No. 17-3076

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: OHIO EXECUTION PROTOCOL LITIGATION	:	On Appeal from the United States
	:	District Court for the
FEARS, ET AL.,	:	Southern District of Ohio
	:	Eastern Division
GARY OTTE; RONALD PHILLIPS; RAYMOND TIBBETS,	:	
	:	District Court Case No. 2:11-cv-1016
Plaintiffs-Appellees,	:	
	:	**DEATH PENALTY LITIGATION**
v.	:	**Execution Scheduled July 26, 2017**
MORGAN, ET AL.,	:	
Defendants-Appellants.	:	

SUPPLEMENTAL BRIEF FOR REHEARING EN BANC OF DEFENDANTS-APPELLANTS

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INTRODUCTION

"One cannot credibly establish a likelihood of success in attacking a death-penalty procedure when the theory of success has yet to succeed in a considerable number of cases over a considerable number of years." *Workman v. Bredesen*, 486 F.3d 896, 906 (6th Cir. 2007). That principle decides this case: The "Supreme Court and several appellate courts have uniformly rejected challenges to lethal injection protocols that use midazolam as the first drug in a three-drug" method. *Gray v. McAuliffe*, No. 3:16CV982, 2017 WL 102970, at *11 (E.D. Va. Jan. 10, 2017); *Glossip v. Gross*, 135 S. Ct. 2726, 2737-38 (2015); *McGehee v. Hutchinson*, __ F.3d __, 2017 WL 1404693, at *2-3 (8th Cir. Apr. 17, 2017) (en banc); *Estate of Lockett v. Fallin*, 841 F.3d 1098, 1113-14 (10th Cir. 2016); *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1301-04, 1314-20 (11th Cir. 2016); *Jordan v. Fisher*, 823 F.3d 805, 811-12 (5th Cir. 2016); *Kelley v. Johnson*, 496 S.W.3d 346, 356-60 (Ark. 2016); *Banks v. State*, 150 So. 3d 797, 800-01 (Fla. 2014). But here, a panel affirmed an injunction against the same protocol. *In re Ohio Execution Protocol*, No. 17-3076, slip op. at 2 (6th Cir. Apr. 6, 2017) ("Panel Op."). The full Court should now reverse the injunction. When doing so, it should clarify three critical legal principles that are designed to protect traditional state authority.

First, inmates seeking to prove that an execution method presents a "'substantial risk of serious harm'" under the Eighth Amendment face a "'heavy

burden.'" *Baze v. Rees*, 553 U.S. 35, 50, 53 (2008) (plurality op.) (citations omitted). They must prove that the method is "'*sure or very likely*'" to cause severe pain. *Glossip*, 135 S. Ct. at 2737 (citation omitted). That rigorous test keeps federal courts from becoming "best-practices board[s]," *Cooey (Biros) v. Strickland*, 589 F.3d 210, 221 (6th Cir. 2009), by requiring challengers to identify a "well-established scientific consensus" against a method, *Baze*, 553 U.S. at 67 (Alito, J., concurring). Scientific uncertainty should doom constitutional claims in this context, *McGehee*, 2017 WL 1404693, at *3, just as it does in others, *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). Yet here, the district court legally erred by using a standard pinned to "uncertainty," Panel Op. 38 (Kethledge, J., dissenting).

Second, inmates seeking to prove that an alternative execution method is available to a State under the Eighth Amendment again face a heavy burden. They must prove *both* that "the State actually has access to the alternative" *and* that the State can implement the alternative "relatively easily and reasonably quickly." *Arthur*, 840 F.3d at 1300; *McGehee*, 2017 WL 1404693, at *3. This standard ensures that the availability element fulfills its purpose—to prevent inmates from turning narrow *method-of-execution* claims into broad *de facto bans* on capital punishment. *Cooey (Biros)*, 589 F.3d at 220. As applied to alternative drugs, the standard requires more than a showing that a drug is "'commercially available.'" *Kelley*, 496 S.W.3d at 359. It requires a showing "that 'there is *now* a source for

[the drug] *that would sell it to*'" the State. *Arthur*, 840 F.3d at 1302 (citation omitted). Yet here, the district court legally erred by defining "available" to require only a mere "possibility" of an alternative. Order, R.948, PageID#32229.

Third, judicial estoppel applies narrowly against States so that it does not "compromise" their "interest" in implementing democratically passed laws. *New Hampshire v. Maine*, 532 U.S. 742, 755 (2001). "[T]he estoppel must be limited to a precise argument presented by the government and accepted by the Court." *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995). And it should not apply if a changed position arises from new facts or law. *New Hampshire*, 532 U.S. at 756; *Longaberger Co. v. Kolt*, 586 F.3d 459, 470-71 (6th Cir. 2009), *abrogated on other grounds by Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016). Yet, for a third time, the district court legally erred by broadly applying estoppel. The court said nothing about changed circumstances, even though Ohio switched to the midazolam protocol only after barbiturates had become unavailable to it and only after *Glossip* had upheld the protocol.

At day's end, in the Supreme Court's ongoing dialogue with the lower courts, it has repeatedly noted that "capital punishment is not prohibited under our Constitution, and that the States may enact laws specifying that sanction." *Baze*, 563 U.S. at 61 (plurality op.); *Glossip*, 135 S. Ct at 2732-33. Yet Ohio has been unable to implement its death-penalty laws for three years and counting, despite its

"'strong interest in enforcing its criminal judgments without undue interference from the federal courts.'" *Cooey (Biros)*, 589 F.3d at 233 (citation omitted). This Court should set legal rules for method-of-execution and judicial-estoppel claims that do not effectively turn those claims into bans on capital punishment.

ARGUMENT

This Court reviews the "'ultimate determination'" to grant an injunction for an abuse of discretion. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (citation omitted). It analyzes four factors: "'(1) whether [the plaintiff] has demonstrated a strong likelihood of success on the merits; (2) whether [the plaintiff] will suffer irreparable injury in the absence of equitable relief; (3) whether the stay will cause substantial harm to others; and (4) whether the public interest is best served by granting the stay.'" *Cooey (Beuke) v. Strickland*, 604 F.3d 939, 943 (6th Cir. 2010) (citation omitted). For each factor, the Court reviews fact findings for clear error and legal conclusions de novo. *Id.*

"Whether the movant is likely to succeed on the merits is a question of law," *Schimmel*, 751 F.3d at 430, and "[a] district court by definition abuses its discretion when it makes an error of law," *Koon v. United States*, 518 U.S. 81, 100 (1996). Further, when a death-penalty inmate has been unable to meet that likelihood-of-success factor, this Court has found it "dispositive." *Cooey (Beuke)*, 604 F.3d at 946; *Workman*, 486 F.3d at 911. It is "dispositive" in this case, too.

I. AS EVERY APPELLATE COURT TO DECIDE THIS QUESTION HAS HELD, THE EIGHTH AMENDMENT PERMITS THE MIDAZOLAM PROTOCOL

To enjoin an execution method, challengers must prove two things. *Glossip*, 135 S. Ct. at 2737-38. *First*, they must show that the method imposes a "substantial risk of severe pain." *Id.* at 2740. *Second*, they must identify an available alternative. *Id.* at 2737. Plaintiffs have proved neither element here.

A. To Prove A Substantial Risk Of Harm, Challengers Must Show Something Approaching A Scientific Consensus Against A Challenged Method, And Plaintiffs Have Not Done So Here

1. *Baze* defined "a 'substantial risk of serious harm'" as an "'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" 553 U.S. at 50 (plurality op.) (citation omitted). This creates a "'heavy burden.'" *Id.* at 53 (citation omitted). As Justice Alito noted, "an inmate should be required to do more than simply offer the testimony of a few experts or a few studies. Instead, an inmate . . . should point to a well-established scientific consensus." *Id.* at 67 (Alito, J., concurring). Thus, "[i]f there is no scientific consensus and a paucity of reliable scientific evidence concerning the effect of a lethal-injection protocol on humans, then the challenger might well be unable to meet this burden." *McGehee*, 2017 WL 1404693, at *3. Several factors confirm this rigorous legal test.

First, *Baze* noted that this element requires a *high degree* of risk—one approaching a *certainty* of severe pain. Panel Op. 36 (Kethledge, J., dissenting).

"[P]risoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is '*sure or very likely* to cause serious illness and needless suffering.'" *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 50 (plurality op.)). Circuit courts thus have uniformly applied this "rigorous" sure-or-very-likely test. *McGehee*, 2017 WL 1404693, at *3; *Arthur*, 840 F.3d at 1299; *Cooey (Biros)*, 589 F.3d at 233.

Second, *Baze* assured States that the substantial-risk element's "substantive requirements" would prevent never-ending litigation. 553 U.S. at 52 n.3 (plurality op.). "[C]hallenges to lethal injection protocols test the boundaries of the authority and competency of federal courts." *Glossip*, 135 S. Ct. at 2740. The Supreme Court adopted this standard to avoid embroiling courts "'in ongoing scientific controversies beyond their expertise,'" *id.* (citation omitted), "with each ruling supplanted by another round of litigation touting a new and improved methodology," *Baze*, 553 U.S. at 51 (plurality op.). The sure-or-very-likely test strikes a "balance between turning the federal courts into tribunals of best practices and maintaining their rightful function as a constitutional check on the 'wanton infliction of pain' by the state." *Cooey (Biros)*, 589 F.3d at 233.

Third, the sure-or-very-likely test comports with background principles. The Supreme Court has "given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales*,

550 U.S. at 163. To uphold a ban on partial-birth abortion, it relied on "documented medical disagreement" over the need for a health exception. *Id.* To uphold a law requiring the commitment of sexually violent individuals, it recognized the scientific disagreement over the nature of pedophilia, but noted that "it [was] precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes." *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997). And to uphold forced-vaccination laws in the early 1900s, it rejected reliance on "those of the medical profession" who disputed the value of vaccinations, noting that the State "was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury." *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905).

Fourth, the sure-or-very-likely test creates a uniform Eighth Amendment. If different trial courts could make independent assessments from conflicting evidence about a drug's efficacy (and if appellate courts deferred to their divergent findings), the Eighth Amendment could mean different things in different States. But "it is unsound to say that, on records very similar in nature, [Oklahoma's protocol] could be valid . . . and [Ohio's protocol] invalid, just because different district judges reached different conclusions about the inferences to be drawn from the same body of [scientific] work." *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 688 (7th Cir. 2002). By granting a "measure of

deference to a State's choice of execution procedures," *Baze*, 553 U.S. at 51 n.2 (plurality op.), this standard assures a level of *uniformity*. That is why the *Baze* plurality noted that "[a] State with a lethal injection protocol *substantially similar* to the protocol we uphold today would not create a risk that meets this standard." *Id.* at 61 (plurality op.) (emphasis added).

2. Plaintiffs must show "that the evidence they presented to the District Court establishe[d] that the use of midazolam is sure or very likely to result in" severe pain. *Glossip*, 135 S. Ct. at 2739. The district court's decision erred by ignoring this test, and Plaintiffs' evidence, at most, shows a scientific debate.

District Court's Decision. The district court committed two *legal* errors. Error One: It failed to "apply the governing standard." *McGehee*, 2017 WL 1404693, at *2. "The bulk of the court's order merely summarized the expert testimony on both sides." Panel Op. 36 (Kethledge, J., dissenting); Order, R.948, PageID#32151 ("summariz[ing]" testimony "at length"). While the district court made a few "factual conclusions" over three pages, Order, R.948, PageID#3226-28, it nowhere found "that use of the lethal-injection protocol is sure or very likely to cause severe pain," *McGehee*, 2017 WL 1404693, at *2.

If anything, the district court expressed uncertainty. "Much of the district court's order highlights the equivocal nature of the evidence." *Id.* While noting that inmates executed with midazolam "exhibit different bodily behaviors," it did

not "know[] precisely why." Order, R.948, PageID#32227. On the key question—whether inmates have "awareness of what is happening"—it noted that "there are not now and never will be clinical studies of the effect of injecting 500 mg of midazolam into a person," and that "we certainly cannot ask the executed whether or not they experienced pain after" the fact. *Id.*, PageID#32227-28. In sum, the court "based its decision, at best, on uncertainty," Panel Op. 38 (Kethledge, J., dissenting), not on sure-or-very-likely harm, *Cooey (Biros)*, 589 F.3d at 225.

Error Two: The district court gave *no* solicitude to cases that have reached conflicting results. Even though *Glossip* was couched in clear-error review, the court should not have discarded its reasoning wholesale. *Glossip* itself did not rely *solely* on the evidence there. It also noted that "*[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 agent and potassium chloride." 135 S. Ct. at 2739-40 (emphasis added).

Like *Glossip*, the district court should have considered these cases when deciding whether Plaintiffs met their heavy burden. *Workman*, 486 F.3d at 906. Indeed, the Tenth Circuit has suggested that courts need not now take as true a complaint's allegation "that midazolam is ineffective" because that allegation "essentially asserts that the use of midazolam is constitutionally deficient," which qualifies as "a legal conclusion." *Lockett* 841 F.3d at 1105 n.5. It added that even

if a complaint "did sufficiently allege that midazolam was a constitutionally unacceptable execution drug, *Glossip* would defeat that argument." *Id.* at 1114. The Eleventh Circuit likewise has held that it is "virtually certain" that a challenger cannot meet this demanding element in this preliminary context. *Grayson v. Warden*, __ F. App'x __, 2016 WL 7118393, at *5 (11th Cir. Dec. 7, 2016).

Record Evidence. Before departing from these cases, the district court at least should have identified overwhelming *new evidence* showing a *new consensus*. It did not. Consistent with many courts' findings, Ohio believes that midazolam will "render an inmate insensate to pain that might result from" the other drugs. *Glossip*, 135 S. Ct. at 2739-40. At most, however, Plaintiffs' evidence shows continued "disagreement" on this issue, *Gonzales*, 550 U.S. at 162, which does not meet their "'heavy burden,'" *Baze*, 553 U.S. at 53 (plurality op.) (citation omitted).

Plaintiffs' evidence "fell into two main categories: testimony about midazolam's effects, and testimony about executions carried out with midazolam." Panel Op. 38 (Kethledge, J., dissenting). Evidence about its effects—including about its ability to induce unconsciousness and alleged ceiling effect—regurgitated evidence from *Glossip*. 135 S. Ct. at 2740-42 (unconsciousness); *id.* at 2742-44 (ceiling effect). If anything, the evidence here was stronger *for the State*. Three of the four experts agreed with the State when considering midazolam's effects *in the abstract*. Ohio's two experts (Drs. Joseph Antognini and Daniel Buffington)

testified that 500 milligrams of midazolam will render an inmate insensate to pain. Tr., R.924, PageID#31063, 31070-72; R.941, PageID#32007. One of Plaintiffs' experts (Dr. Sergio Bergese) agreed that experts have been split on this issue, and that he would have said "[t]hat's going to do the job" if asked the question *without* reports of executions from lay witnesses. Tr., R.923, PageID#30876.

Nor have actual executions created a new post-*Glossip* consensus that midazolam will surely or very likely fail to render inmates insensate to pain. At the panel stage, Plaintiffs highlighted four specific executions—Dennis McGuire, Joseph Wood, Clayton Lockett, and Ronald Smith—that they believed contained "clear evidence of consciousness." Appellees' Br. 37. Yet three of these (McGuire, Wood, and Lockett) occurred *before Glossip* and "have little probative value" because they involved different protocols. *See Glossip*, 135 S. Ct. at 2746.

Regardless, the evidence on which Plaintiffs rely—e.g., that inmates coughed, heaved, flailed their arms, and/or clinched their fists at some point during the execution, Order, R.948, PageID#32142-48—does not prove a *sure-or-very-likely* risk of severe pain. To begin with, "most of [the] accounts came from witnesses who, according to the district court, were likely to be 'highly biased'—such as relatives of executed inmates, capital-defense attorneys, and even the inmates' own lawyers." Panel Op. 39 (Kethledge, J., dissenting).

In addition, reliance on movement alone fails to distinguish *unconsciousness* from *immobility*. Tr., R.924, PageID#31028, 31134. As Dr. Antognini noted, "it's common for patients to move during surgery, and yet they are not conscious." *Id.*, PageID#31028. Patients can "violently" "move their arms around, . . . attempt to sit up from the operating room table, cough, and so forth." *Id.*, PageID#31037. Dr. Buffington has also explained that, in addition to midazolam's sedative effects, it "suppresses the respiratory system." *Gray*, 2017 WL 102970, at *9. And "any signs of respiratory distress such as coughing or gasping would be normal reflexes of respiratory distress, but these signs do not mean the person is conscious," because "'if you've got a serious profound respiratory depression, you've also got serious sedation and significant anesthetic effects all simultaneous.'" *Id.* (citation omitted); *id.* at *12-13 & n.9. To ensure that an inmate is actually unconscious, moreover, Ohio plans to use three consciousness checks witnessed by two team members before administering the other drugs. Tr., R.941, PageID31940-41.

Courts, too, have distinguished unconsciousness from immobility—even for the barbiturates that all agree render inmates unconscious. *Baze* noted that, without a paralytic, "convulsions or seizures could be misperceived as signs of consciousness or distress." 553 U.S. at 58 (plurality op.). *Workman* credited a study that a two-drug protocol "'would typically result in involuntary movement which might be misinterpreted as a seizure or an indication of consciousness.'"

486 F.3d at 909 (citation omitted). Finally, the Supreme Court recently denied stays of execution where midazolam was used. *Williams v. Kelley*, 2017 WL 1443818 (U.S. Apr. 24, 2017); *McGehee v. Hutchinson*, 2017 WL 1414915 (U.S. Apr. 20, 2017); *cf.* Defs.' Resp., R.81, *McGehee v. Hutchinson*, No. 4:17-cv-00179 (E.D. Ark.) (including evidence about an Arkansas execution if Plaintiffs wrongly rely on it here).

3. The panel mistakenly reached the opposite result. Citing *Glossip*, it held that it must apply "clear error" review to the *ultimate conclusion* that a substantial risk of pain existed under the Eighth Amendment. Panel Op. 10-11. This reads *Glossip*'s clear-error language as impliedly overruling this Court's cases and *Baze*. This Court held that "whether [a] protocol exposes the inmate to a substantial risk of serious harm is a question of law." *Harbison v. Little*, 571 F.3d 531, 535 (6th Cir. 2009). That is because "findings of ultimate facts based on the application of legal principles to subsidiary facts are subject to de novo review." *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc). So the panel's ruling was akin to saying that this Court must "defer" to a district court's ultimate finding that counsel performed deficiently under the Sixth Amendment. *But see Combs v. Coyle*, 205 F.3d 269, 278 (6th Cir. 2000) (applying de novo review).

In *Baze*, the trial court had "entered detailed findings of fact and conclusions of law." 553 U.S. at 41 (plurality op.). Yet the plurality nowhere suggested that

clear-error review applied to the *ultimate* substantial-risk holding (which would have conflicted with its view that its decision validated "substantially similar" protocols, *id.* at 61). Indeed, *Baze* mentioned clear-error review *only* once for a subsidiary question. *Id.* at 54. Against this backdrop, *Glossip* is best read as applying clear-error review to the factual finding that midazolam "is highly likely to render a person unable to feel pain during an execution." 135 S. Ct. at 2739.

The panel also expressed concern that if *Glossip* were read broadly, other courts would be "bound by the factual findings of the sole Oklahoma district court judge who presided over the *Glossip* preliminary-injunction hearing." Panel Op. 12-13. Yet *Glossip* invoked the findings of "numerous courts," not a single court. 135 S. Ct. at 2739. And nothing prevents new evidence from "produc[ing] a new understanding." *A Woman's Choice*, 305 F. 3d at 688. The problem for the panel is that the district court relied primarily on evidence of scientific uncertainty that was found insufficient in *Glossip* and that does not meet Plaintiffs' burden here. A healthy respect for our hierarchical judicial system also suggests that it generally should be the Supreme Court to recognize and implement an evidentiary-based change from its cases. *Cf. Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014).

B. Challengers Must Prove An Available Alternative, And Plaintiffs Did Not Show That Barbiturates Are Available To Ohio

1. "[A]ll Eighth Amendment method-of-execution claims" require a challenger "to *plead and prove*" a "*known and available*" alternative method.

Glossip, 135 S. Ct. at 2731, 2739 (emphases added). "To qualify" as available, an alternative must be "feasible," it must be capable of being "readily implemented"; and it must "significantly reduce [the] substantial risk of severe pain" from the challenged method. *Baze*, 553 U.S. at 52 (plurality op.). This definition requires proof that an alternative is both legally and practically available to a State.

Legally, a proposed alternative must *itself* be constitutional under the Eighth Amendment. Because "[c]apital punishment is constitutional," "inmates cannot use method-of-execution challenges to prohibit what the Constitution allows." *Cooey (Biros)*, 589 F.3d at 220. By proposing an "available" alternative, challengers necessarily concede that it comports with the Eighth Amendment. Any other rule would allow them to turn narrow method-of-execution claims into broad claims against capital punishment itself. *See Glossip*, 135 S. Ct. at 2739.

Practically, a proposed alternative must be feasible. *Baze*, 553 U.S. at 64-66 (Alito, J., concurring). *Glossip*, for example, upheld a finding that barbiturates were unavailable to Oklahoma because of a "practical obstacle": "anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences." 135 S. Ct. at 2733, 2738. Similarly, *Baze* rejected "the use of a [Bispectral Index or BIS] monitor" as part of an available alternative because of another *practical* constraint: "The asserted need for a professional anesthesiologist to interpret the BIS monitor readings is nothing

more than an argument against the entire procedure" because anesthesiologists are barred from participating in executions. 553 U.S. at 59 (plurality op.).

Implementing this guidance, courts have held that inmates must prove *both* that "the State actually has access to the alternative" *and* that it "is able to carry out the alternative method of execution relatively easily and reasonably quickly." *Arthur*, 840 F.3d at 1300 (citations omitted). If they cannot do so, "the State has a legitimate penological justification for adhering to its current method of execution in order to carry out lawful sentences." *McGehee*, 2017 WL 1404693, at *3. This test, as applied to drugs, requires challengers to "show that 'there is *now* a source for [the drug] *that would sell it to*'" the State "'for use in executions.'" *Arthur*, 840 F.3d at 1302 (quoting *Brooks v. Warden*, 810 F.3d 812, 820 (11th Cir. 2016)). Availability "on the open market" does not suffice. *Kelley*, 496 S.W.3d at 359.

2. The district court mistakenly found pentobarbital available to Ohio. It conceded that "Ohio's efforts to obtain the drug from other States and from non-State sources have not met with success," even though Ohio would prefer to use barbiturates. Order, R.948, PageID#32229. Indeed, Ohio has been unable to acquire pentobarbital or sodium thiopental since 2013. Gray Depo., R.905-1, PageID#30185-87, 30189. That shows that these drugs are unavailable to it.

Sodium Thiopental. No domestic manufacturer of sodium thiopental exists. *Id.* PageID#30220-21. Ohio thus obtained an import license from the DEA for

sodium thiopental. Defs.' Ex. 92, R.964-1, PageID#33921. Yet the FDA then told Ohio that it interprets federal law to bar the importation of this drug. Defs.' Ex. 90, R.961-19, PageID33817-27. (Texas, which has had sodium-thiopental imports seized by the federal government, has sued over this issue. *See* Amend. Compl., R.30, *Tex. Dep't of Crim. Justice v. U.S. F.D.A.*, No. 3:17-cv-00001 (S.D. Tex.).)

Pentobarbital. Ohio cannot purchase *domestic* pentobarbital due to the manufacturer's distribution controls. Gray Depo., R.905-1, PageID#30311-12, 30224-25; Defs.' Ex. 91, R.964, PageID#33915-17. So Ohio contacted several States for the drug. Gray Depo., R.905-1, PageID#30313-14. It was rebuffed. *Id.* Ohio also cannot now import *foreign* pentobarbital (in finished form or the active pharmaceutical ingredients for compounding). Its import license does not permit it to do so. *Id.*, PageID#30224-25; Theodore Depo., R.881-1, PageID#29104, 29110-11. Ohio applied to add pentobarbital to its license in 2016; that application has been pending for months. Plfs.' Ex. 34, R.966-13, PageID#34506; Plfs.' Ex. 35, R.966-14, PageID#34511. Ohio does not know when the DEA will reach a decision. Theodore Depo., R.881-1, PageID#29104-05, 29171-72.

Even if Ohio could *legally* import pentobarbital, it has no guarantee that it would be able to *practically* import it. Ohio has "not established a relationship with a manufacturer who can provide" pentobarbital to it, "even if [Ohio] were to have a proper licensure." Gray Depo., R.905-1, PageID#30226. Ohio is also

pursuing the option of obtaining the ingredients to compound pentobarbital. *See id.*, PageID#30257. But even *if* it were registered by the DEA to import pentobarbital ingredients, and *if* it found a source to import them, Ohio does not have a compounding entity "lined up." Theodore Depo., R.881-1, PageID#29174.

In short, "[t]he possibility that [Ohio] could acquire pentobarbital for use in executions is too speculative to justify stays of execution" in Ohio, *McGehee*, 2017 WL 1404693, at *3, just as it was too speculative to justify stays in Arkansas, *id.*, Alabama, *Arthur*, 840 F.3d at 1301-03, and Oklahoma, *Glossip*, 135 S. Ct. at 2738. (And to the extent Plaintiffs intend to rely on other alternatives that *no court* has accepted, Appellees' Br. 96-98, they continue to be mistaken, Reply Br. 24-27.)

3. Respectfully, the panel's contrary holding made two mistakes. It wrongly accepted Plaintiffs' definition equating "available" with a "'reasonable possibility.'" Panel Op. 17. The Eighth Circuit correctly rejected this standard. *McGehee*, 2017 WL 1404693, at *3. It conflicts with Supreme Court guidance that an alternative must be *readily* implemented. *Baze*, 553 U.S. at 52 (plurality op.). That term shows that a State must have *access* to a drug *reasonably quickly*. *Arthur*, 840 F.3d at 1300. Yet Ohio has been unable to obtain pentobarbital "with ordinary transactional effort" for some four years. Panel Op. 43 (Kethledge, J. dissenting); Gray Depo., R.905-1, PageID#30185-87, 30189. If pentobarbital is "available" to Ohio on these facts, it was "available" to Oklahoma in *Glossip*.

In addition, the panel suggested that whether an "alternative method of execution is available is a 'factual finding' subject to the 'clearly erroneous' standard of review." Panel Op. 16-17. Yet Ohio does not dispute fact findings. It disputes the district court's expansive definition of the term "available." This Court should review that legal question—which concerns the proper interpretation of the Eighth Amendment—under a de novo standard. *E.g.*, *Jackson v. Danberg*, 594 F.3d 210, 215 (3d Cir. 2010); *cf. McGehee*, 2017 WL 1404693, at *3.

II. JUDICIAL ESTOPPEL DOES NOT APPLY HERE

The district court held that judicial estoppel did not allow Ohio to switch from a barbiturate *one-drug* method to a midazolam *three-drug* method based on a litigation position in 2009. This Court reviews judicial-estoppel claims de novo. *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe*, 546 F.3d 752, 757 (6th Cir. 2008). Plaintiffs have argued that an abuse-of-discretion standard applies because *New Hampshire* described estoppel as equitable. Appellees' Br. 46-47. Yet "the Supreme Court did not instruct that an abuse of discretion standard is appropriate." *Lorillard*, 546 F.3d at 757. Regardless, the standard is irrelevant. The district court committed legal errors, and so abused its discretion. *Koon*, 518 U.S. at 100.

A. Judicial estoppel serves to "'preserve[] the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit

an exigency of the moment.'" *Longaberger*, 586 F.3d at 470 (citation omitted). These "antifraud purposes animating the doctrine" illustrate its narrow domain. *Jarrard v. CDI Telecomms., Inc.*, 408 F.3d 905, 915 (7th Cir. 2005). Even for private parties, courts apply it "'with caution.'" *Lorillard*, 546 F.3d at 758 (citation omitted). A *doubly* cautious standard applies for the government. Estoppel should not be used to "compromise a governmental interest in enforcing the law." *New Hampshire*, 532 U.S. at 755. Nor should it be used to bar a State from changing a position as a "'result of a change in public policy.'" *Id*. (citation omitted). Thus, this narrow doctrine must be read *even more* "narrowly against the government." *Owens*, 54 F.3d at 275 (doctrine proper against government only for a "'knowing assault upon the integrity of the judicial system'" (citation omitted)).

Courts generally examine three factors for estoppel: (1) a party must take "'clearly inconsistent'" positions, (2) the earlier position must have been "accept[ed]" by a court, such that the later position creates the perception that the court '"was misled,'" and (3) the party must have obtained an "unfair advantage." *New Hampshire*, 532 U.S. at 750-51 (citations omitted). Two specific points are relevant here. One: "[I]if the government is to be judicially estopped, the estoppel must be limited to a precise argument presented by the government and accepted by the Court." *Owens*, 54 F.3d at 275. "Alternative arguments put forward by the government, but not accepted by a court in a previous case should not be judicially

estopped in subsequent cases." *Id.* Two: estoppel should not apply when there have been "change[s] in facts essential to the prior judgment." *New Hampshire*, 532 U.S. at 756 (citation omitted). It also should not apply when there has been changes in law. *Longaberger*, 586 F.3d at 470. Both changes show that any "changed position did not result from misconduct." *See Jarrard*, 408 F.3d at 913.

B. For at least two *independent* reasons, the district court legally erred in invoking judicial estoppel. *First*, the court did not "narrowly" apply estoppel to the "precise argument" accepted by a prior court; it applied estoppel loosely based on broader arguments that were not accepted. *Owens*, 54 F.3d at 275.

To recap: In 2009, a district court stayed Kenneth Biros's execution under a protocol using sodium thiopental, pancuronium bromide, and potassium chloride. Ohio appealed, and then changed its protocol. An affidavit noted the "changes": "going forward" Ohio would use sodium thiopental alone; the other two drugs "no longer [would] be used." Collins Aff., R.966-3, PageID#34335. Ohio took two positions based on this change. In the district court, it filed a summary-judgment motion asserting that the entire case by all inmates was moot and that there was "'no reason to believe that [Ohio] will reinstate the previous 'three-drug protocol.'" Mot., Pls.' Ex. 23, R.966-2, PageID#34329. In this Court, it filed a brief (attaching the motion and affidavit) requesting a vacatur of the stay of Biros's execution as moot. All told, then, Ohio made a narrower argument (that the Biros

stay was moot), and a broader argument (that the State was entitled to a final judgment for the whole case). Estoppel cannot be tied to either argument.

Start with the narrow argument to this Court. This Court agreed with Ohio and vacated the stay of Biros's execution as moot. *Cooey (Biros) v. Strickland*, 588 F.3d 921 (6th Cir. 2009). The Court initially found that it had jurisdiction because the stay amounted to an injunction against "enforcing *Biros's* sentence." *Id.* at 923 (emphasis added). On the merits, it noted that "the question at hand is whether Ohio will use the old procedure, or the new one, *in executing Biros*." *Id.* (emphasis added). The Court denied en banc review, *Cooey (Biros) v. Strickland*, 588 F.3d 924 (2009), and Biros was executed under the one-drug method. Estoppel cannot apply from this appeal because the "precise argument" that this Court accepted (that the *Biros* stay was moot) does not conflict with Ohio's decision to use a midazolam three-drug protocol for *others*. *Owens*, 54 F.3d at 275. (The plaintiffs themselves noted in a district-court filing that this Court "did not dismiss the entire case before [the district court] as moot." Mot., R.628, *Cooey v. Strickland*, No. 2:04-cv-01156, at 3-4 n.2 (S.D. Ohio Dec. 7, 2009).)

Turn to the broader argument in the district court. After Biros's execution, the court "suggest[ed]" that various *motions* (not the *whole case*) were moot—including Ohio's summary-judgment motion to end the case. But the court said: "I'm not going to get into an argument over mootness like the Court of Appeals

has done recently. I'm not going to get into that mess . . . ." Hearing Tr., R. 966-10, PageID#34454. Instead, Ohio *voluntarily* withdrew its motion seeking a final judgment, and plaintiffs *voluntarily* amended their complaints to withdraw challenges to the old protocol and substitute challenges to the new one. *Id.*, PageID#34471-74. After memorializing these actions, the court added that the "parties agreed that no arguments were waived or forfeited by the agreed-upon withdrawal and refiling of motions." Order, Pls.' Ex. 30, R.966-9, PageID#34427. Estoppel cannot apply to this broader argument because Ohio's withdrawn summary-judgment motion did not succeed in its efforts to end the case.

In sum, estoppel cannot apply because (1) any successful narrow argument that the stay *for Biros* was moot does not conflict with Ohio's decision to change protocols for *other inmates*; and (2) the broader argument was not *successful*.

Second, the district court ignored the intervening facts and law that led Ohio to change its protocol. In 2009, when Ohio changed to a one-drug protocol, it had no problem "whatsoever" obtaining sodium thiopental. Tr., R.922, PageID#30605. Now Ohio cannot obtain that drug. *Id.*; Gray Depo., R.905-1, PageID#30185-87, 30189. Further, in 2016, Ohio switched to the midazolam protocol because the Supreme Court had upheld it. *Glossip*, 135 S. Ct. at 2731. These changed circumstances cannot be characterized as litigation "misconduct," *Jarrard*, 408 F.3d at 915, because Ohio changed protocols to fulfill its important "interest in

enforcing the law," *New Hampshire*, 532 U.S. at 755. Indeed, the district court *expressly* "disclaim[ed] any finding that Ohio has engaged in any gamesmanship, cynical or otherwise . . . ." Order, Doc.983, PageID#37112. No gamesmanship should have meant no estoppel. Panel Op. 44 (Kethledge, J., dissenting).

C. The panel mistakenly held the contrary. To begin with, it applied estoppel *aggressively*, not with the *double caution* reserved for the State. *See Lorillard*, 546 F.3d at 757; *Owens*, 54 F.3d at 275. When determining the things on which Ohio succeeded *in this Court*, the panel conceded that Ohio's brief itself "did not address claims of other Plaintiffs," Panel Op. 22, and found this Court's decision not "clear" on whether it resolved any unraised claims, *id.* at 23, 26. When determining the things on which Ohio succeeded *in the district court*, the panel conceded that the court made no express mootness finding, *id.* at 26 and that the plaintiffs "agreed to withdraw" their complaints, *id.* at 24; *see id.* at 27. The panel thus could only speculate that "it appears" that this Court or the district court found that Ohio succeeded on a mootness argument. *Id.* at 27. Yet once the panel found the record "open to interpretation," it should have also found estoppel inapplicable. *See Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 382 (6th Cir. 1998); *Lorillard*, 546 F.3d at 758.

In addition, the panel's refusal to consider changed circumstances gets both the estoppel rule and its purpose wrong. Panel Op. 29. As to the rule, the panel

ignored precedent finding changed circumstances relevant. *Id.*; *see New Hampshire*, 532 U.S. at 756; *Longaberger*, 586 F.3d at 470. As to the purpose, the panel asserted that a changed-circumstances exception "makes no sense" given that the "purpose of judicial estoppel is to prevent the confusion and unfairness that would ensue." Panel Op. 29. But estoppel is about gamesmanship; if that is absent, no amount of perceived unfairness can fill the void. *See Jarrard*, 408 F.3d at 915; *see also Longaberger*, 586 F.3d at 470 ("there is no evidence of the gamesmanship that the doctrine of judicial estoppel was intended to prevent"). In that respect, the panel dissent got it exactly right: "[I]f any gamesmanship led us to this pass, it was not gamesmanship by the State." Panel Op. 44 (Kethledge, J., dissenting). It follows that judicial estoppel has no place in this case.

III. WITHOUT A LIKELIHOOD OF SUCCESS, THIS COURT MUST REVERSE

If inmates cannot show a likelihood of success, that is "dispositive." *Cooey (Beuke)*, 604 F.3d at 946. "At some point in time, the State has a right to impose a sentence—not just because the 'State's interests in finality are compelling,' but also because there is a 'powerful and legitimate interest in punishing the guilty,' which attaches to 'the State and the victims of crime alike.'" *Workman*, 486 F.3d at 913 (citation omitted). That time has arrived for the decades-old crimes here.

CONCLUSION

The Court should reverse the district court's preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this May 10, 2017, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail and regular mail upon counsel for parties who have not entered their appearance via the electronic system.

/s/ Eric E. Murphy
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