Eighth Amendment — Death Penalty — Preliminary Injunctions — Glossip v. Gross

In 2008, in *Baze v. Rees*,[1] the Supreme Court considered an Eighth Amendment challenge to the use of a particular three-drug lethal injection protocol. A three-Justice plurality opinion announced that, to prevail on a § 1983[2] method-of-execution claim, a petitioner must establish that a state's proposed method presents an "objectively intolerable risk of harm."[3] Last Term, in *Glossip v. Gross*,[4] the Court revisited *Baze* in the context of Oklahoma's adoption of the sedative midazolam in its protocol as a replacement for a now-unavailable part of the drug cocktail approved in *Baze*. The Court held that the death row inmate–petitioners were not entitled to a preliminary injunction against Oklahoma's lethal injection protocol because they had failed to establish a likelihood of success on the merits of their claim that the use of midazolam violates the Eighth Amendment.[5] In resolving *Glossip* based purely on the petitioners' failure to satisfy this one factor — one of four that some federal courts generally consider when ruling on preliminary injunctions — the Court demonstrated a lack of sympathy for more relaxed, sliding-scale preliminary injunction standards. After *Glossip*, lower courts may have difficulty justifying a flexible approach to the success-on-the-merits prong of the preliminary injunction test.

In 1977, Oklahoma legislators seeking a more humane way of carrying out death sentences adopted a three-drug lethal injection protocol: a large dose of the general anesthetic sodium thiopental, followed by a paralytic agent, and then by potassium chloride, which induces cardiac arrest.[6] After the Court's decision in *Baze*, some drug companies began refusing to supply sodium thiopental for executions.[7] Oklahoma sought an alternative in order to continue carrying out the death penalty,[8] and

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[1] 553 U.S. 35 (2008).

[2] Section 1983 authorizes suit against persons who, acting under color of state law, deprive any U.S. citizen of rights secured by the Constitution. 42 U.S.C. § 1983 (2012).

[3] *Baze*, 553 U.S. at 50 (plurality opinion) (quoting Farmer v. Brennan, 511 U.S. 825, 846 (1994)).

[4] 135 S. Ct. 2726 (2015).

[5] *Id.* at 2736–39.

[6] Denise Grady, *Three-Drug Protocol Persists for Lethal Injections, Despite Ease of Using One*, N.Y. TIMES (May 1, 2014), http://www.nytimes.com/2014/05/02/science/three-drug-protocol-persists-for-lethal-injections-despite-ease-of-using-one.html.

[7] After *Baze*, anti–death penalty advocates worked to make sodium thiopental unavailable for executions. *See, e.g.*, Matt Ford, *Can Europe End the Death Penalty in America?*, THE ATLANTIC (Feb. 18, 2014), http://www.theatlantic.com/international/archive/2014/02/can-europe-end-the-death-penalty-in-america/283790 [http://perma.cc/T9HD-XA8D].

[8] The *Baze* plurality considered the use of an effective sedative integral in upholding the constitutionality of the challenged protocol. *See Baze*, 553 U.S. at 53 (plurality opinion) ("It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation . . . and pain . . . .").

turned to midazolam, a move some derided as part of the "ongoing experiment in executing people with untested drug combinations."[9]

Oklahoma first utilized midazolam on April 29, 2014, as part of the lethal injection protocol used to kill Clayton Lockett.[10] During the execution, Lockett began to kick his right leg, breathe heavily, and try to speak — all signs that he had not been properly sedated.[11] The execution team determined that the IV had infiltrated Lockett's tissue and halted the execution, but Lockett was pronounced dead ten minutes later.[12] Oklahoma stayed all pending executions while it investigated Lockett's.[13] Adopting one of the four alternative drug combinations offered in the post-investigation report, Oklahoma planned to administer 500 milligrams of midazolam followed by the paralytic agent and potassium chloride in its next executions.[14]

On June 25, 2014, twenty-one Oklahoma inmates sentenced to death filed a § 1983 complaint challenging the use of midazolam in Oklahoma's execution protocol as violative of the Eighth Amendment.[15] They argued that the "inherent characteristics" of the drug — namely an alleged ceiling effect, a level beyond which increasing the dosage would not increase the drug's effectiveness, and a risk of "paradoxical reactions," including agitation and involuntary movements — rendered the drug "unsuitable" as the sole anesthetic.[16] They contended that the drug would pose an unconstitutionally "substantial risk" that an inmate would experience "severe pain, needless suffering, and a lingering death,"[17] and cited Lockett's execution as proof.[18] In November 2014, four of the plaintiffs — Charles Warner, Benjamin Cole, John Grant, and Richard Glossip[19] — sought a preliminary in-

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[9] Stephanie Mencimer, *Does This Secret Drug Cocktail Work to Execute People? Oklahoma Will Find Out Tonight.*, MOTHER JONES (Apr. 29, 2014, 11:11 AM), http://www.motherjones.com/mojo/2014/04/double-execution-tonight-ok-using-secret-experimental-drug-protocol [http://perma.cc/24D6-EBYA].

[10] *See* Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC (June 2015), http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069 [http://perma.cc/BQ22-WA9T].

[11] *See id.* Lockett allegedly said "[t]his shit is fucking with my mind," and "[t]he drugs aren't working." *See Glossip*, 135 S. Ct. at 2782 (Sotomayor, J., dissenting) (alterations in original).

[12] *Glossip*, 135 S. Ct. at 2734 (majority opinion).

[13] *Id.* at 2782 (Sotomayor, J., dissenting).

[14] *Id.* at 2734–35 (majority opinion). Despite these recommendations, an autopsy found that the 100 grams of midazolam that had been administered to Lockett would have likely been enough to render the average person unconscious. *Id.* at 2782 (Sotomayor, J., dissenting).

[15] Complaint at 9–12, Warner v. Gross, No. Civ-14-665-C (W.D. Okla. June 25, 2014).

[16] Warner v. Gross, 776 F.3d 721, 726–27 (10th Cir. 2015).

[17] *Id.* (quoting Complaint, *supra* note 15, at 8).

[18] *Id.* at 727.

[19] All four had been convicted of murder. *See Glossip*, 135 S. Ct. at 2735. The Oklahoma Court of Criminal Appeals affirmed each conviction and death sentence. *Id.*

junction barring the defendants from executing them under the new protocol until a court could rule on the merits of their claims.[20]

In December 2014, Judge Friot of the U.S. District Court for the Western District of Oklahoma held a three-day evidentiary hearing on the preliminary injunction motion.[21] After the hearing, Judge Friot orally denied the motion.[22] First, he laid out the standard for entry of a preliminary injunction: "[P]laintiffs must demonstrate, first, that they will likely succeed on the merits of their claim; second, that without preliminary relief they will suffer irreparable harm; third, that the balance of equities tips in their favor; and fourth, that entry of an injunction is in the public interest."[23] He also noted the Tenth Circuit's relaxed preliminary injunction standard: when irreparable harm, the balancing of the equities, and public interest considerations all tip in the movant's favor, "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation."[24] Judge Friot concluded that the petitioners were not entitled to relief under either standard as they had "failed to establish any of the prerequisites."[25]

Writing for a unanimous Tenth Circuit panel, Chief Judge Briscoe[26] found that the district court's factual findings were not clearly erroneous and affirmed the district court's order denying the petitioners' motion for a preliminary injunction.[27] The plaintiffs petitioned for certiorari and applied for stays of their executions.[28] The Court denied Warner's application,[29] and he was executed on January

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[20] *Warner*, 776 F.3d at 727.

[21] *Glossip*, 135 S. Ct. at 2735–36; *see* Transcript of Court's Ruling at 4–5, Warner v. Gross, No. Civ-14-665-F (W.D. Okla. Dec. 22, 2014) [hereinafter Transcript].

[22] Transcript, *supra* note 21, at 80; *see also* Order Denying Motion for Preliminary Injunction, Warner v. Gross, No. Civ-14-0665-F (W.D. Okla. Dec. 22, 2014) [hereinafter Order]. Judge Friot also rejected a challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to the testimony of an expert witness for the state. *Glossip*, 135 S. Ct. at 2736.

[23] Transcript, *supra* note 21, at 50.

[24] *Id.* at 51 (quoting Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001)).

[25] Order, *supra* note 22, at 1. Most critically, Judge Friot stated that the petitioners had failed to establish a likelihood of success on the merits of their claim under either the traditional or relaxed standard. *Id.* The court grounded its decision in (1) the petitioners' failure to prove that Oklahoma's protocol "presents a risk that is 'sure or very likely to cause serious illness and needless suffering,' amounting to 'an objectively intolerable risk of harm,'" Transcript, *supra* note 21, at 65 (quoting Baze v. Rees, 553 U.S. 35, 50 (2008) (plurality opinion)); and (2) the petitioners' failure to identify a known and available method of execution that presented a substantially less severe risk of pain than the method that the State proposed, as the court determined *Baze* required, *id.* at 66–67.

[26] Chief Judge Briscoe was joined by Judges Gorsuch and Matheson.

[27] Warner v. Gross, 776 F.3d 721, 735–36 (10th Cir. 2015).

[28] Petition for Writ of Certiorari, *Glossip*, 135 S. Ct. 2726 (No. 14-7955); Application for Stays of Execution, *Glossip*, 135 S. Ct. 2726 (No. 14A761).

[29] Warner v. Gross, 135 S. Ct. 824, 824 (2015); *see also id.* (Sotomayor, J., dissenting from denial of stays of execution).

15, 2015.[30] Nevertheless, the Court granted the petitioners' writ of certiorari and then stayed the executions of Cole, Grant, and Glossip.[31]

Five months later, however, the Supreme Court affirmed the Tenth Circuit's decision.[32] Writing for the Court, Justice Alito[33] found that the inmates were not entitled to a preliminary injunction because they had failed to establish that they were likely to succeed on the merits of their Eighth Amendment claims,[34] a requirement purportedly established in *Winter v. Natural Resources Defense Council, Inc.*[35] According to Justice Alito, the preliminary injunction posture of the case "require[d] petitioners to establish a likelihood that they can establish both that Oklahoma's lethal injunction protocol creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives."[36] They had failed on both counts.

First, the petitioners had failed to "satisfy their burden of establishing that any risk of harm was substantial when compared to a known and available alternative method of execution."[37] Like the district court and court of appeals, Justice Alito found that *Baze* required petitioners to propose a substitute method of execution, and the petitioners had failed to do so.[38] Second, Justice Alito determined that the district court did not commit clear error in finding that midazolam is highly likely to render a person unable to feel pain during execution.[39] Finally, Justice Alito declared that the inmates' remaining arguments — that the district court should have rejected the state expert's testimony, that the state expert's report contained a mathematical error, that there was no consensus among the States regarding midazolam's efficacy as the drug had not been widely adopted, and that Lockett's execution and Arizona's botched July 2014 execution of Joseph Wood es-

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[30] *Glossip*, 135 S. Ct. at 2736.

[31] Warner v. Gross, 135 S. Ct. 1173 (2015) (mem.); Glossip v. Gross, No. 14-7955, 135 S. Ct. 1197 (2015) (mem.); *see also* Ian Millhiser, *The Supreme Court Allowed a Man to Be Executed, Then They Took His Case*, THINKPROGRESS (Jan. 26, 2015, 9:03 AM), http://thinkprogress.org/justice/2015/01/26/3615214/supreme-court-allows-oklahoma-execute-man-decide-take-case [http://perma.cc/6WTH-CHG9].

[32] *Glossip*, 135 S. Ct. at 2731.

[33] Justice Alito was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas.

[34] *See Glossip*, 135 S. Ct. at 2736–38.

[35] 555 U.S. 7, 20 (2008). Justice Alito maintained that the parties had agreed that the case turned on this factor, *Glossip*, 135 S. Ct. at 2736–37, and omitted assessment of the other three preliminary-injunction considerations.

[36] *Glossip*, 135 S. Ct. at 2737.

[37] *Id.* at 2738.

[38] *Id.* at 2738–39 ("*Baze* . . . made clear that the Eighth Amendment requires a prisoner to plead and prove a known and available alternative." *Id.* at 2739.).

[39] *Id.* at 2739–40. Justice Alito found that petitioners had presented only speculative evidence and had not met the burden of proof to counter the district court's findings. *Id.* at 2740–42.

tablished that midazolam was likely to cause substantial pain — lacked merit.[40]

Justice Sotomayor dissented.[41] The Court, she contended, had "fail[ed] to fully appreciate the procedural posture in which th[e] case [arose]."[42] The petitioners need not "prove their claim," and had presented enough "compelling evidence . . . that midazolam will not work as [intended]"[43] to be "at the very least *likely* to prove . . . a constitutionally intolerable risk that they will be awake, yet unable to move, while chemicals known to cause 'excruciating pain' course through their veins."[44] Justice Sotomayor also criticized the majority's "legally indefensible" conclusion that, under *Baze*, petitioners must identify an alternative, available method of execution to successfully challenge a state's planned method.[45] According to Justice Sotomayor, "the *Baze* plurality opinion provides no support for the Court's proposition," and any such requirement mentioned in *Baze* was limited to cases in which, as in *Baze*, petitioners offer that a proposed method was intolerable in light of available alternatives.[46]

Justice Breyer also dissented,[47] questioning whether the death penalty inherently violates the Eighth Amendment.[48] He methodically set forth four "fundamental constitutional defects" in the death penalty[49]: (1) a lack of reliability, as demonstrated by the recent rise in exonerations of individuals who had been sentenced to death;[50] (2) arbitrary imposition of the penalty since its reinstatement in 1976;[51] (3) cruelly excessive delays in the imposition of the penalty, which result in individuals spending many years on death row;[52] and (4) such rare imposi-

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[40] *Id.* at 2744–46.

[41] Justice Sotomayor was joined by Justices Ginsburg, Breyer, and Kagan.

[42] *Glossip*, 135 S. Ct. at 2792 (Sotomayor, J., dissenting).

[43] *Id.*

[44] *Id.* (quoting Baze v. Rees, 553 U.S. 35, 71 (2008) (Stevens, J., concurring in the judgment)). To Justice Sotomayor, there was "little doubt that the District Court clearly erred in relying" on "the numerous flaws" in the state expert's testimony. *Id.* at 2786.

[45] *Id.* at 2792–93.

[46] *Id.* at 2793–94.

[47] Justice Breyer was joined by Justice Ginsburg.

[48] *Glossip*, 135 S. Ct. at 2755 (Breyer, J., dissenting). Justices Scalia and Thomas filed separate concurrences to disparage Justice Breyer's plea for judicial abolition of the death penalty. *See id.* at 2746–50 (Scalia, J., concurring); *id.* at 2750–55 (Thomas, J., concurring).

[49] *Id.* at 2755–56 (Breyer, J., dissenting).

[50] *See id.* at 2756–59. Justice Breyer noted estimates of as many as 154 exonerations in capital cases since 1973. *Id.* at 2757. Notably, some observers have claimed that Richard Glossip himself may be factually innocent of the crime for which he was convicted and sentenced to death. *See* Liliana Segura & Jordan Smith, *What Happened in Room 102*, THE INTERCEPT (July 9, 2015, 2:20 PM), https://firstlook.org/theintercept/2015/07/09/oklahoma-prepares-resume-executions-richard-glossip-first-line-die [http://perma.cc/9QN5-XR9J].

[51] *See Glossip*, 135 S. Ct. at 2759–64 (Breyer, J., dissenting).

[52] *See id.* at 2764–72.

tion of the death penalty that it should today be regarded as constitutionally unusual.[53] Instead of "try[ing] to patch up the death penalty's legal wounds one at a time," Justice Breyer welcomed full briefing on the broader question of its abolition.[54]

Both Justice Alito's majority opinion and Justice Sotomayor's dissent interpreted *Winter* to mean that the death row inmate–plaintiffs seeking a preliminary injunction must establish a likelihood of success on the merits of their claim that the use of the sedative midazolam violates the Eighth Amendment.[55] Despite the Court's straightforward invocation of this rule, courts of appeals and commentators have disagreed about whether *Winter* imposes such a mandate. In deciding *Glossip* based on only one of four factors federal courts generally consider when ruling on preliminary injunctions, the Court may have resolved — albeit unintentionally — part of a circuit split on the threshold requirements for preliminary injunctions. *Glossip* seems to require that courts take an inflexible approach to, at least, the success-on-the-merits prong of the preliminary injunction test, an approach that may have consequences in the death-penalty context and elsewhere.

Preliminary injunctions are pretrial orders issued to "protect plaintiff[s] from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits."[56] They require the nonmoving party to do or to refrain from doing a particular action until the temporary order is lifted or superseded.[57] When granted, preliminary injunctions may be based on "evidence that is less complete than in a trial on the merits."[58] Still, courts regard the preliminary injunction as an "extraordinary and drastic remedy."[59] The movant must, "by a clear showing, carr[y] the burden of persuasion" to be granted injunctive relief.[60]

But courts have long disagreed about what carrying the burden of persuasion should entail. Generally, courts assess four factors in deciding whether to grant a preliminary injunction: (1) whether irreparable harm is likely to occur if the injunction is not granted before trial; (2) the movant's likelihood of success on the merits; (3) the balance of

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53 *See id.* at 2772–76.

54 *Id.* at 2755.

55 *See id.* at 2736–37 (majority opinion); *id.* at 2792 (Sotomayor, J., dissenting).

56 11A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2947 (3d ed. 2015).

57 WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 11 (1871).

58 Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) (citing Progress Dev. Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961)).

59 Munaf v. Geren, 553 U.S. 674, 689–90 (2008) (quoting CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1995)).

60 Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam) (quoting WRIGHT ET AL., *supra* note 59, § 2948) (emphasis omitted).

harms between parties if an injunction is issued or if one is not; and (4) the public interest.[61] Noting that the injunction is a type of equitable relief and that "[f]lexibility is a hallmark of equity jurisdiction,"[62] most, but not all,[63] courts and commentators have historically regarded the four factors as considerations and not free-standing requirements that must each be met for a preliminary injunction to issue.[64] After the Court's 2008 decision in *Winter*, some appellate courts began to question whether the Court had abrogated this balancing approach to preliminary injunctions. Despite tackling the standard for only one of the four relevant factors,[65] the Court matter-of-factly stated that "[a] plaintiff seeking a preliminary injunction *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, that the balance of equities tips in his favor, and that an injunction is in the public interest."[66] On its face, the test as articulated in *Winter* appears to nullify at least some sliding-scale approaches to preliminary injunctions — instead requiring findings in favor of the moving party on each prong — but the Court did not squarely address that question.[67]

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[61] WRIGHT ET AL., *supra* note 56, § 2948. For a detailed telling of the emergence of a more standardized approach to preliminary injunctions, see John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 527–40 (1978); and Lea B. Vaughn, *A Need for Clarity: Toward a New Standard for Preliminary Injunctions*, 68 OR. L. REV. 839, 844–48 (1989).

[62] Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting). *See generally* Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23 (1951).

[63] *See, e.g.*, Evergreen Presbyterian Ministries Inc. v. Hood, 235 F.3d 908, 918 (5th Cir. 2000) (listing all four factors as independent requirements); Adams v. Freedom Forge Corp., 204 F.3d 475, 484 (3d Cir. 2000) (characterizing at least the first two factors as independent requirements).

[64] *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 444 (4th ed. 2010) (noting that before *Winter*, "the overwhelming weight of authority in the lower courts had been that [the] four [preliminary-injunction] factors are part of a balancing test or a sliding scale").

[65] In *Winter*, the Court held that the Ninth Circuit erred in upholding a preliminary injunction restricting a U.S. Navy sonar training program based on claims from environmental advocates that the exercises harmed marine mammals. 555 U.S. at 12. The lower courts had held that "when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm." *Id.* at 21. The Court found the "possibility" standard too lenient. *Id.* at 22.

[66] *Id.* at 20 (emphasis added). The Court cited *Munaf v. Geren*, 553 U.S. 674 (2008); *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987); and *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), as establishing this rule. None of these decisions squarely held that all four factors are necessary for a preliminary injunction to issue. *See* Arthur D. Wolf, *Preliminary Injunction Standards in Massachusetts State and Federal Courts*, 35 W. NEW ENG. L. REV. 1, 24 (2013) ("Although the Court cited prior decisions for this four-factor test, in fact it had never expressly and clearly so ruled in unmistakable language prior to its decision in *Winter*." (citation omitted)).

[67] In her dissenting opinion in *Winter*, Justice Ginsburg expressed her belief that the case did not foreclose the balancing approach: "[C]ourts have evaluated claims for equitable relief on a 'sliding scale' . . . . This Court has never rejected that formulation, and I do not believe it does so today." 555 U.S. at 51 (Ginsburg, J., dissenting) (citation omitted). Cases since *Winter* have not expressly clarified the Court's expectations. In *Nken v. Holder*, 556 U.S. 418 (2009), decided in

Circuit courts of appeals grappled immediately with how to square the *Winter* articulation of the preliminary injunction standard with their more flexible versions of the test.[68] Before *Winter*, some circuits utilized a sliding-scale version of the preliminary injunction test under which a movant could either establish all four of the traditional factors or show irreparable harm, as well as "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor."[69] After *Winter*, the Fourth Circuit held that the "serious questions" test was no longer viable.[70] Some D.C. Circuit judges believed that *Winter* abrogated the "serious questions" approach,[71] but the court did not resolve the matter.[72] By contrast, the Second, Seventh, and Ninth Circuits managed to square their "serious questions" tests with *Winter*.[73]

Glossip arose in the Tenth Circuit, which had not squarely adjudicated the viability of the "serious questions" approach.[74] In rendering

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the same term as *Winter*, the Court referred to the preliminary-injunction factors as just that — "factors" — and made note that the success-on-the-merits and irreparable-injury prongs are "most critical." *Id.* at 434. But in *Monsanto Co. v. Geertson Seeds Farms*, 130 S. Ct. 2743 (2010), just one Term later, the Court again cited all four factors as mandatory. *Id.* at 2757 ("An injunction should issue only if the traditional four-factor test is satisfied."). And, most recently, in *Perry v. Perez*, 132 S. Ct. 934 (2012), the Court made note of the success-on-the-merits prong as a usual demonstration, but implied that it is not an always-mandated requirement for a preliminary injunction to issue. *Id.* at 942 ("Plaintiffs seeking a preliminary injunction of a statute must normally demonstrate that they are likely to succeed on the merits of their challenge to that law.").

68 *See* Rachel A. Weisshaar, Note, *Hazy Shades of* Winter*: Resolving the Circuit Split over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1025 (2012); *see also* Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 211 n.35 (2012).

69 Random House, Inc. v. Rosetta Books LLC, 283 F.3d 490, 491 (2d Cir. 2002).

70 *See* Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 346 (4th Cir. 2009) ("In its recent opinion in *Winter*, the Supreme Court articulated clearly what must be shown to obtain a preliminary injunction . . . . [A]ll four requirements must be satisfied." (citation omitted)), *vacated on other grounds*, 130 S. Ct. 2371, *reissued in part*, 607 F.3d 355 (4th Cir. 2010).

71 *See* Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (expressing the view that "the old sliding-scale approach to preliminary injunctions . . . is 'no longer controlling, or even viable'" after *Winter* (quoting Am. Trucking Ass'ns v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009))).

72 *See* Sherley v. Sebelius, 644 F.3d 388, 393 (D.C. Cir. 2011) (noting the circuit split on the interpretation of *Winter* and declining to "wade into [it]").

73 *See* All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011) (holding that a sliding-scale approach to preliminary injunctions survives *Winter*); Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 38 (2d Cir. 2010) ("We have found no command from the Supreme Court that would foreclose the application of our established 'serious questions' standard . . . ."); Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009).

74 *See* Weisshaar, *supra* note 68, at 1046 (labeling the Tenth Circuit "undecided" on the question of how to approach "serious questions" post-*Winter*). Since *Winter*, the Tenth Circuit has at times appeared to acknowledge that the relaxed standard remains viable. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1128 (10th Cir. 2013) (en banc) (noting that movants urged application of the relaxed preliminary injunction standard, but declining to resolve whether the

his findings after the preliminary injunction hearing, Judge Friot made note of the possibility that the court could assess the plaintiffs' claims under the "serious questions" approach.[75] The Tenth Circuit likewise referenced the looser standard, though only to dismiss in a footnote the suggestion that the approach remained viable under Court precedent.[76]

The *Glossip* Court made no note of the "serious questions" approach. Instead, it recited the test from *Winter* as the mandatory standard for preliminary injunctions and proceeded to assess one prong — likelihood of success on the merits — under that approach.[77] The majority suggested that "[t]he parties agree[d] that this case turns on whether petitioners are able to establish a likelihood of success on the merits."[78] To be sure, both the petitioners and the respondents focused heavily on the success-on-the-merits prong, but that focus should not have foreclosed other avenues for relief. The petitioners argued that if the success-on-the-merits prong was satisfied, a preliminary injunction should issue,[79] but they still put forward an argument that the other prongs had been met. The respondents disputed that theory, creating a live controversy over these prongs, too.[80] But after finding that the first prong had not been established, the Court deemed the inmates' claims

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standard applied), *aff'd*, 134 S. Ct. 2751 (2014). At other times, the court has cited *Winter* as requiring that all four factors be met. *See, e.g.*, Sierra Club, Inc. v. Bostick, 539 F. App'x 885, 888 (10th Cir. 2013) ("A party seeking a preliminary injunction must prove that *all four* of the equitable factors weigh in its favor . . . .").

[75] Transcript, *supra* note 21, at 51. Judge Friot determined that the plaintiffs' claims failed under that standard just as they did under the traditional standard. *Id.* at 79.

[76] *See* Warner v. Gross, 776 F.3d 721, 728 n.5 (10th Cir. 2015) (dismissing *Kikumura*'s relaxed approach as inconsistent with Supreme Court precedent requiring inmates to "establish 'a significant possibility of success on the merits'" (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006))).

[77] *Glossip*, 135 S. Ct. at 2736–38.

[78] *Id.* at 2737.

[79] *See* Brief for Petitioners at 39–46, *Glossip*, 135 S. Ct. 2726 (No. 14-7955).

[80] *Compare id.* at 39 n.28 (noting that, though "not at issue," the other three factors had been "met"), *with* Brief for Respondents at 57–59, *Glossip*, 135 S. Ct. 2726 (No. 14-7955) (titling a section "Petitioners Failed to Satisfy Even the Most Relaxed of Preliminary Injunction Standards" and arguing, first, against a relaxed approach, and, second, that the claims failed even under a relaxed approach). More significantly, the Court has noted that "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." Kamen v. Kemper Fin. Servs., Inc. 500 U.S. 90, 99 (1991). The issue before the *Glossip* Court was the permissibility of the use of Oklahoma's three-drug protocol, and the lower court holding directly before the Court was the denial of the petitioners' motion for a preliminary injunction. The Court was not limited to the theories put forward by the parties in resolving the claims before it. Though the parties did not squarely brief the other three prongs, they expressed clear disagreement on how those factors should be resolved, and it was within the Court's authority, under *Kamen*, to address those prongs especially when, as here, the failure to do so "could reasonably be understood by lower courts and nonparties to establish binding circuit precedent" requiring a showing of likelihood to succeed on the merits. *Id.* at 100 n.5.

unrealizable, despite precedent suggesting that the other three preliminary injunction factors may have tipped in the inmates' favor.[81]

Glossip's likely reification of the *Winter* requirements for a preliminary injunction may have ramifications in death penalty cases and other contexts. A trial court judge who might otherwise apply the "serious questions" version of the preliminary injunction test to preserve the status quo in order to more completely hear and evaluate evidence that might support a petitioner's claims may perceive *Glossip* as limiting her discretion to do so. This outcome is problematic given that some method-of-execution preliminary injunction hearings evaluate relatively new and untested execution drugs about which a judge may not have enough information to render a measured decision regarding the likely outcome of a merits decision.[82] Before *Glossip*, death-row inmates faced an uphill climb attempting to quickly marshal evidence of the inefficacy of a state-selected method of execution — at times in the face of drug secrecy laws[83] and state officials' unwillingness to provide information about drug protocols[84] — in time to ensure that petitioners lived to see their claims adjudicated on the merits. In eschewing the "flexibility . . . inherent in equitable remedies,"[85] the *Glossip* Court may have made that hill all the more steep and further entrenched a rigid approach to the preliminary injunction test.

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[81] Regarding irreparable harm, "most federal circuit courts have held that irreparable injury should be presumed in constitutional cases." Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J.L. & PUB. POL'Y 743, 744 (2012). Regarding the balancing of the equities, the death row inmates' potential losses absent the temporary injunction — an unconstitutionally painful death at the hands of the state — arguably outweigh the state's interest in a timely administration of the death penalty. Finally, regarding the public interest, courts have consistently observed that "it is always in the public interest to prevent the violation of a party's constitutional rights." G & V Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir. 1994) (citing Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979); Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati, 822 F.2d 1390, 1400 (6th Cir. 1987)).

[82] *See* Transcript of Oral Argument at 41–44, *Glossip*, 135 S. Ct. 2726 (No. 14-7955) (asking respondents what recourse is available to a district court judge who "just can't tell" whether use of a particular drug would pose an unconstitutionally substantial risk of harm after a preliminary injunction hearing).

[83] *See* Tracy Connor, *Court Upholds Georgia's Execution-Drug Secrecy*, NBC NEWS (May 19, 2014, 4:23 PM), http://www.nbcnews.com/storyline/lethal-injection/court-upholds-georgias-execution-drug-secrecy-n109226 [http://perma.cc/64VG-L6XM].

[84] *Compare* Landrigan v. Brewer, No. CV-10-02246-PHX, 2010 WL 4269559, at *8–10 (D. Ariz. Oct. 25, 2010) (granting a temporary restraining order where the defendants had "refused to provide the information to Plaintiff that would allow him to attempt to carry his burden," *id.* at 8, and the court was "left to speculate . . . whether the . . . drug will cause pain and suffering," *id.* at 10), *vacated*, 131 S. Ct. 445 (2010), *with* Brewer v. Landrigan, 131 S. Ct. 445, 445 (2010) (noting that "speculation cannot substitute for evidence that the use of the drug is 'sure or very likely to cause serious illness and needless suffering'" necessary to satisfy the traditional success-on-the-merits prong (quoting Baze v. Rees, 553 U.S. 35, 50 (2008))).

[85] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).