No. 17A____

IN THE

# Supreme Court of the United States

RICKY JOVAN GRAY,

*Applicant,*

v.

TERENCE RICHARD MCAULIFFE, Governor, Commonwealth of Virginia, HAROLD W. CLARKE, Director, Virginia Department of Corrections, EDDIE PEARSON, Warden, Greensville Correctional Center, DAVID ZOOK, Warden, Sussex I State Prison, OTHER UNKNOWN EXECUTIONERS, EMPLOYEES, AND AGENTS, Virginia Department of Corrections,

*Respondents.*

## EMERGENCY APPLICATION FOR STAY TO PROTECT THIS COURT'S JURISDICTION FOLLOWING JUDGMENT OR, IN THE ALTERNATIVE, PENDING FILING AND DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

**CAPITAL CASE**
**Execution of Ricky Jovan Gray**
**scheduled for**
**JANUARY 18, 2017 at 9:00 p.m.**


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Dated: January 17, 2017

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TO: THE HONORABLE JOHN G. ROBERTS, JR.,
CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT:

Ricky Jovan Gray, through his attorneys, respectfully requests that this Court stay his execution, which is currently scheduled for January 18, 2017.

## PRELIMINARY STATEMENT

The Respondents propose to execute Mr. Gray on January 18, 2017 using a novel and experimental combination of drugs. This includes (1) midazolam that is not FDA-approved and that, instead, was prepared by a secret compounding pharmacy that employed unknown compounding processes outside the purview of any regulation, and (2) potassium chloride that fits the same description. No state has ever used compounded midazolam in an execution, compounded potassium chloride in an execution, or two compounded drugs in the same execution. Mr. Gray brought his complaint to challenge Respondents' experimental and unconstitutional method of execution, not as a challenge to his own sentence of death.

However, rather than address the merits of Mr. Gray's claims—which allege that the never-before-used method of execution violates his Fifth, Eighth, and Fourteenth Amendment rights—Respondents sought, and the district court granted, extensions of time for the Commonwealth to file a response to his complaint. In the latest request for an extension, Respondents expressly asked that they be granted permission to file a responsive pleading on January 24, thereby allowing them to carry out Mr. Gray's execution and make further litigation moot. *See* Def. Mot. for Enlargement of Time to File Resp. Pleadings, at 1-2, Jan. 10, 2017,

attached hereto as Attachment 1. Mr. Gray asks this Court to intervene to preserve its jurisdiction to review the merits of his claims and to prevent Respondents from achieving their goal of "running out the clock" by executing Mr. Gray using the very method of execution Mr. Gray alleges is unconstitutional and which is currently under review in the federal courts.[1]

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[1] The Respondents have consistently interfered with Mr. Gray's ability to plead and develop support for his claims, orchestrating a situation in which he was forced into litigating this issue one month before his scheduled execution date.

For the past year, Mr. Gray's counsel had been in contact with the Office of the Attorney General ("OAG"), requesting information on the chemicals the Virginia Department of Corrections ("VDOC") planned to use to execute Mr. Gray, and asking to be apprised of "any developments." Declaration of Lisa J. Fried ("Fried Decl."), Ex. F, attached hereto in relevant part as Attachment 2. On October 4, 2016, the OAG informed Mr. Gray's counsel that the VDOC had "obtained a supply of midazolam suitable for use in an execution by lethal injection." Att. 2, Ex. F. Counsel for Mr. Gray followed up and learned on October 6, 2016, that the midazolam and potassium chloride the VDOC planned to use in an execution was compounded. Att. 2, Ex. F. Additional information was not sent in response to Mr. Gray's inquires of October 7 until November 4—almost a full month later. Att. 2, Ex. F. In the meantime, Mr. Gray began to request additional information from the prison as required by the administrative grievance process as soon as he learned that the VDOC planned to use compounded midazolam and compounded potassium chloride in his execution. Those responding from the prison, however, refused to provide any information in response to his requests. Mr. Gray was told that the prison in which he was housed could not provide information since the execution would be carried out at another prison, and the prison ultimately refused to log his grievance and provide any information because his request for information was "beyond the control of the Department of Corrections." Declaration of Nathaniel S. Boyer ("Boyer Decl."), Ex. D, attached hereto as Attachment 3. In addition, counsel from the undersigned's law firm had been filing Freedom of Information Act requests in order to obtain information about chemicals to be used in lethal injection. In a letter dated September 15, 2016, the VDOC responded to a request including inventory logs for drug products or substances intended or considered for use in lethal injections, records of any activity by the VDOC to acquire or purchase chemicals for execution, and any and all communications regarding lethal injection chemicals—including midazolam. The response contained no mention of the compounded midazolam and compounded potassium chloride—despite the fact that

Mr. Gray's claims present legal issues of national importance—including an issue currently under this Court's review – whether to satisfy his burden in a means-of-execution suit, a condemned prisoner is limited to selecting an alternative method of execution from those already permitted by state law. *See Arthur* v. *Dunn*, No. 16-602 (Certiorari requested on same question); *Johnson v. Kelly*, Dkt. No. 16-6496 (Certiorari requested on following question: "In a means-of-execution suit, are known and available alternatives limited to those already provided in a statute an inmate is challenging?"). Mr. Gray should not be executed when his case presents a legal question that is identical to one that is presently pending before this Court.

Mr. Gray brings this Application, pursuant to 28 U.S.C. § 1651, seeking a stay of execution from this Court on either of two alternate grounds. First, Mr. Gray requests a stay to preserve this Court's jurisdiction to review the case following resolution of litigation in the district court and orderly appellate proceedings in the Court of Appeals. Second, and in the alternative, Mr. Gray requests a stay pending the filing, consideration, and disposition of a petition for writ of certiorari before judgment to review the decision of the United States District Court for the Eastern District of Virginia. *See* 28 U.S.C. § 1254(1); 28 U.S.C. § 2101(e).

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they were in VDOC's possession and the Respondents' witness would later testify he picked up the chemicals in late August or the first part of September. Prelim. Injunction Hr'g Tr. 95:19-24, Jan. 3, 2017, attached hereto as Attachment 4.

As discussed below, Mr. Gray satisfies all the factors necessary to warrant the grant of a stay on both grounds: (1) the circumstances presented by this application are of the utmost exigency because Mr. Gray is scheduled to be executed on January 18—one day from now—if this Court does not grant a stay; (2) the legal rights implicated by Mr. Gray's case concern the indisputably clear and fundamental constitutional rights to be free from cruel and unusual punishment and to receive due process of law, which—if not for at least four closely related legal errors by the district court—would have entitled Mr. Gray to a preliminary injunction below; and (3) without this Court's immediate intervention, this Court will lose jurisdiction over the important legal questions raised by the district court's errors, and over this case, the moment that Mr. Gray loses his life.

## PROCEDURAL HISTORY

On December 14, 2016, after fully exhausting his administrative remedies through the three-tiered review process required by the VDOC, Mr. Gray filed a complaint seeking a declaratory judgment under 28 U.S.C. § 1983. Compl., attached hereto as Attachment 5. On December 16, 2016, Mr. Gray filed a motion for preliminary injunction with the district court. Emergency Mot. for Prelim. Injunction, attached hereto as Attachment 6. On January 3, 2017, the United States District Court for the Eastern District of Virginia, Richmond Division (Hudson, J.), held a hearing on the preliminary injunction motion. At the close of the hearing, Respondents requested an extension of time to file their pleading responsive to the Complaint—due January 4—until the court ruled on the injunction. Att. 4 at 190:7-13. The district court granted the extension. *Id.* 190:21.

On January 10, the court denied Mr. Gray's motion for a preliminary injunction to stay his execution pending the litigation of Mr. Gray's Fifth, Eighth, and Fourteenth Amendment claims. Mem. Op. at 48-49, Jan. 10, 2017, attached hereto as Attachment 7. On that same day, Respondents sought a second extension of time to file a responsive pleading until January 24. Att. 1 at 2. Respondents argued that an extension would "effectively moot[] the litigation" assuming that Mr. Gray was executed on January 18, 2017.[2] *Id.* The district court presumed Respondents would file a motion to dismiss the complaint or waive their reply but granted the requested extension. Jan. 11, 2017 Order at 4, attached hereto as Attachment 8.

Mr. Gray filed a notice of appeal in the district court on January 11, 2017, with regard to the district court's denial of the motion for preliminary injunction. *See* Notice of Appeal, attached hereto as Attachment 9. On January 12, 2017, Mr. Gray filed an emergency motion in the United States Court of Appeals for the Fourth Circuit to stay his execution, pending the disposition of his appeal. *See* Mot. for Injunction, attached hereto as Attachment 10. The Court of Appeals denied Mr. Gray's application for a stay of execution on January 13, 2017. *See* Order of Court of Appeals, attached hereto as Attachment 14. Mr. Gray's appeal is pending before the Court of Appeals, and his underlying Complaint is pending before the district court.

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[2] Despite relying expressly on this argument, Respondents also claimed the motion was not filed for the purpose of delay.

## FACTUAL HISTORY

Mr. Gray is a death row inmate in the custody of the Virginia Department of Corrections ("VDOC"), which is scheduled to execute Mr. Gray on January 18, 2017, by lethal injection. Att. 2, Ex. B. The VDOC employs a three-drug protocol to execute death row inmates by lethal injection: A first drug intended to establish and maintain general anesthesia making the inmate insensate to pain throughout the execution process; a second drug to paralyze the inmate in order to prevent the inmate from showing outward signs of distress; and a third drug to induce cardiac arrest and kill the inmate. Def. Ex. 1, attached hereto as Attachment 11.

Virginia did not make the specific drug protocol it intended to use on Mr. Gray known to him until October 6, 2016, and November 4, 2016, when Mr. Gray received responses to e-mail requests to the Virginia Attorney General's office. Att. 2, Ex. F. First, VDOC will inject Mr. Gray with compounded midazolam (a sedative); second, it will inject Mr. Gray with commercially manufactured rocuronium bromide (a paralytic), and, finally, it will inject Mr. Gray with compounded potassium chloride (the fatal drug). *Id.*[3] If the execution goes forward with this protocol, it will be the first time an execution has ever been carried out in the United States using compounded midazolam, compounded potassium chloride, or a combination of compounded drugs. *Id.* It is on the basis of the specific drugs that the VDOC intends to use in Mr. Gray's execution that Mr. Gray filed his civil lawsuit and related requests for a stay.

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[3] The VDOC has obtained enough compounded midazolam and compounded potassium chloride to perform multiple executions.

There is no clinical testing of the use of midazolam in such high doses, because the effects of such high-doses can cause a slow death by respiratory failure. Att. 4 at 54:10-17. There is no clinical testing of the efficacy of midazolam as an anesthetic when used in conjunction with rocuronium bromide and potassium chloride, because the effects of potassium chloride are intended to be fatal. *Id.* at 57:10-23. Consequently, as the Respondents' witness conceded, the only non-theoretical evidence that can be cited as to the efficacy of midazolam in properly anesthetizing prisoners subject to lethal injection is its use in prior lethal injections. *Id.* at 57:24-25, 58:1-3. On that point, numerous executions by lethal injection with the use of manufactured, FDA-regulated midazolam have resulted in objective evidence of suffering, including the most recent example of Ronald Bert Smith in Alabama on December 8, 2016, in which Mr. Smith struggled for breath, coughed, and clenched his fists for about thirteen minutes before finally dying. Att. 2, Ex. FF.

In the time since Mr. Gray filed his initial complaint in the district court, Arizona has ceased its use of manufactured midazolam, and Florida has adopted a new protocol that does not include midazolam. Att. 4 at 9:3-7. Respondents' witness, A. David Robinson, had testified that he had consulted with Florida—before the switch—in planning Virginia's use of midazolam. Att. 4 at 98:8-11, 105:10-15.

The midazolam and potassium chloride that the VDOC has procured for this execution are *not* FDA-approved, manufactured drugs. *Cf. Glossip v. Gross*, 135 S.

Ct. 2726 (2015) (Section 1983 challenge to efficacy of *FDA-approved, manufactured* midazolam). Rather, both have been prepared by a compounding pharmacy through processes unknown to Respondents, *id.* at 101:25–104:4, and not regulated by established standards for the practice of pharmacy, Va. Code § 53.1-234. Creating sterile drugs for intravenous administration—such as compounded midazolam and compounded potassium chloride—"is acknowledged by pharmaceutical manufacturers and the FDA alike to be one of the most difficult of all pharmaceutical processes to execute." Declaration of Larry D. Sasich, PHARMD, MPH, FASHP ("Sasich Decl.") ¶ 52, attached hereto as Attachment 12. The highly technical process presents numerous opportunities for error, including cross-contamination with another drug produced in the same facility. *Id.* When additional substances are carelessly included in the final preparation, they can interfere with the effectiveness of the preparation, or cause pain independently. *Id.* Whether such contaminants are present is easily determined through readily available tests that were not conducted by the VDOC. *Id.*

It is undisputed fact that the compounded drugs that Respondents propose to use in this execution *are over 100 days past an acceptable beyond use date* ("BUD," which is the equivalent of an "expiration date" for compounded drugs), given the Respondents' improper storage of the drugs. Att. 4 at 137:12–142:3. As the VDOC's own head pharmacist testified, proper storage of compounded drugs is important, *even if* the drugs are going to be used for a lethal injection. Att. 4 at 142:22–143:5. After all, the first drug is administered for entirely clinical reasons—to anesthetize

the inmate to the otherwise-excruciating effects of the second and third drugs. When non-sterile drugs are stored improperly, that greatly increases the risk that they will be sub-potent or otherwise ineffective due to contamination. *See id.* at 20:13–21:8. Mr. Gray's Complaint alleges that the use of these particular drugs, past an acceptable BUD, greatly magnifies the risk that the compounded midazolam will fail to properly anesthetize Mr. Gray. Att. 4 at 19:5-15, 20:13-20, 21:9-15, 22:8-15 (Dr. Larry D. Sasich testifying that when drugs are not sterile, have improper acidity levels, or contain endotoxins, the risk that the inmate will suffer pain during the course of execution increases). The district court, however, improperly dismissed these as "clinical" concerns that are irrelevant to assessing the risk that midazolam will effectively establish and maintain anesthesia. Att. 7 at 32 n.11.

Despite this need to determine such vital information about the quality, sterility, and efficacy of the compounded drugs to be used in his execution, Virginia Code section 53.1-234 prevents Mr. Gray from learning meaningful information in this regard. It provides:

> The identities of any pharmacy or outsourcing facility that enters into a contract with the Department for the compounding of drugs necessary to carry out an execution by lethal injection, any officer or employee of such pharmacy or outsourcing facility, and any person or entity used by such pharmacy or outsourcing facility to obtain equipment or substances to facilitate the compounding of such drugs and any information reasonably calculated to lead to the identities of such persons or entities . . . shall be confidential, shall be exempt from the Freedom of Information Act . . . , and *shall not be subject to discovery*

> *or introduction as evidence in any civil proceeding unless good cause is shown.*

Va. Code § 53.1-234 (emphasis added) (the "Secrecy Statute"). This statute, combined with the fact that the VDOC has denied having knowledge about the preparation and maintenance of the drugs that will be used to execute Mr. Gray (*see* Att. 2, Ex. F), frustrates Mr. Gray's ability to learn about the compounded drugs that will be used to execute him.

Moreover, consistent with this Court's prior rulings, Mr. Gray has identified a known and available alternative execution method that, by all available evidence in this case, would significantly reduce the risk of unnecessary and severe pain to be suffered during his execution: death by firing squad. Virginia has the means to employ this method without significant inconvenience. Respondents reject this alternative, and hold out the electric chair as a constitutionally permissible method of execution, despite the fact that the Governor—a Respondent in this case—has admitted that such method is "inhumane" and causes "unspeakable pain[.]" Att. 2, Ex. W.

## JURISDICTION

This Court is empowered by the All Writs Act, 28 U.S.C. section 1651(a), to "issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principle of law." This Court's jurisdiction over this Application comes under 28 U.S.C. sections 1254(1) and 1292(e).

## REASONS FOR GRANTING THE STAY

### I. The Court Should Grant a Stay to Preserve Jurisdiction.

The Court should exercise its power to preserve its jurisdiction over the proceedings in this case, by staying Mr. Gray's execution scheduled for January 18, 2017. Each element deserving of preservation is still pending in the Court of Appeals, but that will be rendered moot if this Court fails to act.

Under the All Writs Act, 28 U.S.C. section 1651(a), an individual Justice may issue an injunction when (1) the circumstances are "critical and exigent"; (2) "the legal rights at issue are indisputably clear"; and (3) "the injunctive relief is necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313-14 (1986) (Scalia, J., in chambers) (citations and internal quotation marks omitted). For the reasons discussed below, this Application satisfies all prongs of this test.

#### A. Mr. Gray Faces "Critical and Exigent" Circumstances.

In one day, Mr. Gray will be killed by the Commonwealth of Virginia if this Court does not grant this Application. While Mr. Gray does not challenge the sentence of death that he received for his crimes, he does challenge the method by which the Commonwealth intends to effectuate that sentence. The Commonwealth of Virginia will inject Mr. Gray with substances of unclear provenance and pharmacological effect. An appeal is pending before the Court of Appeals on the grounds that the district court erred in both its legal conclusions and factual findings when it refused to enjoin the execution based on an alleged and demonstrable risk that Mr. Gray will suffer excruciating pain, akin to having fire

course through his veins due to the failure of the compounded midazolam to perform as an anesthetic against the noxious stimuli of the latter two drugs in the protocol. The "necessarily present" irreparable harm of death will certainly occur. *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring). But perhaps more importantly, the execution will be carried out while Mr. Gray's allegations that the manner intended to be used by Respondents still are unresolved and under review in federal court. If the Commonwealth proceeds with the execution as planned, Mr. Gray will be prevented from litigating his challenge and protecting his rights. In the event that Mr. Gray's claims are confirmed and he suffers chemical torture, he will have no recourse. It is difficult to envision circumstances more exigent.

B. Mr. Gray's Legal Rights at Issue Are Indisputably Clear.

At issue are Mr. Gray's Fifth, Eighth, and Fourteenth Amendment rights. Respondents intend to execute Mr. Gray on January 18, 2017 in a manner that violates the Eighth Amendment's prohibition against cruel and unusual punishment, while depriving him of the ability to challenge that violation. Respondents will do so behind a veil of secrecy that frustrates Mr. Gray's efforts to learn meaningful details about the chemicals that will be used to cause his death, which violates his Fifth and Fourteenth Amendment right to Procedural Due Process.

The court below failed to apply the appropriate controlling legal standard at least four times when evaluating Mr. Gray's evidence that these rights were violated, and the lower courts relied upon those failures to deny Mr. Gray an

injunction. These legal error, discussed below, are the result of the lower court's misinterpreting and misapplying this Court's clear precedent.

a. Mr. Gray's Eighth Amendment Rights Are Indisputably Clear.

In order to establish that a proposed method of execution violates the Eighth Amendment, this Court has held that a plaintiff must make two showings. First, he must show that the proposed method carries a "demonstrated risk of severe pain." *Glossip*, 135 S. Ct. at 2731. In considering whether the proposed method of execution meets this standard, the court must consider risk factors in the aggregate. *See Farmer v. Brennan*, 511 U.S. 825, 843 (1994) ("It does not matter whether the risk comes from a single source or multiple sources."). Second, a plaintiff must show that the risk is "substantial" when compared to "known and available alternatives"—that is, alternatives that are "feasible, readily implemented," and that "in fact significantly reduce a substantial risk of severe pain." *Baze v. Rees*, 553 U.S. 35, 52 (2008).

Mr. Gray's has a clear right to relief. He has stated a claim under this standard; he should have the opportunity to prosecute his claims before his execution; and he is confident that, with legal questions resolved and upon a fully developed record, he will prevail. Nonetheless, in the course of denying Mr. Gray's request for a stay, the district court already misinterpreted and misapplied this precedent, in at least three ways.

1. SECOND PRONG OF *GLOSSIP* ANALYSIS: A condemned inmate satisfies his *Glossip* burden of identifying an "available alternative" by proposing a method of execution that is not authorized and approved by state statute at the time of litigation.

As noted above, to succeed on his *Glossip* claim, Mr. Gray was required to proffer a "known and available alternative" that "significantly reduces a substantial risk of severe pain." *Glossip*, 135 S. Ct. at 2737. To that end, Mr. Gray's Complaint proffered the firing squad and introduced substantial evidence that the method is both "feasible" and "readily implemented." *Id.*; *see* Att. 5 ¶¶ 67-75.

In addressing the motion for a preliminary injunction, the district court held that any proposed alternative method must be authorized by statute in order to be considered "available." Att. 7 at 39; *id.* at 38-40 (citing *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1314–20 (11th Cir. 2016), *petition for cert. filed*, No. 16-602 (U.S. Nov. 3, 2016); *Arthur v. Dunn*, ___ F.3d ___, 2016 WL 3912038, at *2 n.5 (M.D. Ala. July 19, 2016); *Boyd v. Myers*, No. 14-cv-1017, 2015 WL 5852948, at *4 (M.D. Ala. Oct. 7, 2015); *Kelley v. Johnson*, 496 S.W.3d 346, 359–60 (Ark. 2016), *petition for cert. filed*, No. 16-6496 (U.S. Oct. 20, 2016)).

It is indisputably clear that, to meet his burden, Mr. Gray may identify a method of execution that is not provided-for by statute. First, *Glossip* requires a prisoner to identify an "available" alternative. There is no requirement that the alternative trace its roots to a state statute. *Arthur*, 840 F.3d at 1319 ("It is true that neither *Baze* nor *Glossip* held that an execution alternative must be statutorily authorized as that, of course, was not the issue."). "Available" does not mean "authorized by statute." Rather, it means "feasible" and "readily implemented." *Glossip*, 135 S. Ct. at 2737. A firing squad can be "readily implemented."

Second, to hold otherwise would be tantamount to ceding the scope of a prisoner's Eighth Amendment rights to the whims of individual states. Instead of determining what the Eighth Amendment *requires*, it would permit states to delineate the scope of the Eighth Amendment's prohibition against cruel and unusual punishment. *See Arthur*, 840 F.3d at 1315. That is backward. Under such analysis, a state could adopt legislation approving of only one or two methods of execution that are unconstitutional (*e.g.* death by burning alive or death by drawing and quartering), and an inmate would be without recourse. But the Fourteenth Amendment's Due Process Clause incorporates the Eighth Amendment and applies it to the states. *Robinson v. California*, 370 U.S. 660, 666 (1962). "The National Government and, beyond it, the separate States are bound by the proscriptive mandates of the Eighth Amendment to the Constitution of the United States, and all persons within those respective jurisdictions may invoke its protection." *Kennedy v. Louisiana*, 554 U.S. 407, 412 (2008); *see also Baze*, 553 U.S. at 52 ("a State's refusal *to change its method* can be viewed as 'cruel and unusual' under the Eighth Amendment" (emphasis added)). To the extent state law conflicts with the federal Constitution, state law "must yield." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824); U.S. Const. art. VI (Supremacy Clause).

The conduct that violates the Eighth Amendment—Virginia's "refusal to change its method" of execution—cannot at the same time shield Virginia from the Eighth Amendment's requirements. The constitutional and administrative rules that govern Virginia's legislative process have been employed by the legislature to

amend the execution statute a number of times, including as recently as April 2016. *See, e.g.*, 2016 Va. Laws Ch. 747, H.B. 815 (Apr. 20, 2016); 2007 Va. Laws. Ch. 652, H.B. 2418 (Mar. 20, 2007); 1996 Va. Laws Ch. 679, H.B. 326 (Apr. 6, 1996); 1994 Va. Laws Ch. 921, H.B. 862 (Apr. 20, 1994). It can employ them again, whether it does so to adopt a firing squad as a method of execution or some other method that passes constitutional muster.

Third, "available" does not mean "*immediately* available." Requiring Virginia to amend its execution statute may "impos[e] significant costs on the [Commonwealth] and the administration of its penal system." *Nelson v. Campbell*, 541 U.S. 637, 644 (2004); *but cf.* Att. 4 at 99:22–100:7 (deputy director at VDOC testifying that the VDOC has not "explored" what the costs would be). But *Glossip* does not require Mr. Gray to identify an alternative method that is known, available, *and* cost-free.[4] Mr. Gray simply must show an execution-method alternative that is "feasible" and "readily implemented." *Glossip*, 135 S. Ct. 2737; *see Am. Textile Mfrs. Inst. Inc. v. Donovan*, 452 U.S. 490, 508–09 (1981) ("feasible" means "capable of being done, executed, or effected"); *United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 422 (6th Cir. 2006) ("'[R]eadily' is a relative term, one that describes a process that is *fairly* or *reasonably* efficient, quick, and easy, but not necessarily the most efficient, speedy, or easy process.").

[4] The VDOC's selection of a method of execution is not significantly constrained by cost. The recent purchase of compounded chemicals for two potential executions totaled $66,000—as much as ten times the cost of non-compounded versions of the same chemicals. Att. 5 ¶ 56.

On this record, the Commonwealth has neither explained nor introduced evidence that it cannot carry out a firing-squad execution.

The district court's erroneous conclusion that the firing squad is not an "available" alternative relied, in part, on its factual finding that the VDOC lacks the chamber, protocol, and firearms necessary to carry out a firing squad execution. Att. 7 at 40. This is strained, and belied by the record.

To start, Virginia has many law-enforcement officers "who can pull the trigger and have the training to aim true." *Cf. Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, C.J., dissenting from denial of reh'g *en banc*, addressing a challenge to Arizona's method of execution); *see* Att. 2, Ex. O. VDOC officers are also trained and certified on the use of firearms. Att. 4 at 106:4–11. Virginia's law-enforcement population means that it also has the arsenal. *See Wood*, 759 F.3d at 1103 (Kozinski, C.J., dissenting from denial of reh'g *en banc*). Additionally, constructing a chamber should be neither difficult nor expensive, if it is even required at all.

Although Virginia has not yet developed protocols for carrying out a firing-squad execution, Utah's firing-squad protocol is instructive. (Utah is one of two states that allow for executions by firing squad. *See* Okla. Stat. tit. 22 § 1014 (2015); Utah Code Ann. § 77-18-5.5(1)–(4)). The State follows a simple procedure. First, "[t]he prisoner is seated in a chair that is set up in front of a wood panel and in between stacked sandbags that keep the bullets from ricocheting around the room." *See* Att. 2, Ex. Z. "About twenty or twenty-five feet across from the inmate

is the opposite wall with two slit-like openings. The firing squad members stand behind this wall and put their high-powered guns through the openings." Deborah W. Denno, *The Firing Squad as a "Known and Available Method of Execution" Post-Glossip*, 49 U. Mich. J. L. Reform 749, 783–84 (2016). Second, "[a] doctor then places a round white target on the inmate's chest." *Id.* at 784. And third, each squad member aims and fires. *Id.* Because "firearms have no purpose *other* than destroying their targets," of course "[e]ight or ten large-caliber rifle bullets fired at close range can inflict massive damage, causing instant death every time." *Wood*, 759 F.3d at 1103 (Kozinski, C.J., dissenting from denial of reh'g *en banc*). The shooters remain anonymous, and one of their weapons "is loaded with a blank round so nobody knows which officer killed the inmate." *See* Att 2, Ex. Z.

In the course of denying the preliminary injunction, the district court discounted all of this by stating that "should Virginia choose to amend its execution statute and adopt the firing squad, the Commonwealth would be free to adopt whatever protocol it sees fit." Att. 7 at 41. Because Virginia could adopt any protocol it wanted, the district court reasoned, "there is no way for the [district c]ourt to determine whether these officers and firearms would satisfy the requirements of a hypothetical protocol that the VDOC has not yet adopted." *Id.* at 40.

This obviously is a preliminary finding, and the court's erroneous reasoning makes a mockery out of *Glossip*'s requirement that an inmate challenging a method of execution identify an "available alternative." Mr. Gray has pointed to a known

alternative and introduced substantial evidence of its feasibility. That is all that *Glossip* requires. It is now the Commonwealth's obligation to conform its conduct to the Constitution.

The district court also found that there was insufficient evidence from which to conclude that death by firing squad was "significantly [likely to] reduce a substantial risk of severe pain." *Id.* at 41. This conclusion is unsupported by the record. In fact, trauma surgeon Dr. Jonathan Groner, M.D.'s undisputed testimony described in detail how multiple gunshots to the chest cause virtually instantaneous and painless death by resulting in an "immediate cessation of blood flow to the carotid arteries, which are the major blood supply to the brain." *See* Declaration of Jonathan I. Groner, M.D. ("Groner Decl.") ¶¶ 10–14, attached hereto as Attachment 13. The fact that the firing squad is subject to human error (Att 7 at 41–42)—doubtful as it may be that *four* trained shooters *all* miss their target—is irrelevant. Att. 4 at 126:10–18. *Glossip* does not require an error-free execution method. Rather, Mr. Gray must show that the firing squad significantly reduces a substantial risk of severe pain when compared with Virginia's lethal-injection protocol. *Glossip*, 135 S. Ct. at 2737. He did just that, but because the district court applied the wrong standard, he was denied relief.

2. SECOND PRONG OF *GLOSSIP* ANALYSIS: The use of the electric chair to carry out a sentence of death violates the Eighth Amendment's prohibition against cruel and unusual punishment.

In proffering the firing squad as an "available alternative," Mr. Gray argued that the "alternative" that is currently provided-for by Virginia statute—namely, death by electrocution—is not a legitimate option, because it also carries a

"demonstrated risk of severe pain." Respondents proffered no contrary evidence. The district court nonetheless disagreed with Mr. Gray's allegations, stating that "over a century of settled law" establishes that death in the electric chair is a constitutional method of execution. Att. 7 at 35. The district court continued: Although electrocution has yielded "visually disturbing" accounts of the condemned, *inter alia*, "catching on fire," there is no "evidence that the condemned inmates were conscious or able to feel these effects before dying." Att. 7 at 37; *cf. Baze*, 553 U.S. at 48 (disapproving of death by "burning alive"). The district court's conclusion is incorrect.

To start, this Court has never held that electrocution passes Eighth Amendment muster. In *In re Kemmler*, 136 U.S. 436 (1890)—often cited regarding the constitutionality of the electric chair—this Court held only that the Eighth Amendment did not apply to the states, and that the Court lacked jurisdiction. *Id.* at 446, 447; *see also Baze*, 553 U.S. at 48 (In *Kemmler*, "we rejected an opportunity to incorporate the Eighth Amendment against the States in a challenge to the first execution by electrocution, to be carried out by the State of New York."). The Eighth Amendment's prohibition against cruel and unusual punishment now applies to the states. *See Robinson*, 370 U.S. at 666. Similarly, in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (plurality opinion), this Court worked "under the assumption, but without so deciding," that the Eighth Amendment applied to the states. *Id.* at 462.

In any event, neither of these cases address the legal question whether electrocution carries a "demonstrated risk of severe pain," the test under current precedent. *See Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 61). The allegations and record evidence in this case compels the conclusion that electrocuting a person to death violates the Eighth Amendment's prohibition against cruel and unusual punishment.

Indeed, it is so indisputably clear that use of the electric chair as a method of execution violates the Eighth Amendment, that Governor-Respondent McAuliffe has admitted as much. Governor-Respondent McAuliffe admitted that electrocuting an inmate to death is an "excessively inhumane punishment[]" that causes the person to suffer "unspeakable pain as [he] die[s]." Att. 2, Ex. W. The Respondents did not deny this admission, and they failed to argue or introduce any evidence showing that electrocution would not cause Mr. Gray to suffer.

The district court did not even acknowledge the Governor's admission, which aligns with the unrebutted declaration of Dr. Groner. Observing that inmates "heat[] up significantly during the electrocution," Att. 13 ¶ 7, Dr. Groner concluded that "execution by electrocution will not cause rapid death with little pain," *id.* ¶ 15; *see also id.* ¶ 17 ("the electric chair will cause a death that is neither instantaneous nor painless"), because "the evidence fails to show that inmates are rendered instantly senseless by the flow of electricity through the scalp electrode," *id.* ¶ 17. Dr. Groner observed that, based on his experience caring for patients suffering from electrical injuries, "cardiac arrest is not the primary cause of death in

electrocution." *Id.* ¶ 16. Respondents did not introduce any evidence to rebut or contradict this. There is no factual basis or binding precedent that electrocuting a person to death is consistent with the Eighth Amendment.

Importantly, under Virginia law, electrocution is only an available method of execution if the inmate selects it as a method. Va. Code 53.1-234. Thus, by state statute, the inmate's selection of this method is a condition precedent to authorization to use electrocution as an available method of execution. Thus, no court can rely on electrocution as an alternative method of execution in Virginia unless that inmate has chosen that method. Respondents have provided no authority that would allow the state to require the inmate to choose this method, or any method, of execution, and there is no basis for imposing such a requirement.

3. FIRST PRONG OF *GLOSSIP* ANALYSIS: A condemned inmate need not "quantify" the risk of pain posed by the proposed method of execution in order to satisfy the first prong of his *Glossip* burden in a method of execution challenge.

*Glossip* requires the inmate challenging the method of execution to show, at the preliminary injunction stage, a likelihood that he can establish a "*demonstrated risk* of severe pain and that the risk is substantial when compared to known and available alternatives." *Glossip*, 135 S. Ct. at 2737 (emphasis added). This standard does not require that the pain is "sure" or "very likely"—the standard applied by the district court. *See* Att. 7 at 11-12, 23, 27, 28, 30, 31, 32, 32 n.12, 37, 47. *But see, e.g., Adams v. Bradshaw*, 826 F.3d 306, 320 (6th Cir. 2016) (using "demonstrated risk" and "substantial" standard); *Jones v. Bradshaw*, 138 F. Supp. 3d 921, 925 (N.D. Ohio 2015) (same); *contra Grayson v. Warden*, 2016 WL 7118393,

at *2 (11th Cir. Dec. 7, 2016) (using "sure" or "very likely" standard); *First Amendment Coal. of Arizona, Inc. v. Ryan*, 188 F. Supp. 3d 940 (D. Ariz. 2016) (same). Yet, the district court below has gone further in misapplying this Court's standard by requiring that the risk also be "quantified," repeatedly dismissing Mr. Gray's evidence due to the failure of the experts to pinpoint the precise level of risk. *See* Att. 7 at 11, 31, 33, 34 n.13.

Having applied the wrong legal standard, the district court did not properly consider the undisputed fact that the compounded drugs that Respondents propose to use in this execution *are over 100 days past an appropriate* BUD, given the Respondents' improper storage of the drugs. Att. 7 at 32; *but see* Att. 4 at 137:12–142:3. As the VDOC's own head pharmacist testified, proper storage of compounded drugs is important, *even if* the drugs are going to be used for a lethal injection. Att. 4 at 142:22–143:5. After all, the first drug must still serve its clinical purpose of anesthetizing the inmate to the otherwise-excruciating effects of the second and third drugs—and when drugs are stored improperly, that greatly increases the risk that they will be sub-potent or otherwise ineffective due to contamination. The district court erred by dismissing these as irrelevant "clinical" concerns. Att. 7 at 32 n.11. While it is true that lethal injection is not a clinical procedure, *the drugs still need to be effective for their intended purpose. See Baze*, 553 U.S. at 53 (it "is uncontested that, failing a proper dose of [the first drug] that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of [the second drug] and pain from the [third

drug]"). The use of drugs beyond an acceptable BUD greatly magnifies the risk that the compounded midazolam will fail to properly anesthetize Mr. Gray. Att. 4 at 19:5-15, 20:13-20, 21:9-15, 22:8-15 (Dr. Sasich testifying that when drugs that are not sterile, have improper acidity levels, or contain endotoxins, the risk that the inmate will suffer pain during the course of execution increases).

The district court also dismissed as speculative the mounting anecdotal and scientific evidence that midazolam has failed and will fail to maintain a state of sufficient anesthesia throughout the lethal injection execution. As the Respondents' own expert admitted, this anecdotal evidence provides the primary data point from which to analyze the efficacy of these lethal injection drugs, because clinical tests are not (and cannot be) conducted on these drugs at such high dosages. To that end, there is substantial evidence of executions in which inmates appear to lose consciousness at first, only to later regain consciousness and unnecessarily suffer the painful effects of the drugs. *See* Att. 2, Exs. DD, EE, FF, GG, KK. And the district court completely ignored the fact that even where executions *appear* to have gone forward without any problems, the inmate may be suffering chemical torture while in the state of total paralysis caused by the second drug in the three-drug protocol.[5]

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[5] Relatedly, this Court has not approved the use of midazolam in all instances. In *Glossip*, the Court reasoned that a fact-dependent inquiry is required to assess midazolam's efficacy. Based on the record in that case, the Court held that the district court did not clearly err in finding that midazolam was likely to render an inmate insensate to pain. *See First Amendment Coal. of Az., Inc. v. Ryan*, No. CV-14-01447-PHX-NVW, 2016 WL 2893413, at *6 (D. Ariz. May 18, 2016) ("*Glossip* 'did not enshrine one court's findings after an emergency injunction hearing as scientific

Similarly, the district court dismissed the risks associated with using compounding pharmacies to prepare sterile injectable drugs. Att. 7 at 29-32. The Commonwealth has taken these risks to a new level by *removing itself entirely* from its typical oversight and regulatory function with regard to compounding pharmacies preparing drugs for use in lethal injections. Generally, compounding is considered the "practice of pharmacy." Va. Code §§ 54.1-3300, 54.1-3401. This designation brings the pharmacy under the purview of a robust set of regulations and laws regarding the preparation and dispensation of compounded drugs. However, Virginia has determined that "[t]he compounding of" drugs to be used for lethal injection "(i) shall not constitute the practice of pharmacy . . . (ii) is not subject to the jurisdiction of the Board of Pharmacy, the Board of Medicine, or the Department of Health Professions; and (iii) is exempt from the provisions of . . . the Drug Control Act." Va. Code § 53.1-234. By statute, the Commonwealth has been relieved of responsibility—mandated in all other pharmaceutical contexts—to regulate the preparation, maintenance, and sourcing of compounded drugs. Att. 12 ¶ 32.

The district court also erroneously disregarded the risks associated with the Active Pharmaceutical Ingredients ("API's) used in compounding. Specifically, there are significant concerns about the API manufacturing process. Plants in

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fact beyond challenge, let alone endorse midazolam's constitutionality in all cases'"); *see also Price v. Dunn*, CA 14–0472–KD–C, 2015 WL 6962854, at *8 (S.D. Ala. Oct. 20, 2015). The midazolam addressed in *Glossip* was an FDA-approved, manufactured version of midazolam, not a compounded version like the VDOC proposes to use in this case.

China have been found to use the same equipment to produce APIs for human ingestion as to produce pesticides. *Id.* ¶ 35. And the FDA recently placed an API manufacturer in India on Import Alert for refusing to allow FDA inspection of its facilities. *Id.* ¶ 35. FDA-regulated pharmaceuticals, in contrast, are subject to strict documentation, testing, and quality control of their manufacturing procedures. *Id.* Without such oversight, APIs for compounding can easily be adulterated or misbranded, meaning that the final product may be contaminated or fail to meet the chemical/U.S. Pharmacopeial Convention standards for the drug it purports to be.

The risk posed by compounding is real and non-negligible. In 2012, the New England Compounding Center caused a fungal meningitis epidemic resulting in over 60 deaths. *Id.* ¶ 50. And seven Virginia compounding pharmacies have been cited for deficiencies in their production of compounded sterile products: Akina Pharmacy (Form 483 issued August 2016); Alexandria Medical Arts Pharmacy & Compounding Laboratory (Warning Letter issued April 2010); Hunter Holmes McGuire Veterans Admin Medical Center (Form 483 issued March 2015, Form 483 issued October 2016); RxSouth, LLC (Form 483 issued December 2012, Referral Letter to Virginia Board of Pharmacy issued August 2013, Form 483 issued February 2014, Warning Letter issued October 2014, Form 483 issued April 2016); Sentara Enterprises (Form 483 issued July 2015, Warning Letter issued August 2016); The Wellness Pharmacy, LLC (Form 483 issued March 2015, Warning Letter

issued March 2016); and Wood's Pharmacy, Inc. (Form 483 issued January 2015). *Id.* ¶ 61.

Recent botched executions caused by compounded drugs provide powerful evidence that using compounded drugs in lethal injection executions creates an unconstitutional risk of severe pain. When Oklahoma executed Michael Lee Wilson in January 2014, it used compounded pentobarbital as the first of three drugs. Upon administration of the purported pentobarbital, Mr. Wilson cried out, "I feel my whole body burning!" Att. 2, Ex. T. Jose Luis Villegas similarly complained of a burning sensation when Texas executed him with compounded pentobarbital in April of 2014. Att. 2, Ex. U. Likewise, when Eric Robert was executed with compounded pentobarbital in South Dakota in October 2012, he gasped heavily, his skin turned a blue-purplish hue, his eyes remained open throughout the execution, and his heart continued to beat ten minutes after he stopped breathing. He took more than twenty minutes to die. *See* Att. 2, Ex. V. These events were consistent with the administration of a compounded drug that was contaminated or sub-potent. *See* Att. 12 ¶¶ 62–64.

Mr. Gray's right to challenge the Commonwealth's punishment of him and protect his right to be free from cruel and unusual punishment is indisputably clear. Without the lower courts' legal error regarding Mr. Gray's Eighth Amendment challenges, Mr. Gray met the burden determined by this Court to entitle him to injunctive relief.

b. Mr. Gray's Due Process Rights Are Indisputably Clear.

Virginia Code section 53.1-234 ("Secrecy Statute") violates Mr. Gray's right to procedural due process under the Fifth and Fourteenth Amendments because Mr. Gray has a cognizable liberty interest in obtaining discovery in his lawsuit regarding the manner in which the drugs that are to be used in his execution were prepared.

Although Mr. Gray presented evidence that should have been sufficient to satisfy the showing to obtain a preliminary injunction, to the extent Mr. Gray has been accused of offering "speculative" evidence, this is precisely the result of Mr. Gray having been denied the opportunity to take discovery. Att. 7 at 33. In particular, the district court ruled that Mr. Gray is categorically foreclosed from obtaining discovery that might establish the identity of the compounding pharmacy that prepared the compounded drugs at issue in this litigation due to Virginia's Secrecy Statute—and would allow him to investigate and present evidence of the conditions and circumstances in which the drugs were prepared. Att. 7 at 42–45; *see* Va. Code § 53.1-234. The Secrecy Statute states:

> The identities of any pharmacy or outsourcing facility that enters into a contract with the Department for the compounding of drugs necessary to carry out an execution by lethal injection, any officer or employee of such pharmacy or outsourcing facility, and any person or entity used by such pharmacy or outsourcing facility to obtain equipment or substances to facilitate the compounding of such drugs and any information reasonably calculated to lead to the identities of such persons or entities . . . shall be confidential, shall be exempt from the Freedom of Information Act . . . , and *shall not be subject to discovery or introduction as evidence in any civil proceeding unless good cause is shown.*

*Id.* The Secrecy Statute, combined with the fact that the VDOC has denied knowing important details about the preparation and maintenance of the chemicals that will be used to execute Mr. Gray (*see* Att. 2, Ex. F), frustrate Mr. Gray's ability to develop important evidence about the source and the methods and conditions in which the chemicals were prepared that will be used to execute him, and related risks that the chemicals will be ineffective.

More than that, the Secrecy Statute is a violation of Mr. Gray's Fifth and Fourteenth Amendment rights to procedural due process, and the district court erred in concluding otherwise when it held that Mr. Gray does not have a cognizable "liberty interest" in obtaining this information. Att. 7 at 42–45. Various other states have enacted similar "secrecy statutes," challenges to which have elicited strong dissenting opinions. As Judge Wilson of the U.S. Court of Appeals for the Eleventh Circuit recently wrote, a "prisoner facing execution has the weightiest of interests in being free from a cruel and unusual execution—far less weighty interests enjoy due process protections." *See Jones v. Comm'r, Georgia Dep't of Corr.*, 812 F.3d 923, 937–38 (11th Cir. 2016) (Wilson, J., dissenting from denial of rehearing *en banc*); *Phillips v. DeWine*, 841 F.3d 405, 432 (6th Cir. 2016) (Stranch, J., dissenting) (concluding that there is a substantial liberty interest at stake in Eighth Amendment method-of-injection claims that is entitled to procedural protections). Respondents cannot deny Mr. Gray the most "basic ingredient of due process": "an opportunity to be allowed to substantiate a claim before it is rejected." *Jones*, 812 F.3d at 935 (Wilson, J., dissenting from denial of rehearing *en banc*)

(quoting *Ford v. Wainwright*, 477 U.S. 399, 414 (1986)); *see also Phillips*, 841 F.3d at 432 (Stranch, J., dissenting) ("The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." (quoting *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014)).

Detailed information needed to assess the quality and character of the method of execution is especially important in the Virginia execution process because the process asks the inmate to make a knowing, voluntary, and intelligent waiver of his constitutional rights. Under Virginia law, a condemned inmate is allowed to select between lethal injection and electrocution as the method of his own execution. Should an inmate select a method of execution, the selection is recognized as a knowing, voluntary and intelligent waiver of both the Eighth Amendment right to be free from cruel and unusual punishment and the and Fourteenth Amendment right to due process. *Stewart v. Lagrand*, 526 U.S. 115, 119 (1999).[6] Thus, material information about the manner in which the VDOC plans to carry out the execution of Mr. Gray is not sought merely for the sake of having more information. It implicates, and is sought to inform, the exercise of his rights under the Eighth and Fourteenth Amendments. To be clear, Mr. Gray does not maintain that the failure to provide any piece of information relating to the execution process is a violation of due process. But the district court held that there

[6] According to the Supreme Court of Virginia, an inmate who does *not* make a selection likewise makes a knowing, voluntary, and intelligent waiver of these rights. *Orbe v. Johnson*, 601 S.E.2d 547, 549 (Va. 2004).

was no information relating to the execution process that could implicate due process rights. This is clear error. *Moran v. Burbine*, 475 U.S. 412 (1986).

### C. The Injunctive Relief Mr. Gray Seeks Is Necessary and Appropriate in Aid of This Court's Jurisdiction

Injunctive relief from this Court is necessary not only to aid this Court's certiorari jurisdiction, but to preserve it at all. The Court is permitted to issue any writ "in aid of the appellate jurisdiction which might otherwise be defeated." *McClellan v. Carland*, 217 U.S. 268, 280 (1910). Mr. Gray's execution would certainly defeat the Court's appellate jurisdiction.

Injunctive relief is also appropriate in this case. Despite Virginia's strong interest in enforcing its judgments, *see Nelson v. Campbell*, 541 U.S. 637, 650 (2004), it does not have an interest in carrying out a judgment for execution in a manner that violates 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."). In that same regard, the public interest "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.

Respondents specifically asked that the district allow them to file a responsive pleading to the merits of Mr. Gray's Complaint on or before January 24,

2017. The district court granted this request. A temporary stay of execution will not disrupt this proposed filing. Nor will a temporary stay of execution rob the Commonwealth of its interest in carrying out the sentence imposed on Mr. Gray; it will merely allow Mr. Gray time and ability to litigate his case, and will allow time for the Court of Appeals to address the merits of his appeal without prematurely mooting review by executing Mr. Gray by the very method that both lower courts have failed to review.

As such, Mr. Gray's requested injunctive relief is both appropriate and necessary.

## II. The Court Should Also Grant a Stay Pending Filing, Consideration, and Disposition of a Petition for Certiorari Before Judgment

In the alternative to entering an injunction to preserve jurisdiction pending completion of Mr. Gray's case, the Court should issue a stay pending filing, consideration, and disposition of a petition for certiorari before judgment is rendered in Mr. Gray's pending appeal before the Court of Appeals. *See* 28 U.S.C. § 1254(1); 28 U.S.C. § 2101(e). Mr. Gray's appeal presents several issues worth this Court's grant of a writ of certiorari; Mr. Gray therefore asks this Court for a stay so that a petition for writ of certiorari before judgment to review the decision of the United States District Court for the Eastern District of Virginia can be filed with this Court.

First, Mr. Gray's pending appeal before the Court of Appeals raises the precise legal issue that is the subject of two petitions for certiorari currently pending before this Court. *Arthur v. Dunn*, Dkt. No. 16-602; *Johnson v. Kelly*, Dkt.

No. 16-6496. These petitions present the question of whether a proposed "known and available" alternative must be approved by an existing state statute. *Arthur v. Dunn*, Dkt. No. 16-602; *Johnson v. Kelly*, Dkt. No. 16-6496. The fact that certiorari is still being considered on this very issue is reason enough for this Court to stay Mr. Gray's execution. *See e.g.*, *Emmett v. Johnson*, 552 U.S. 987 (2007) (granting stay of execution in challenge to lethal-injection protocol after the Court granted petition for certiorari in *Baze v. Rees*, 551 U.S. 1192, *amended* 552 U.S. 945 (2007)); *see also Schwab v. Florida*, 552 U.S. 1034 (2007) (granting stay of execution pending filing and disposition of a petition for writ of certiorari after *Baze*). Indeed, this Court granted a stay of execution in Mr. Arthur's case in November, just hours before his execution, so that it could consider whether to grant certiorari in his case. *Arthur v. Dunn*, 137 S. Ct. 15 (2016).

Moreover, Mr. Gray's case is an even better vehicle for certiorari review of this question than *Arthur*. First, although the Alabama statute in *Arthur*, like the Virginia statute here, authorized both lethal injection and electrocution, *see* Ala. Stat. § 15-18-82.1, Arthur did not argue, as Mr. Gray has, that electrocution is unconstitutional, *Arthur*, 2016 WL 6500595, at *39 n.30. *Second*, the plaintiff in *Arthur* failed to allege that Alabama "would have the first idea about how to carry out a [firing-squad] execution." 2016 WL 6500595, at *41. Unlike in *Arthur*, Mr. Gray has pleaded and shown that the Commonwealth could feasibly organize and carry out a firing-squad execution. *But see Arthur*, 2016 WL 6500595, at *41 (no allegation or evidence). Mr. Gray has put forward evidence, for example, about the

number of police officers in the Commonwealth, the availability of guns and ammunition, and the accessibility of model firing-squad procedures from other states. *See* Att. 2, Exs. O, P, Z. The VDOC representative who testified on behalf of Respondents did not dispute these facts, acknowledged the VDOC staff maintains marksmanship proficiency, and admitted the VDOC had not considered the firing squad as a viable alternative. Att. 4 at 100:2-8, 106:4-11.

Second, Mr. Gray's case presents another question of law that has been the subject of dispute in lower courts across the country: Does *Glossip*'s standard of "demonstrated risk of severe pain[,]" *Glossip*, 135 S. Ct. at 2737, equate to a requirement that the condemned inmate show that pain is "sure" or "very likely"? *See, e.g.*, *Adams v. Bradshaw*, 826 F.3d 306, 320 (6th Cir. 2016) (using "demonstrated risk" and "substantial" standard); *Jones v. Bradshaw*, 138 F. Supp. 3d 921, 925 (N.D. Ohio 2015) (same); *contra Grayson v. Warden*, 2016 WL 7118393, at *2 (11th Cir. Dec. 7, 2016) (using "sure" or "very likely" standard); *First Amendment Coal. of Arizona, Inc. v. Ryan*, 188 F. Supp. 3d 940 (D. Ariz. 2016) (same). While it is Mr. Gray's position that the *Glossip* standard indisputably requires no more than its plain language of a "demonstrated risk[,]" the growing divergence in lower federal courts on this issue makes this question ripe for the Court's consideration.

Third, this Court has not yet considered the constitutionality of a secrecy statute—a question that has divided justices of the circuit courts. *See Jones v. Comm'r, Georgia Dep't of Corr.*, 812 F.3d 923, 937–38 (11th Cir. 2016) (Wilson, J.,

dissenting from denial of rehearing en banc); *Phillips v. DeWine*, 841 F.3d 405, 432 (6th Cir. 2016) (Stranch, J., dissenting) (concluding that there is a substantial liberty interest at stake in Eighth Amendment method-of-injection claims that is entitled to procedural protections). A stay should be granted to preserve this Court's opportunity to consider the constitutionality of Virginia's Secrecy Statute and its application in this case.

## CONCLUSION

For all of the foregoing reasons, the application should be granted.

Respectfully submitted,

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No. 17A___

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IN THE
SUPREME COURT OF THE UNITED STATES

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RICKY JOVAN GRAY,

*Applicant,*

v.

TERENCE RICHARD MCAULIFFE, Governor, Commonwealth of Virginia, HAROLD W. CLARKE, Director, Virginia Department of Corrections, EDDIE PEARSON, Warden, Greensville Correctional Center, DAVID ZOOK, Warden, Sussex I State Prison, OTHER UNKNOWN EXECUTIONERS, EMPLOYEES, AND AGENTS, Virginia Department of Corrections,

*Respondents.*

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## CERTIFICATE OF SERVICE

I, Jon M. Talotta, a member of the Bar of this Court, hereby certify that on January 17, 2017, three copies of the Emergency Application for Stay to Protect This Court's Jurisdiction Following Judgment or, in the Alternative, Pending Filing and Disposition of a Petition for Writ of Certiorari Before Judgment were served by e-mail and first-class United States mail, postage prepaid, to:

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I further certify that all parties required to be served have been served.

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