App No. _____

In the Supreme Court of the United States

THOMAS D. ARTHUR, PETITIONER

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, WARDEN, RESPONDENTS

CAPITAL CASE
EXECUTION OF THOMAS D. ARTHUR
SCHEDULED FOR
THURSDAY, NOVEMBER 3, 2016

APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI

SUHANA S. HAN
Counsel of Record
ADAM R. BREBNER
MEREDITH C. SHERMAN
STEPHEN S. MAR
AKASH M. TOPRANI
JUSTIN D. ROLLER
125 Broad Street
New York, NY 10004
(212) 558-4000
hans@sullcrom.com

Counsel for Petitioner Thomas D. Arthur

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To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Petitioner Thomas D. Arthur respectfully requests a stay of his execution, which is scheduled for **TODAY, November 3, 2016**, pending this Court's disposition of his petition for a writ of certiorari filed concurrently with this application.

JURISDICTION

This Court has jurisdiction to enter a stay under 28 U.S.C. § 2101(f), 28 U.S.C § 1651 and Supreme Court Rule 23.

REASONS FOR GRANTING THE STAY

A stay of execution is warranted where (1) "four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari," (2) there is "a significant possibility of reversal of the lower court's decision," and (3) there is "a likelihood that irreparable harm will result if [the execution] is not stayed." *Barefoot* v. *Estelle*, 463 U.S. 880, 895 (1983) (quoting *White* v. *Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers)). Where a stay is requested in conjunction with a writ of certiorari, as opposed to a direct appeal, the second factor takes on

less importance. *See In re Roche*, 448 U.S. 1312, 1314 n.1 (1980). Further, "in a close case, it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (quoting *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1308-09 (Marshall, J., in chambers)).

1. The Court is likely to grant certiorari, for reasons discussed in detail in Mr. Arthur's concurrently filed petition for certiorari. Specifically, this case presents two legal questions of great national importance. *First*, lower courts are in need of this Court's guidance on how to interpret the "known and available alternative" requirement from *Glossip* v. *Gross*, 135 S. Ct. 2726 (2015). Since *Glossip*, this issue has repeatedly arisen in Eighth Amendment litigation and is already the subject of substantial disagreement among jurists. *See, e.g.*, *Johnson* v. *Kelley*, 2016 Ark. 268.

Here, the meaning of the "known and available alternative" requirement in *Glossip* resulted in a deeply divided decision by the Court of Appeals for the Eleventh Circuit. As noted by the dissenting opinion of the court of appeals, the rule articulated by the majority "tak[es] the unprecedented step of ascribing to states the power to legislatively foreclose

constitutional relief . . . nullify[ing] countless prisoners' Eighth Amendment right to a humane execution," Pet. App. 109a, meaning that "relief under *Baze* and *Glossip* is now a mirage for prisoners across [the Eleventh] circuit." Pet. App. 135a. The majority decision requires review by this Court.

Second, this case presents an opportunity for this Court to resolve a Circuit split on whether, under the Equal Protection clause of the Fourteenth Amendment, a condemned prisoner has the right not to be arbitrarily deprived of a State's self-imposed execution safeguards. This Court has not previously addressed either of these critical issues.

2. Mr. Arthur also has a strong likelihood of obtaining a reversal of the court of appeals' decision. On the first Question Presented, the opinion below conflicts with this Court's decision in *Glossip* by foreclosing any practicable method of proving that a state's selected method of execution is unconstitutional. The court of appeals' decision affirmed the district court's ruling that, as a matter of law, a method of execution challenger is confined to pleading alternatives that are permitted by state statute. *See* Pet. App. 97a. That ruling, as the dissent in the court of appeals noted, allows states to legislatively exempt themselves from Eighth Amendment scrutiny in a

manner inconsistent with the Supremacy Clause. *See* Pet. App. 114a-115a, 129a-130a. That outcome is "unprecedented" because:

> States cannot render an execution alternative not feasible and readily implemented—and thereby insulate themselves from constitutional scrutiny—by opposing the alternative through legislation or any other means. The Supremacy Clause precludes that type of state incursion on the Eighth Amendment.

Pet. App. 115a. "The upshot of this novel allocation of power [upheld by the court of appeals] is that a state statute can abrogate prisoners' Eighth Amendment right to a humane execution," which contravenes *Glossip*. Pet. App. 129a-130a.

And even if a challenger pleads a lethal injection alternative that is "permitted by statute" (as Mr. Arthur did in this case), the standard applied by the court of appeals creates a burden that no challenger could possibly meet. The court held that a state was not obliged to consider a drug alternative to a lethal injection protocol unless the condemned prisoner identified a specific, willing source for that alternative — requiring a showing of a specific "source for [the alternative drug] that would sell it to the [State] for use in executions." Pet. App. 63a (quoting *Brooks* v. *Warden*, 810 F.3d 812, 820 (11th Cir. 2016)) (emphasis in original). This, of course, is

completely impracticable, since condemned prisoners lack the authority or ability to negotiate for the supply of drugs on behalf of the State.

The court of appeals also demanded that, for his additional as-applied claim addressing his unique health condition, Mr. Arthur produce medical evidence laying out "specifics" of an alternative protocol, Pet. App. 78a—even though no medical expert could ethically provide such evidence—and also erroneously affirmed the summary exclusion of medical evidence regarding the dose of a drug called for by Alabama's protocol as "speculative"—even though no medical expert could have testified that such a dose (many times higher than ever used clinically) was within his or her "realm of practice". *See* Pet. App. 88a.

Finally, the court of appeals held, contrary to its own precedent and an opinion from the Court of Appeals for the Sixth Circuit, that a state is permitted to adopt a safeguard to ensure an execution that complies with the Constitution and then employ it inconsistently in particular executions without regard to whether it is actually effective. With no rational basis for doing so, the State's selective introduction of risk into executions offends the Equal Protection Clause of the Fourteenth Amendment.

3. In order to adequately brief this Court on the important Questions Presented, Mr. Arthur requires a temporary stay of execution. If it is not granted, Mr. Arthur will suffer the most irreparable injury imaginable: he will be strapped to a gurney, administered a drug that is highly likely to cause him to suffer a painful heart attack, and then, without being anesthetized, injected with a succession of drugs that will paralyze his involuntary muscles (producing a sensation comparable to being buried alive) and then a caustic agent (inducing an agonizing sensation of fire running through his veins). Irreparable harm "is necessarily present in capital cases," *Wainwright* v. *Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring), and even more so here given the nature of Mr. Arthur's claims.

4. Moreover, the equities in this case strongly favor a stay. While the State has a strong interest in the enforcement of its judgments, *see Nelson* v. *Campbell*, 541 U.S. 637, 650 (2004), it has no interest in executing a condemned prisoner in violation of the Constitution, *see In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) ("[W]e perceive no substantial harm that will flow to the State of Alabama or its citizens from postponing petitioner's execution to determine whether that execution would violate the Eighth Amendment."). The same is true of the public interest, which "has never

been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional rights." *In re Ohio Execution Protocol Litig.*, 840 F. Supp. 2d 1044, 1059 (S.D. Ohio 2012), *motion to vacate stay denied*, 671 F.3d 601 (6th Cir.), *motion to vacate stay denied sub nom. Kasich* v. *Lorraine*, 132 S. Ct. 1306.

Additionally, this is not a "last-minute attempt[] to manipulate the judicial process." *Gomez* v. *U.S. Dist. Ct. for N.D. Cal.*, 503 U.S. 653, 654 (1992) (per curiam). Mr. Arthur has been diligent in his prosecution of this action, and has consistently pursued timely adjudication on the merits. In fact, Mr. Arthur was fully prepared to make his merits showing on the torturous effects of the State's method of execution, including expert evidence, when, only six days before trial was to begin, the district court blocked Mr. Arthur from making that showing by bifurcating the hearing. Moreover, Mr. Arthur sought to expedite the appeal process when the order of execution was entered—he filed his opening appeal brief ten days before the deadline on September 24, 2016, almost six weeks before his scheduled execution date. Pursuant to order of the court of appeals, Mr. Arthur's appeal was fully briefed and submitted on October 19, 2016. *See* Pet. App. 60a. This petition is being filed on the day of Mr. Arthur's execution because

the court of appeals did not issue its 140-page decision (including a 29-page dissenting opinion) until yesterday, November 2, 2016, at 7:05 PM EDT — the day before the scheduled execution (the court of appeals also waited until then to deny Mr. Arthur's motion for a stay). Mr. Arthur does not ask for delay in bringing this case to an end; he merely asks for a stay until he has a chance to appeal the erroneous rulings below and prove his claims.

CONCLUSION

For the reasons set forth above and in Mr. Arthur's concurrently filed petition for certiorari, this Application for a Stay of Execution should be granted.

Respectfully submitted,

/s/ Suhana S. Han
Suhana S. Han
Counsel of Record
Adam R. Brebner
Meredith C. Sherman
Stephen S. Mar
Akash M. Toprani
Justin D. Roller
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
Fax: (212) 558-3588
E-mail: hans@sullcrom.com

Counsel for Petitioner
Thomas D. Arthur

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