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Comment

THE NEEDLE LIVES TO SEE ANOTHER DAY! THREE-DRUG PROTOCOL RULED CONSTITUTIONAL IN *GLOSSIP V. GROSS*

I. INTRODUCTION

The Eighth Amendment provides one of the most important protections for citizens – prohibition of cruel and unusual punishment.¹ Since the founding of the United States, the death penalty has been left to the states to implement, so long as it does not violate the Eighth Amendment.² As a result, states have ratified their criminal codes and constitutions to keep their method of capital punishment within the constitutional limits.³ Challenges to states' methods of execution began as early as the mid-1800s.⁴ In one such case from 2015, the Supreme Court granted certiorari in *Glossip v. Gross* to determine if the three-drug protocol used to carry out lethal injection as the primary form of execution violated the Eighth Amendment.⁵ The majority of states that still have capital punishment use lethal injection as their primary form of execution.⁶ Joining the large number of cases recognizing that a three-drug protocol is constitutional, the Court upheld Oklahoma's death penalty.⁷

In analyzing the Court's decision in *Glossip*, this Comment will grapple with whether lethal injection is appropriate under the United

¹ See U.S. CONST. amend. VIII (prohibiting the government from inflicting cruel or unusual punishment against its people).

² See *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (providing that while the State has the power to punish, the amendment stands to assure this power is exercised within the limits of civilized standards).

³ See ARIZ. CONST. art. XXII, § 22 (amended 1933) (stating individuals who committed offenses before the effective date of the amendment shall have the choice of either lethal injection or lethal gas).

⁴ See *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878) (holding execution by shooting does not violate the Eighth Amendment).

⁵ See *Glossip v. Gross*, 135 S. Ct. 2726, 2729 (2015) (granting certiorari to address plaintiffs' claim that Oklahoma's death penalty violates the Eighth Amendment).

⁶ See *Baze v. Rees*, 553 U.S. 35, 42 (2008) (citing that lethal injection is the most common method of implementing the death penalty). At the time of the *Baze* decision, thirty-six states had adopted lethal injection as the exclusive or primary means of implementing the death penalty, which made it the most used form of execution. *Id.* Of the thirty-six states that adopted lethal injection, thirty used the same combination of three drugs in their lethal injection protocol. *Id.* at 44.

⁷ See *Glossip*, 135 S. Ct. at 2731 (finding that the three-drug protocol used in Oklahoma for executions did not violate the Eighth Amendment).

States Constitution.⁸ Part II discusses the facts from *Glossip v. Gross*.⁹ Next, Part III reviews the legal background of the protections provided under the Eighth Amendment and how the death penalty has stayed within the realm of the Eighth Amendment.¹⁰ Part IV analyzes the Supreme Court's holding in *Glossip*, arguing that the Court correctly applied standards for the death penalty under the Eighth Amendment established by judicial precedent, and discusses any future consequences of its application to future death penalty cases.¹¹

II. STATEMENT OF FACTS IN *GLOSSIP V. GROSS*

On June 25, 2014, four plaintiffs filed a motion for a preliminary injunction.¹² The plaintiffs' motion cited 42 U.S.C. § 1983, challenging that the lethal injection protocol in Oklahoma violated the Constitution.¹³ On December 22, 2014, the district court denied the plaintiffs' motion for preliminary injunction, concluding that plaintiffs did not establish a likelihood of success on the merits of counts two or seven.¹⁴ The plaintiffs

⁸ See *infra* Part II-IV (analyzing whether or not the Court correctly reviewed previous cases and tests concerning the death penalty).

⁹ See *infra* Part II (stating the facts in *Glossip v. Gross*).

¹⁰ See *infra* Part III (reviewing the evolution in the protections of the Eighth Amendment and of the Supreme Court's position on the death penalty).

¹¹ See *infra* Part IV (providing a detailed look into why the Supreme Court's decision in *Glossip v. Gross* was correct).

¹² See *Warner v. Gross*, 776 F.3d 721, 723 (10th Cir. 2015) (listing the plaintiffs, Charles Warner, Richard Glossip, John Grant, and Benjamin Cole, who were among the twenty-one Oklahoma death-row inmates who filed a 42 U.S.C. § 1983 lawsuit).

¹³ See *id.* at 723 (holding that plaintiffs were convicted of first degree murder and sentenced to death); see also *Warner v. State*, 144 P.3d 838, 856 (Okla. Crim. App. 2006) (detailing that Charles Warner anally raped and murdered his girlfriend's eleven-month-old daughter and was sentenced to death); *Glossip v. State*, 157 P.3d 143, 147 (Okla. Crim. App. 2007) (explaining Richard Glossip hired another motel employee to kill the owner of the motel and was sentenced to death for first degree murder); *Grant v. State*, 58 P.3d 783, 789 (Okla. Crim. App. 2002) (articulating John Grant murdered a food service supervisor by repeatedly stabbing her with a prison-made shank; he was sentenced to death for first degree murder); *Cole v. State*, 164 P.3d 1089, 1092 (Okla. Crim. App. 2007) (depicting Benjamin Cole murdered his nine-month-old daughter by pushing her legs toward her head as she lay on her stomach crying, which resulted in him being sentenced to death for first degree murder); see also 42 U.S.C. § 1983 (2012) (“[A]ny citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be held liable to the party injured in an action at law. . .”).

¹⁴ See *Warner*, 776 F.3d at 726-27 (determining the district court ruled from the bench and denied plaintiff's motion for preliminary injunction). Count two alleged that the inherent characteristics of midazolam—including an alleged ceiling effect and an alleged risk of paradoxical reactions—render it unsuitable as a stand-alone anesthetic, and thus, pose a substantial risk that an inmate would experience “severe pain, needless suffering, and a lingering death.” *Id.* Count seven alleged that the defendants were engaging in a program of biological experimentation on captive and unwilling human subjects. *Id.*

filed a notice of appeal on December 23, 2014, along with an emergency motion for stay of execution.¹⁵

On appeal, following the denied motion for a preliminary injunction, the Court of Appeals for the Tenth Circuit affirmed the district court.¹⁶ In addition to affirming the district court's decision, the Court of Appeals added that failing to identify an alternative form of execution was not outcome-determinative in this case.¹⁷ The Supreme Court granted certiorari, then stayed the executions of the petitioners pending the resolution of this case.¹⁸

III. LEGAL BACKGROUND OF *GLOSSIP V. GROSS*

The Eighth Amendment of the United States Constitution prohibits the federal government from imposing excessive bail, excessive fines, or cruel and unusual punishment.¹⁹ There has been an evolution within the courts in regard to the rights under the Eighth Amendment and how various forms of execution have been accepted.²⁰ The interpretation of the Eighth Amendment evolved to meet society at the time death penalty cases were decided.²¹ However, the Eighth Amendment has been interpreted differently over time.²²

¹⁵ See *id.* at 727 (stating that, along with filing a notice of appeal, plaintiffs filed an emergency motion for stay of execution pursuant to Federal Rules of Appellate Procedure 8 and 27).

¹⁶ See *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015) (confirming the district court's finding of fact). The Tenth Circuit affirmed and accepted the district court's finding of fact regarding midazolam's efficacy. *Id.*

¹⁷ See *id.* at 2736 (holding the ruling was "not outcome-determinative"). The Court of Appeals for the Tenth Circuit determined that because the plaintiffs failed to show that midazolam, either in its inherent characteristics or its possible negligent administration, created a demonstrated risk of severe pain, it was not necessary to reach the alternative-form test. *Id.*

¹⁸ See *id.* (showing that the Court voted to grant review and stay the executions of *Glossip*, *Cole*, and *Grant*). *Glossip*, *Cole*, and *Grant*'s executions were stayed pending the Supreme Court's ruling. *Id.* However, *Warner* was executed on January 15, 2015. *Glossip*, 135 S. Ct. at 2736.

¹⁹ See U.S. CONST. amend. VIII (explaining there shall be no excessive bail, fines, or cruel and unusual punishment).

²⁰ See *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (stating the Eighth Amendment has not been regarded as a static concept). The Court discussed how the Eighth Amendment must draw its meaning. *Id.*

²¹ See *id.* at 173 (determining that an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment). The Eighth Amendment must draw its meaning from the evolving standards of decency, which mark the progress of a maturing society. *Id.* Additionally, the punishment for the crime must be proportional. *Id.*

²² See *id.* at 154 (explaining how the death penalty should be analyzed in the various levels of courts). The Eighth Amendment has been interpreted in a flexible and dynamic manner.

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It was not until the mid-1800s that the death penalty was challenged under the cruel and unusual punishment clause in the Eighth Amendment, and the beginning of a different interpretation of the Eighth Amendment began.²³ After the ruling in *Wilkerson v. State of Utah*, the Supreme Court saw a number of cases that would establish the commonly practiced forms of the death penalty.²⁴ In 1890, New York moved to make electrocution its primary form of execution.²⁵ The Supreme Court rejected the petitioners' argument that because the new form of punishment was unusual, it violated the Eighth Amendment.²⁶

Further, in Nevada in 1921, lethal gas was a new form of punishment.²⁷ After the Nevada Supreme Court rejected the notion that lethal gas was a cruel or unusual punishment, other states adopted it to carry out their death penalty punishments.²⁸ Along with lethal injection and lethal gas, some states used hanging and a firing squad as forms of execution.²⁹ There was a period of nine years that saw a pause in

Gregg, 428 U.S. at 154. The Court recognized that in order for "a principle to be vital, [it] must be capable of wider application than the mischief which gave it birth." *Id.*

²³ See *Wilkerson v. State of Utah*, 99 U.S. 130, 135 (1878) (discussing the various modes of execution that have been used in the past and applying the Eighth Amendment to those methods). Shooting, as a mode of executing the death penalty for a death row inmate, did not constitute cruel and unusual punishment under the Eighth Amendment. *Id.*

²⁴ See, e.g., *In re Kemmler*, 136 U.S. 436, 448 (1890) (using different cases to discuss the relationship between state laws and the Fifth and Fourteenth Amendments). Death by electrocution was found not to violate the Eighth Amendment, so it was adopted by a majority of states. *Id.*

²⁵ See *id.* at 445 (citing New York Code of Criminal Procedure § 505 (1888), which states "the punishment of death must in every case be inflicted by causing to pass through the body of a convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead").

²⁶ See *id.* at 448 (holding the enactment of the statute was within the power of the state legislature). Although the new method of execution might be said to be unusual because it was new, "it could not be assumed to be cruel in the light of that common knowledge which has stamped certain punishments as such; that it was for the legislature to say in what manner sentence of death should be executed; [and] that this act was passed in the effort to devise a more humane method of reaching the result." *Id.*

²⁷ See *State v. Jon*, 211 P. 676, 682 (Nv. 1923) (providing the Nevada legislature was seeking to provide a method of inflicting the death penalty in the most humane way). In *Jon*, the court held that it was a scientific fact that lethal gas provided a painless death. *Id.* It was also said that while suffering and torture may be inflicted by the administration of lethal gas, it was not a sufficient argument against lethal gas. *Id.* The court must presume that the officials administering the lethal gas will carefully avoid inflicting cruel punishment. *Id.* The state statute that authorized the execution of persons convicted of murder in the first degree by the use of lethal gas did not violate the federal or state constitution. *Id.*

²⁸ See ARIZ. CONST. art. XXII, § 22 (amended 1933) (stating the judgment of death shall be "inflicted by administering an intravenous injection of a substance in a lethal quantity").

²⁹ See UTAH CODE CRIM. PROC. § 105-37-16 (1933) (allowing prisoners to be executed by hanging or firing squad).

executions in the United States, however.³⁰ Along with ending the nine-year pause, *Gregg v. Georgia* provided that the Eighth Amendment must adapt with the changing society, and the punishment must be proportional to the crime.³¹

Lethal injection is the most commonly used form of carrying out the death penalty, and it was not until recently that the Supreme Court provided a two-step protocol for lethal injection to be constitutional.³² In *Baze v. Rees*, the Supreme Court found that the three-drug protocol used in Kentucky to carry out the death penalty did not violate the Eighth Amendment.³³ Additionally, in *Baze*, it was determined that just because an execution method may result in pain, it does not mean it is cruel or unusual.³⁴ In 2015, the Supreme Court granted certiorari in *Glossip* to determine whether the three-drug protocol used by Oklahoma violated the Eighth Amendment.³⁵

IV. ANALYSIS OF THE DECISION IN *GLOSSIP V. GROSS*

A. *The Glossip v. Gross Decision*

In a five-to-four decision, the Supreme Court held that the lethal injection protocol used in Oklahoma to carry out the death penalty did not violate the Eighth Amendment.³⁶ Writing for the majority, Justice Samuel

³⁰ See *Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (concluding a jury can no longer wantonly and freakishly impose the death sentence). The nine-year pause on the death penalty ended when the Supreme Court held that the new statutory scheme for the death penalty in Georgia did not violate the Eighth Amendment. *Id.*

³¹ See *id.* at 173, 187 (discussing the Eighth Amendment must draw its meaning from the evolving standards of decency, which mark the progress of a maturing society and that the punishment for the crime must be proportional).

³² See *Baze v. Rees*, 553 U.S. 35, 42 (2008) (showing a total of thirty-six states have adopted lethal injection as the exclusive or primary means of carrying out the death penalty). If a state does not give an alternative procedure, its current method might be found to be cruel and unusual. *Id.* at 52. First, a petitioner must effectively address a “substantial risk of serious harm.” *Id.* Second, a petitioner must provide an alternative form of execution. *Id.* The alternative form must be feasible, readily implemented, and significantly reduce a substantial risk of severe pain. *Id.*

³³ See *id.* at 63 (reminding everyone that throughout history, whenever a method of execution was challenged as cruel and unusual, the Court rejected it). Kentucky’s three-drug protocol is consistent with the Eighth Amendment. *Baze*, 553 U.S. at 63.

³⁴ See *id.* at 50 (establishing that violation of the Eighth Amendment depends on the conditions presenting the risk being “sure or very likely to cause serious illness and needless suffering”). Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of “objectively intolerable risk of harm” that would qualify as cruel and unusual punishment. *Id.*

³⁵ See *supra* Part II (providing the factual background of *Glossip v. Gross*).

³⁶ See *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015) (providing two independent reasons why the Court affirmed the lower court’s decision). The Court found petitioners failed to

Alito began by providing a descriptive background of the evolution of the death penalty, including the several methods used to carry out punishment, and how they did not violate the Eighth Amendment.³⁷ To support his reasoning as to why it was proper to deny petitioners injunction, Justice Alito relied in part on the holding in *Winter v. Natural Resources Defense Council, Inc.*³⁸ Along with the precedent set in *Winter*, Alito also relied on *Baze*.³⁹

In a contested decision, the Court affirmed that the three-drug protocol used by Oklahoma did not violate the Eighth Amendment.⁴⁰ The Court applied the test set forth in *Baze* to determine the constitutionality of the lethal injection protocol.⁴¹ Justice Alito provided that if the petitioners in *Glossip* were able to prove that the Oklahoma protocol creates a risk of severe pain and that the risk is substantial when compared to alternative methods, the petitioners would have succeeded in their request for an injunction.⁴²

In his opinion, Justice Alito first affirmed based on petitioners' failure to satisfy the first requirement from the *Baze* test.⁴³ The Court rejected the

identify a known and available alternative method of execution that entails a lesser risk of pain. *Id.* The Court also found that the District Court did not commit clear error when it found the petitioners failed to establish that Oklahoma's use of massive doses of midazolam in its execution protocol entails a substantial risk of severe pain. *Id.* Therefore, the three-drug protocol did not violate the Eighth Amendment. *Id.* The specific drug that petitioners were concerned about was midazolam, which is supposed to put the inmate in a coma like state. *Id.*

³⁷ See *id.* at 2731-32 (reviewing the different forms of the death penalty and their constitutionality in comparison to the Eighth Amendment).

³⁸ See 555 U.S. 7, 20 (2008) (overturning the lower courts granting of a preliminary injunction). For a plaintiff to succeed seeking a preliminary injunction, he must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in his favor, and an injunction is in the public interest. *Id.*

³⁹ See *Baze*, 553 U.S. at 52 (listing the requirements for a preliminary injunction to succeed).

⁴⁰ See Dahlia Lithwick, *A Horrifying Day at Court*, SLATE (2015), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2015/04/glossip_v_gross_supreme_court_justices_argue_about_lethal_injection_abolition.single.html [<https://perma.cc/8U7U-YSG8>] (highlighting the contention in the courtroom on the day of the decision). Chief Justice John Roberts had to step in and scold his colleagues for their rancor and rudeness during oral arguments. *Id.*

⁴¹ See *Baze*, 553 U.S. at 52 (providing the alternative procedure must be feasible, readily implemented, and significantly reduce a substantial risk of severe pain).

⁴² See *Glossip*, 135 S. Ct. at 2737 (proving specifically that Oklahoma's lethal injection protocol creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives). The only way to succeed in a motion for a preliminary injunction is if these requirements are met. *Id.*

⁴³ See *id.* at 2738 (denying petitioners' argument that the State could use sodium thiopental as part of a single drug protocol). The first ground of affirmance for the Court was based on

petitioners' argument that they need not identify a known and available alternative method of execution that presents less risk of harm.⁴⁴ The petitioners additionally argued that the requirement to identify an alternative method contravenes the Court's pre-*Baze* decision in *Hill v. McDonough*.⁴⁵ Justice Alito rejected the petitioners' claim based on the ruling in *Hill*, which established that a method-of-execution claim must be brought under 42 U.S.C. § 1983, because such a claim does not attack the validity of the prisoner's conviction or death sentence.⁴⁶ Additionally, the Court rejected the petitioners' argument against the use of midazolam for their execution; the court articulated that relying on a previous inmate's pain suffered during his execution was not enough to establish that midazolam was sure or very likely to cause pain in theirs.⁴⁷

In support of the affirmation of the second requirement in *Baze*, Justice Alito provided a four-point analysis.⁴⁸ First, the Court reviewed the district court's factual findings under the deferential "clear error" test,

petitioners' failure to satisfy their burden on establishing that any risk of harm was substantial when compared to a known and available alternative method of execution. *Id.*

⁴⁴ *See id.* (concluding the petitioners did not show a risk of pain so great that other acceptable, available methods must be used). Petitioners' argument goes against *Baze*, which is now the controlling opinion and the requirements that the Court now follows. *Id.*

⁴⁵ *See Glossip*, 135 S. Ct. at 2738 (implying petitioners misread the decision in *Hill*). The portion of the opinion in *Hill* on which they relied concerned a question of civil procedure, not a substantive Eighth Amendment question. *Id.* *See also* *Hill v. McDonough*, 547 U.S. 573, 577 (2006) (explaining the petitioner already brought an unsuccessful federal habeas corpus petition). The question before the Court was whether *Hill*'s claim must be brought by an action for a writ of habeas corpus under the statute authorizing that writ, or whether it may proceed as an action for relief under 42 U.S.C. § 1983. *Id.* Filing an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course. *Id.* at 583.

⁴⁶ *See id.* at 579–80 (stating that habeas corpus and a § 1983 claim are two main avenues to relief on complaints related to imprisonment). Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus. *Id.* An inmate's challenge to the circumstances of his confinement, however, may be brought under § 1983. *Id.*

⁴⁷ *See Glossip*, 135 S. Ct. at 2745–46 (claiming that Lockette had only been administered 100 milligrams of midazolam and the issue with the execution was the inability to find an IV site). Aside from the Lockette execution, twelve other executions were conducted using the three-drug protocol at issue here, and those appear to have been conducted without any significant problems. *Id.*

⁴⁸ *See id.* at 2739 (explaining the four-part test consisted of: a "clear error" standard, the petitioners bearing the burden of persuasion, the court's conclusions about the use of midazolam, and the testing of the authority and competency of federal courts given challenges to lethal injection). The district court did not commit clear error when it found that midazolam is highly likely to render a person unable to feel pain during an execution. *Id.* *See also Baze*, 553 U.S. 35, 52 (stating that the petitioner must show an alternative form of execution).

finding that there was no clear error.⁴⁹ Second, the petitioners bear the burden of persuasion on the issue, which they failed to meet.⁵⁰ Third, several courts have concluded that midazolam succeeded in its intended purpose.⁵¹ Fourth, challenges to lethal injection test the authority and competency of federal courts.⁵² In addition to bearing the burden of persuasion on the issue, petitioners also have to show the ceiling effect for midazolam was lower than it was intended to be.⁵³

Finally, Justice Alito discussed the safeguards that Oklahoma has taken to administer midazolam.⁵⁴ Justice Alito pointed to three steps that were taken by Oklahoma: (1) the execution team must secure both a primary and backup IV access site; (2) the execution team must confirm the viability of the IV sites; and (3) the execution team must continuously monitor the offender's level of consciousness.⁵⁵ Additionally, the Court noted that the safeguards implemented by Oklahoma configure with the Court's conclusion in *Baze*, along with satisfying the dissent's argument in that case.⁵⁶

⁴⁹ See *id.* (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (stating the clear error standard does not entitle the Court to overturn a finding simply because the Court is convinced that it would have decided the case differently)).

⁵⁰ See *id.* (acknowledging that petitioners expended a great effort attacking peripheral aspects of the doctor's testimony). Petitioners made little attempt to provide evidence to the district court that the use of midazolam is sure or very likely to result in needless suffering. *Glossip*, 153 S. Ct. at 2739.

⁵¹ See *id.* at 2739–40 (affirming the Court's decision by explaining that several other trial courts have reached the same finding, with multiple appellate courts affirming those decisions). Numerous courts concluded that midazolam, as the first drug, is likely to render an inmate insensate to pain that might result from the administration of the paralytic agent and potassium chloride. *Id.*

⁵² See *id.* at 2740 (reiterating Justice Samuel Alito stating that federal courts should not "embroil themselves in ongoing scientific controversies beyond their expertise").

⁵³ See *id.* at 2743 (criticizing petitioners argument that midazolam has a "ceiling" above which any increase in dosage produces no effect). It is petitioners' burden to establish that midazolam's ceiling occurred at a dosage below the massive 500-milligram dose employed in the Oklahoma protocol and at a point at which the drug failed to render the recipient insensate to pain. *Id.*

⁵⁴ See *Glossip*, 153 S. Ct. at 2742. Oklahoma took important measures to make sure that the administration of the midazolam would occur without incident. *Id.*

⁵⁵ See *id.* (agreeing with the District Court that Oklahoma took safeguards to minimize the risk that might occur during the execution). The district court did not commit clear error in concluding that these safeguards help to minimize any risk that might occur in the event that midazolam does not operate as intended. *Id.*

⁵⁶ See *id.* (pointing out the difference between the protocols in Kentucky and Oklahoma). The Court concluded in *Baze* that the establishment of a primary and backup IV, and the presence of personnel to monitor an inmate, help to significantly reduce the risk that an execution protocol will violate the Eighth Amendment. *Id.* Many of the safeguards that Oklahoma implemented coincide with what the dissent pointed out in *Baze*. *Glossip*, 153 S. Ct. at 2742.

B. *Appraisal of the Glossip v. Gross Decision*

The Court in *Glossip* reached the correct result.⁵⁷ Oklahoma's use of the three-drug protocol does not violate the Eighth Amendment of the United States Constitution because it satisfies the requirements set forth under prior judicial rulings.⁵⁸ The right of petitioners to seek a preliminary injunction was fully recognized by the Court.⁵⁹ Furthermore, states have the right to implement a chosen method to carry out the death penalty as long as it does not violate the Constitution.⁶⁰ Because the Court followed judicial precedent set forward in *Baze* and concluded that the petitioners failed to meet those standards, the ruling was correct.⁶¹

C. *Potential Consequences of the Glossip Decision*

The constitutionality of the death penalty will continue to be a controversial topic, just as it is now.⁶² Justice Stephen Breyer's dissent, in which Justice Ruth Bader Ginsburg joined, provided a passionate argument against the majority opinion.⁶³ The dissent thought it was a good time to reopen the question of the constitutionality of the death penalty.⁶⁴ Additionally, Justice Breyer provided four reasons as to why this question should be reopened, which included: (1) serious unreliability; (2) arbitrariness in application; (3) unconscionably long

⁵⁷ See generally *Beatty v. Brewer*, 649 F.3d 1071, 1072 (2011) (holding that to obtain preliminary injunctive relief, a plaintiff must demonstrate (1) that he is likely to succeed on the merits of such a claim; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest).

⁵⁸ See *Glossip*, 153 S. Ct. at 2739–40 (providing critical analysis of the standards set forth in *Baze* to the facts of the current case before the Court).

⁵⁹ See *id.* at 2729 (giving the petitioners the opportunity to show that they were likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public's best interest).

⁶⁰ See *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (explaining the phrase "cruel and unusual" is policy reflected in the Anglo-American tradition of criminal justice).

⁶¹ See *Glossip*, 153 S. Ct. at 2729 (articulating the standards in *Baze* are that a prisoner must establish that lethal injection creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives).

⁶² See *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.")).

⁶³ See *supra* Part IV.A (providing an analysis of the decision in *Glossip v. Gross*).

⁶⁴ See *Glossip*, 153 U.S. at 2755 (asking whether the death penalty violates the Constitution). Justice Stephen Breyer points out that when the Court upheld the death penalty nearly forty years ago, statutes contained safeguards sufficient to ensure that the penalty would be applied reliably and not arbitrarily. *Id.* Since application of the death penalty has changed, Justice Breyer believes that the question of the death penalty should be reopened. *Id.*

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delays that undermine the death penalty's penological purpose; and (4) most places in the United States have abandoned its use.⁶⁵ The holding in *Glossip* will lead to a continuing time of controversy, with no signs of improvement.⁶⁶

V. CONCLUSION

The death penalty has been both a moral and Constitutional issue as long as the United States has been around. As society has evolved and matured, so have the opinions on this issue. The Court confidently applied the standards set by judicial precedents to the decision in *Glossip v. Gross*. Additionally, the Court accepted the precautions that Oklahoma took in ensuring the penalty was carried out smoothly and legally. Based on *Glossip*, states will have a guideline to abide by when carrying out the death penalty. Furthermore, *Glossip* provides clear standards that a plaintiff needs to meet to be successful in a motion for a preliminary injunction. Finally, states with the same protocol as Oklahoma will feel more secure in administering their penalties without fear of a Constitutional challenge.

Steven Paku*

⁶⁵ See *id.* at 2756 (drawing from Justice Breyer's four reasons as to why the question on the death penalty should be reopened, his time on the bench, and his belief that the death penalty is cruel and unusual punishment).

⁶⁶ See Adam Liptak, *Supreme Court Allows Use of Execution Drug*, N.Y. TIMES (2015), http://www.nytimes.com/2015/06/30/us/supreme-court-execution-drug.html?_r=1 [<https://perma.cc/SRD9-KL3L>] (discussing the ruling in *Glossip* and highlighting how divided the Court is on the death penalty). Justice Breyer and Justice Ruth Bader Ginsburg came very close to announcing that they were ready to rule the death penalty unconstitutional. *Id.* However, that gave rise to debate with Justice Antonin Scalia and Justice Clarence Thomas. *Id.* Justice Scalia called Justice Breyer's plea for judicial abolition of the death penalty "gobbledygook." *Id.* The exchange between the Justices in this case highlights the current controversy and demonstrates that this debate is far from over. *Id.*

* J.D. Candidate, Valparaiso University Law School (2018). I would like to thank my family, specifically my parents, John and Nancy, and fiancée, Shannon. Without their support, love, and encouragement, law school would not be possible. I would like to thank my friends for listening to me and reassuring me. Finally, I would like to thank the Editors of Volume 51 for all their hard work and dedication.