These circumstances include: (1) undue delay in seeking the amendment; (2) lack of notice to the opposing party; (3) bad faith or dilatory motive of the moving party; (4) repeated failure by the moving party to cure deficiencies in earlier amendments; (5) futility of the proposed amendment; and (6) undue prejudice to the opposing party. *Id.* And, as especially applicable here, "[l]ate amendments fundamentally changing the theory of a case are generally not viewed favorably when the facts and theory have been known to the party seeking the amendment since the beginning of the litigation." Id. at 81.

The Chancery Court considered these factors in denying Appellants' motion to add as-applied challenges related to the qualifications of the Department's drug supplier. The motion was denied because of Appellants' undue delay in moving to amend and because as-applied challenges fundamentally change the nature of the lawsuit. TR X, 1361-62. The Court noted that Plaintiffs had previously represented to the Court that their lawsuit was a facial challenge to the lethal injection protocol. TR X, 1362. And the protocol, as written, allows for the use of compounded preparations of the lethal chemicals, including midazolam. TR X, 1359. The Chancery Court did allow, however, the addition of allegations concerning compounding for Appellants' facial challenge. TR X, 1355. The Court's analysis and conclusion were reasonable and appropriate.

Moreover, Appellants failed to avail themselves of an opportunity to prepare a "fully developed record" for appellate review on this issue. TR XII, 1586. In its order denying reconsideration of the motion to add as-applied challenges, the Chancery Court directed that "Plaintiffs shall be permitted at trial to make an offer of proof, through the testimony of Ms. Inglis, [concerning] their allegations that John/Jane Doe Pharmacists 1) are not properly licensed in the State of Tennessee; 2) do not have adequate facilities to compound high-risk sterile injectables; and 3) have a disciplinary history that calls into question their competence to provide sterile, stable, potent chemicals for lethal injections in the State of Tennessee." TR XII, 1586-87. Appellants made no such offer.

In any event, an amendment to add an as-applied challenge to the qualifications of the Department's drug supplier/compounder would have been futile. Appellants made no specific allegation as to how implementation of the protocol using compounded lethal injection chemicals would be unconstitutional as applied to any individual inmate. Instead, their contention that one or more participant in the execution process may cause the protocol to be carried out in an unconstitutional manner in the future was hypothetical and speculative and therefore not justiciable under the Declaratory Judgments Act. *See West I,* 460 S.W.3d at 132.

XI. The Chancery Court Did Not Abuse Its Discretion in Permitting Appellees' Expert Dr. Feng Li to Testify Out of Order. (Abdur'Rahman Issue 12)

Appellants contend that the Chancery Court "abused her authority" by allowing the Appellees to present the testimony of their expert witness Dr. Feng Li out of order. Abdur'Rahman Appellants' Brief, at 328. But that contention is baseless.

A trial court has broad discretion in controlling the course and conduct of trial. *State v. Davidson*, 509 S.W.3d 156, 193-94 (Tenn. 2016); The time and manner of the introduction of witnesses and control of the order of proof rests within the sound discretion of the trial court. *Dezarne v. State*, 470 S.W.2d 25, 27-28 (Tenn. Crim. App. 1971); *Wilson v. State*, 452 S.W.2d 355, 358 (Tenn. Crim. App. 1969); *Castelli v. Lien*, 910 S.W.2d 420, 425 (Tenn. Ct. App. 1995) (trial judges have broad discretion over the order of proof). Appellate courts will reverse a judge's decision only

if the trial judge abused her discretion and when the error has affected substantial rights of one or both parties. *Castelli*, 910 S.W.2d at 425-26.

The Chancery Court's decision to permit Dr. Li to testify out of order resulted in no injustice or prejudice to the Appellants. They had an opportunity depose him before trial and to cross-examine him during trial. Indeed, Appellants themselves assert that "the Chancellor ignored Dr. Li in her ruling" and admit that any prejudice from admission of the testimony is "difficult to cite." Abdur'Rahman Appellants' Brief, at 333 n.126.

This issue is entirely meritless.

XII. The Chancery Court Did Not Abuse Its Discretion in Permitting the Testimony of Appellees' Expert Witnesses. (Abdur'Rahman Issue 13)

Appellants contend that the Chancery Court should have excluded the testimony of Appellees' experts Dr. Roswell Evans and Dr. Feng Li under Tenn. R. Evid. 702 and 703 and *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997). Abdur'Rahman Appellants' Brief, at 334. The Chancery Court did not abuse its discretion.

A "witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise" if that testimony "will substantially assist the trier of fact to understand the evidence or to determine a fact in issue." Tenn. R. Evid. 702 . A court "shall disallow testimony in the form of an opinion or inference if the underlying facts or date indicate a lack of trustworthiness." Tenn. R. Evid. 703. Questions regarding the admissibility of expert testimony rest

within the sound discretion of the trial court, and a court's ruling will only be overturned if the discretion is "arbitrarily exercised or abused." *McDaniel*, 955 S.W.2d at 263-64.

Here, the Chancery Court found that Dr. Evans was qualified and "allowed to state expert opinions in the field of pharmacy and pharmacology." TE XLV, 2067. The Court further found that "Dr. Li is qualified to testify as an expert witness in the fields of anatomic, forensic, clinical pathology and physiology and with respect to toxicology" and, further, that his "forensic expertise and experience will aid the Court under Rule 7.02 (sic) and 7.03 (sic)." TE XLVIII, 51.

There was nothing arbitrary or abusive about the Chancery Court's decision to permit the testimony of Dr. Evans and Dr. Li. They both testified as experts in previous litigation in Tennessee addressing the constitutionality of the State's lethal injection protocol. *West II*, 519 S.W.3d at 561-62. Dr. Evans also testified as an expert witness in *Glossip* as well as other cases cited in that opinion. *Glossip*, 135 S.Ct. at 2739-40. The Chancery Court made clear that Appellants' objections could be considered in assessing the weight that the Court would place on the opinions of these experts. XLVIII, 51.

It is difficult to understand how Appellants can even claim prejudice or harm when they themselves assert that the Chancery Court gave no weight whatsoever to anything the Appellees' experts had to offer. Abdur'Rahman Appellants' Brief, at 333 n.126, 334.

In the final analysis, however, any error in the admission of the testimony of Appellees' experts is harmless because the testimony of Dr. Evans and Dr. Li had absolutely no bearing on the sole issue on which

the Chancery Court based its decision. That decision turned solely on Appellants' failure to satisfy the feasible-alternative element of *Glossip*: "The Court finds that in this lawsuit, the Plaintiffs have failed to prove the essential element that there exists an available alternative. On *this basis alone*, by United States law, this lawsuit must be dismissed." XVI, 2239 (emphasis added).

Appellants are entitled to no relief in this issue.

XIII. This Court's Expedited Appellate Schedule Does Not Violate Appellants' Due Process Rights. (Abdur'Rahman Issue 14)

Appellants contend that the Court's expedited briefing schedule violates due process by depriving them of "deliberative appellate review" and by imposing a death sentence in a "freakish manner" in violation of "the promise" of *Gregg v. Georgia*, 428 U.S. 153 (1976). Abdur'Rahman Appellants' Brief, at 352. They are wrong on both points.

The fundamental element of due process is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). But due process is flexible and requires consideration of the panoply of interests involved. *Workman v. State*, 41 S.W.3d 100, 103 (Tenn. 2001). "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Moncier v. Board of Professional Responsibility*, 406 S.W.3d 139, 153 (Tenn. 2013) (quoting *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)). The hearing must also employ a decision-maker or decision-makers who are unbiased. *Heyne v.*

Metropolitan Nashville Bd. of Educ., 380 S.W.3d 715, 734-35 (Tenn. 2012) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

Appellants have been denied no due process in this proceeding. They received extensive process in the Chancery Court and were permitted every opportunity to make a complete record on their claims. In this Court, Appellants will be heard through counsel in writing (in a brief far exceeding—with the permission of this Court—the page/word limit that would otherwise apply) and in person (with extended time granted by this Court for oral argument) before an impartial tribunal. The issues are governed by established precedent and require no extended period for analysis and disposition.

Moreover, the "promise" of *Gregg v. Georgia*, 428 U.S. 153 (1976), has already been fulfilled. *Gregg* made clear that a death penalty may be constitutionally imposed through a system in which the sentencing authority is apprised of the information relevant to the imposition of the sentence and provided with standards to guide its use of the information. 428 U.S. at 195. Each of the Appellants was charged by the State of Tennessee with first-degree murder. They were afforded counsel and tried twice by a jury, first to determine whether they were guilty of the crime and again to determine whether death was the appropriate sentence based on an individualized assessment of aggravating and mitigating circumstances. They were convicted and sentenced according to law and were afforded the right to direct and post-conviction review in the state and federal courts. The method of execution to be employed by the State of Tennessee to carry out Appellants' lawful sentences has been upheld by the United States Supreme Court and numerous other courts.

It has *never* been held unconstitutional. There is nothing arbitrary or "freakish" about this course of events, and Appellants' due process claim is meritless.

Additional Issues Raised by Miller Appellants:

I. The Chancery Court's Ruling Does Not Turn on Facts Developed in Other Cases.

The Miller Appellants first contend that the Chancery Court violated their right to due process of law by "relying on fact-based findings from other cases" in addressing the first element of *Glossip*. Miller Brief, at 23. This contention is meritless for two reasons. First, the premise is demonstrably wrong: a plain reading of the Chancery Court's decision shows that it does not rely on fact findings from other cases. Second, the "fact-based findings from other cases" to which the Miller Appellants refer all go to the question of the risk of injury posed by midazolam. But the Chancery Court's ruling rests entirely on its determination that Appellants failed to show that their proposed alternative method of execution—pentobarbital—is available to the State of Tennessee. "On this basis alone, by United States law, this lawsuit is dismissed." XVI, 2239. Because the Eighth Amendment "requires a prisoner to plead and prove and known and available alternative," *Glossip*, 135 S.Ct. at 2739, and because Appellants failed to do this, which

failure alone resulted in dismissal of their suit, any fact issues related to the alleged risks of injury from midazolam are not dispositive.[7]

Although consideration of the midazolam issue was not necessary to its disposition of the case, the Chancery Court did nevertheless address the evidence that the Appellants had put in the record in this case. And based on that proof, the Court made one principal finding: "The Court finds that [Appellants'] experts established that midazolam does not elicit *strong* analgesic effects and the inmate being executed *may* be able to feel pain from the administration of the second and third drugs." XVI, 2251 (emphasis added).

But the Chancery Court also recognized that the Constitution does not require a painless death, as there is *some risk of pain* inherent in any method of execution. *Glossip*, 135 S.Ct. at 2733. And it examined multiple factors to determine whether the risk was "objectively intolerable" under the Eighth Amendment: (1) case law examining the use of midazolam; (2) official documentation and demonstrative evidence submitted by both parties of twenty executions using midazolam performed by the Departments of Correction of Florida, Arkansas, and Ohio, which established an average duration of executions using a midazolam-based three-drug protocol of 13.55 minutes; and (3) eyewitness accounts of lethal injection executions performed in other states. XVI, 2252-58. These considerations properly informed the

[7]Appellants' suggestion that the Chancery Court must address the elements in any particular order is meritless. Miller Brief, at 23. *Glossip* makes clear that an inmate's failure to prove either of the two elements is an "independent reason[]" for dismissal of the claim. 135 S.Ct. at 2731.

Court's legal conclusion that the risk of harm from the use of a midazolam-based lethal injection protocol is not "sure or very likely to result in needless suffering." *Glossip*, 135 S.Ct. at 2739.

Appellants take issue with the Chancery Court's reference to "statements made by other courts about the three drugs in Tennessee's execution protocol." Miller Brief, at 24. But it was entirely appropriate for the Chancery Court to examine how other courts, especially the United States Supreme Court, have applied the identical governing legal principles to materially similar facts. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 412 (2000) (state court may be deemed "unreasonable" if it decides a case differently from the Supreme Court on a set of materially indistinguishable facts).

Fidelity to precedent—the policy of stare decisis—is vital to the proper exercise of the judicial function. "Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 377 (2010) (Roberts, C.J., Concurring) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

The Chancery Court's review and application of other cases addressing materially similar facts was entirely appropriate and

provides no basis for relief.[8] It in no way impinged on any right to due process.

II. Appellants Were Not Denied an Opportunity to Be Heard on the Second Element of *Glossip*.

Finally, Appellants contend that they were denied "notice and an opportunity to be heard" on whether there is a feasible and readily available alternative method of execution to the three-drug midazolam protocol that significantly reduces a substantial risk of pain. Miller Brief, at 29. Appellants' arguments largely mirror those of the Abdur'Rahman Appellants, which were addressed in Sections I and II, *supra*, at pages 11-26, and are incorporated here by reference.

For their part, the Miller Appellants seek to shift the fault for their failure to prove the availability of their proposed alternative method of execution—pentobarbital—to the State. Their theory seems to be that they did not know they had to prove that pentobarbital was available because they did not have notice that pentobarbital was unavailable to the State until Protocol A was removed from the Department's execution protocol. Miller Brief at 33.

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[8] On a seemingly unrelated point, Appellants also fault the Chancery Court for failing to perform a comparative analysis of the risk of harm from the midazolam-based three-drug protocol with the evidence of Appellant's "proposed alternative protocol." Miller Brief, at 27. But as explained above, that analysis was unnecessary because Appellants failed to show that their proposed alternative method of execution—pentobarbital—was available to the State of Tennessee in the first place. TR XVI, 2239

But this theory does not comport with reality. Appellants had actual notice that pentobarbital was unavailable to the State as early as February 15, 2018, before the commencement of this action and well before their various amended complaints were filed. Appellants were on notice—through at least one filing made by the State in this Court and served on counsel for all the Appellants—that pentobarbital was very likely not available to the Department for the purposes of carrying out executions. State's Motion to Set Execution Dates, filed on February 15, 2018. The Motion, at 1, makes clear that the Department anticipated "difficulty obtaining the drugs necessary to carry out execution by lethal injection" after June 1, 2018. With specific reference to pentobarbital, the Motion expressly states, at 2 (emphasis added):

> Despite continuing efforts to identify an alternate source of pentobarbital, *the Department currently has none on hand and no known source to obtain more*. As a result, the Department deemed it necessary to provide an alternative drug combination to ensure it could comply with its statutory obligation to carry out death sentences by lethal injection when ordered to do so. Thus, on January 8, 2018, the Commissioner of Correction approved a revised lethal injection protocol, which added an alternative protocol (Protocol B) using a three-drug combination, consisting of midazolam, vecuronium bromide, and potassium chloride, along with the existing single-drug protocol using pentobarbital (Protocol A).

Clearly, if the Appellants drew an incorrect inference about the availability of pentobarbital from the Department's retention of Protocol A in its January revision, that is a problem entirely of their own making. If nothing else, the Motion told them explicitly that Protocol B had been

added as an alternative for the very reason that pentobarbital was then unavailable to the Department and would likely be unavailable in the future.

Additional notice came to Appellants on May 21, 2018, when Appellees filed, as an attachment to a Motion for Protective Order, V, 661, an Affidavit of Commissioner Parker, which again stated, "As Commissioner, I approved the January 8, 2018 [lethal injection protocol] because the drug pentobarbital and chemicals to compound pentobarbital, the drug in TDOC's previous procedures, are unavailable to TDOC for the purpose of carrying out executions by lethal injection." V, 670-71 (Affidavit of Tony C. Parker). That same affidavit was filed again as Exhibit 2 to Appellees' Motion for Summary Judgment on May 29, 2018. VI, 704mmmm.

Plaintiffs are generally required to prove at trial allegations made in their complaints. Since, as Appellants themselves concede, Miller Brief, at 31, they pled from the outset of the lawsuit that pentobarbital constitutes a "feasible and readily-available" alternative to a three-drug midazolam protocol, they knew from the outset that it was their burden to prove that allegation at trial. And they were on notice from the outset that pentobarbital was not then available to the Department and likely would not ever be available.

In sum, the removal of Protocol A did not render pentobarbital unavailable. Nor was the removal of Protocol A the first "notice" that Appellants had of the unavailability of pentobarbital.

Moreover, the removal of Protocol A is irrelevant to whether there is feasible or readily implemented alternative to Protocol B for purposes

of *Glossip*. Nothing limited Appellants to identifying as a feasible alternative only a drug or drugs that the Department had specified. The inmate bears the burden of showing that "there is *now* a source for pentobarbital *that would sell it to the [Department of Correction]* for use in executions." *Id.* at 1302 (emphasis in original). *Arthur v. Commissioner, Alabama Department of Corrections*, 840 F.3d 1268, 1300 (11th Cir. 2016), *cert. denied sub nom*., *Arthur v. Dunn*, 137 S.Ct. 725 (2017). And Appellants had ample notice of the requirement to plead *and prove* an available alternative through *Glossip*. This is "a requirement of *all* Eighth Amendment method-of-execution claims." *Glossip*, 135 S.Ct. at 2731 (emphasis added).

In the end, it simply defies logic to suggest that Appellants believed pentobarbital was, in fact, available to the State. As Commissioner Parker testified, if the Department had a source of Pentobarbital, it would be used."[9] XXXVII, 1355. And as the Chancery Court pointed out, it "defies common sense that the State would not make the effort to locate pentobarbital," since this Court has already upheld its use. XVI, 2247.

Finally, contrary to Appellants' contention, *Bucklew v. Precythe*, 138 S.Ct. 1706 (2018), has no application here. Miller Brief, at 46-48. In *Bucklew v. Precythe*, 883 F.3d 1087, 1096-97 (8th Cir. 2018), the Eighth Circuit rejected a Missouri death row inmate's challenge to the constitutionality of Missouri's lethal injection method of execution because the inmate failed to show that an alternative method of execution by lethal gas would substantially reduce his pain and suffering.

[9] The Appellants also deposed the Commissioner before trial.

From that decision, the inmate petitioned the United States Supreme Court for a writ of certiorari on three questions. Two of the questions address evidentiary standards for comparing a state's existing method of execution with an inmate's proposed alternative. The third question asks whether the Eighth Amendment requires an inmate to prove an alternative method of execution at all "when raising an as-applied challenge to the state's proposed method of execution based on [the inmate's] rare and severe medical condition." Petition for Writ of Certiorari at (i), *Bucklew v. Precythe*, No. 17-8151 (U.S. Mar. 5, 2018).

In its order granting certiorari, the United States Supreme Court pointedly directed the parties to brief and argue a fourth question: "Whether petitioner met his burden under *Glossip v. Gross*, 576 U.S. ____, 135 S.Ct. 2726, 192 L.Ed.2d 761 (2015), 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." *Bucklew v. Precythe*, 138 S.Ct. 1706 (April 30, 2018).

First, it is clear from the questions pending on certiorari that *Bucklew* has no application here. *West* and *Glossip* are binding authority on the elements necessary to sustain Appellants' challenge to Tennessee's method of execution. Thus, any speculation regarding the potential outcome of *Bucklew* is not appropriate for the Court's consideration.

Second, *Glossip* holds that "identify[ing] a known and available alternative method of execution that entails a lesser risk of pain [is] a requirement of *all* Eighth Amendment method-of-execution claims."

Glossip, 135 S.Ct. at 2731 (emphasis added). Given this unambiguous authority, *Bucklew* is not instructive on the Appellants' burden to plead and prove an alternative method of execution in this case. *Glossip* and *West* state that requirement clearly, a requirement that will not be revisited in *Bucklew*. Indeed, the Supreme Court's independent, additional question in *Bucklew* reinforces that requirement. The very premise of the additional question is that the petitioner's "burden under *Glossip*" remains a threshold inquiry. *Bucklew*, 138 S.Ct. at 1706.

Third, the specific issues in *Bucklew* are not the issues before this Court. Unlike this case, the point of contention in *Bucklew* was not whether the inmate's proposed alternative—lethal gas—was a feasible and available alternative. *Bucklew v. Precythe*, 883 F.3d 1087, 1094 (8th Cir. 2018) (cert. granted). Instead, the point of contention was the comparative risk of harm between the State's existing method of execution (lethal injection) and the inmate's proposed alternative (lethal gas), considering the inmate's unique congenital medical condition. *Id.* at 1093.

In sum, *Bucklew* is neither authoritative nor instructive here. *Glossip* and *Baze* established two requirements for an Eighth Amendment method-of-execution challenge, and this Court reiterated and re-affirmed those requirements in *West,* 519 S.W.3d at 566 ("*Glossip* . . . made clear the burden of proof that a condemned inmate must satisfy in Eighth Amendment challenges to a lethal injection protocol"). *Bucklew* will not alter these requirements and is otherwise not on point on any issue before this Court.

CONCLUSION

The judgment of the Chancery Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing motion was forwarded by operation of the e-filing system, by United States mail, first-class postage prepaid, and by email on the 21st day of September 2018, to the following:

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CERTIFICATE OF COMPLIANCE

In accordance with Tenn. Sup. Ct. R. 46, § 3.02, the total number of words in this brief, excluding the cover page, Table of Contents, Table of Authorities, and Certificate of Compliance, is 13,464. This word count is based upon the word processing system used to prepare this brief.

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