1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RICHARD E. GLOSSIP, ET AL., :

4 Petitioners : No. 14-7955

5 v. :

6 KEVIN J. GROSS, ET AL. :

7 - - - - - - - - - - - - - - - - - - x

8 Washington, D.C.

9 Wednesday, April 29, 2015

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11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:15 a.m.

14 APPEARANCES:

15 ROBIN C. KONRAD, ESQ., Phoenix, Ariz.; on behalf of

16 Petitioners.

17 PATRICK R. WYRICK, ESQ., Solicitor General, Oklahoma

18 City, Okla.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:15 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first this morning in Case 14-7955, Glossip v. Gross.

5 Ms. Konrad.

6 ORAL ARGUMENT OF ROBIN C. KONRAD

7 ON BEHALF OF THE PETITIONERS

8 MS. KONRAD: Mr. Chief Justice, and may it

9 please the Court:

10 Oklahoma chooses to execute our clients with

11 a three-drug formula that includes a paralytic and

12 potassium chloride, drugs that cause intense pain and

13 suffering. The second and third drugs are

14 constitutional only if a prisoner will not feel the pain

15 and be aware of the suffocation caused by those drugs.

16 The district court erred as a matter of law

17 and as a matter of fact when it found that midazolam as

18 the first drug is constitutionally tolerable.

19 JUSTICE SCALIA: Why is that a matter of

20 law? I mean, as I see it, it's just -- just a fact

21 question, and -- and the district court found that it --

22 it did eliminate the pain. And you're asking us to find

23 that the district court was clearly erroneous in that

24 determination? Do we usually do that kind of thing?

25 MS. KONRAD: Justice Scalia, the -- there's

1 a question of law and there's a question of fact.

2 JUSTICE SCALIA: What's the question of law?

3 MS. KONRAD: The question of law includes

4 the -- the fact that the district court found that this

5 three-drug formula was constitutionally tolerable in

6 spite of two facts, the first one being that there is a

7 medical consensus that this drug cannot be used as the

8 sole drug --

9 JUSTICE SCALIA: It's a question of fact.

10 That's a question of fact.

11 MS. KONRAD: That --

12 JUSTICE SCALIA: You're saying the question

13 of law is that the -- the district court ignored two

14 facts. Ignoring two facts does not make it a question

15 of law; it's still a question of fact.

16 MS. KONRAD: The -- if -- if I can, Justice

17 Scalia, the second point is the question of law also

18 involves that the district court found that this drug

19 creates a greater risk of harm than sodium thiopental,

20 but that it could not quantify. So it found that this

21 drug that creates a greater risk of harm that it could

22 not quantify and it also had before it evidence that

23 this drug is not used for the purpose that -- which the

24 State intends it to be used.

25 JUSTICE SOTOMAYOR: Could you -- the way

1 I've thought of this -- and I know that in your brief
2 you think de novo review goes to everything. If I
3 disagree with you, if I think that I have to give
4 deference to the district court's factual finding on how
5 this drug works, the -- how do you call it -- the --
6 MS. KONRAD: The midazolam.
7 JUSTICE SOTOMAYOR: Midazolam, but that it's
8 a legal question of whether how that drug works creates
9 a risk of harm that's constitutionally intolerable. Is
10 that how you divide up the legal end?
11 MS. KONRAD: Yes, Justice Sotomayor, and --
12 JUSTICE SOTOMAYOR: So the facts are now.
13 Now let's go to my real question, okay? That a judge
14 ignores evidence is not necessarily an abuse of
15 discretion or a clear error. But -- so what are the
16 clear errors in terms of the reasoning that the district
17 court used?
18 MS. KONRAD: So the clear errors in this
19 case, we have to look at what this case is about. And
20 this case is about known information and undisputed
21 facts that were before the court. This drug, midazolam,
22 is in a different class than barbiturates, this drug is
23 not known, it's not a pain reliever. The district court
24 recognized these two facts at 76 of the Joint Appendix.
25 It's known that this drug has a ceiling

1 effect, so there's a certain point at which giving more
2 of the drug is not going to matter. The district court
3 recognized that at 78. The State's expert recognized
4 that. The Petitioners' experts recognized that.
5 CHIEF JUSTICE ROBERTS: Well, but what the
6 district court determined is that it was -- was not able
7 to tell precisely when the ceiling effect kicked in,
8 precisely when they hit the ceiling, right?
9 MS. KONRAD: That is --
10 CHIEF JUSTICE ROBERTS: And that -- that is
11 your theory for when pain is possible, when it hits the
12 ceiling, right?
13 MS. KONRAD: What the district court found,
14 Mr. Chief Justice, is whatever the ceiling effect may
15 be, it takes effect only at the spinal cord and that 500
16 milligrams of midazolam will, quote, "create a
17 phenomenon which is not anesthesia," but effectively
18 paralyzes the brain and eliminates awareness of pain.
19 Now, that finding, we have to -- we have to
20 look at what undisputed facts were before the court in
21 making that finding to --
22 CHIEF JUSTICE ROBERTS: Well, is it
23 undisputed facts? I thought you had the burden of
24 showing that the determinations were clearly erroneous.
25 So it's certainly not a case where the facts have to be

1 undisputed.

2 MS. KONRAD: And I'm sorry if I misspoke,

3 Mr. Chief Justice. What we have to look at before in

4 order to show why this was a clearly erroneous finding

5 is what the undisputed facts were before the district

6 court in order for it to reach that conclusion.

7 JUSTICE SOTOMAYOR: Do you even have to go

8 that far? The State here doesn't even propose that

9 their doctor was right on this point.

10 MS. KONRAD: Well, that --

11 JUSTICE SOTOMAYOR: They're not defending

12 it, they don't say it's true. They -- I -- conceded,

13 as I read their brief, that it does not work the way

14 the doctor said it worked, that it does not paralyze

15 the brain, correct?

16 MS. KONRAD: That is correct, Justice

17 Sotomayor.

18 JUSTICE SOTOMAYOR: So it's clear error.

19 Now we've got an admission that the expert

20 was plainly wrong. So how -- what else, I guess --

21 there was nothing else that the district court could

22 have based its conclusion on, correct?

23 MS. KONRAD: That is correct. And -- and

24 the -- the district court reached this decision based

25 on no scientific evidence and with a medical consensus

1 to the contrary that this drug is not able to
2 pharmacologically do what the States' expert said that
3 it could in fact do. And that clear error is
4 combined -- and as the district court said at Joint
5 Appendix 47, that this is partially a mixed question of
6 fact and mixed question of law.
7 JUSTICE KAGAN: Ms. Konrad, can I make sure
8 I understand this because, you know, I read that -- the
9 part of the opinion that you're referring to and I just
10 really couldn't figure it out.
11 So is it that the court said, well, we don't
12 know what the ceiling effect is generally, but the
13 ceiling effect only goes to how something operates at
14 the spinal cord level, it doesn't go to how it operates
15 at the brain and this -- and -- this -- this takes --
16 what we -- what we care about is how it operates at the
17 brain, so we don't even have to worry about ceiling
18 effect; is that right?
19 MS. KONRAD: That's --
20 JUSTICE KAGAN: Is that --
21 MS. KONRAD: That is --
22 JUSTICE KAGAN: Is that what the court said?
23 MS. KONRAD: Justice Kagan, that is what the
24 district court found based on the testimony of the
25 State's experts that's not supported by any scientific

1 literature, any -- any medical information and, in fact,
2 is inconsistent with the State's expert's own testimony.
3 Because he testified and explained that the way this
4 drug works is it works throughout the central nervous
5 system. He said --
6 JUSTICE KAGAN: So you're saying we do have
7 to worry about the ceiling effect. There isn't this
8 dichotomy between the drug at the spinal cord and the
9 drug at the brain, and the -- it's actually crucial what
10 kind of ceiling effect this drug has in -- in
11 contradiction to what the court said, which was we
12 didn't have to worry about ceiling effect. Is that --
13 MS. KONRAD: That --
14 JUSTICE KAGAN: Is that how it goes?
15 MS. KONRAD: Yes, Justice Kagan. And
16 this --
17 JUSTICE ALITO: Did you introduce any
18 evidence to show the dosage at which the ceiling effect
19 would occur?
20 MS. KONRAD: We had testimony from our
21 expert who -- who indicated that it could be calculated,
22 but it was not calculated. But, Justice Alito, that
23 doesn't matter because what matters is that we know that
24 the drug has a ceiling effect, and that is what matters.
25 JUSTICE ALITO: Well, what if the ceiling

1 effect is 1,000 milligrams?

2 MS. KONRAD: There is no evidence in the

3 record to support that. And in fact --

4 JUSTICE ALITO: No. I'm just saying is

5 there any evidence to show that it is any amount below

6 500?

7 MS. KONRAD: It doesn't matter. It

8 doesn't --

9 JUSTICE ALITO: Of course it matters.

10 JUSTICE SOTOMAYOR: Well, the one proof we

11 do have is the Wood execution, not the one that was

12 botched, but Mr. Wood was given 750 milligrams, correct?

13 MS. KONRAD: Yes, Justice Sotomayor.

14 JUSTICE SOTOMAYOR: And he laid writhing in

15 pain for 20 minutes? 25 minutes? I don't remember how

16 long.

17 MS. KONRAD: Mr. Wood was 2 hours.

18 JUSTICE SOTOMAYOR: I'm sorry, 2 hours.

19 Now, there's been some defense that the 750 wasn't

20 immediately delivered, but it was still 750 that went

21 into his system and caused that kind of pain, correct?

22 MS. KONRAD: Yes. And our expert testified

23 that Mr. Wood's execution demonstrates the ceiling

24 effect; that giving more of this drug is not going to

25 put a prisoner into a deep coma-like --

1 JUSTICE ALITO: Well, how many executions
2 have been carried out using this drug?
3 MS. KONRAD: Using midazolam?
4 JUSTICE ALITO: Yes.
5 MS. KONRAD: 15.
6 JUSTICE ALITO: Okay. And you're talking
7 about one.
8 MS. KONRAD: No, we're actually talking of
9 several executions that -- the execution in this case,
10 in Oklahoma, that happened a year ago of Mr. Lockett
11 demonstrates why midazolam is not a proper drug that can
12 do what the State intends it to do and put a prisoner in
13 a deep coma-like unconscious.
14 CHIEF JUSTICE ROBERTS: I thought there were
15 issues of the administration of the drug, you know,
16 the -- the nature of the veins and so forth. Weren't
17 those present or have I got a different one in mind than
18 the Lockett case?
19 MS. KONRAD: No, Mr. Chief Justice.
20 CHIEF JUSTICE ROBERTS: No? I'm sorry.
21 "No" what? That was not that or -- were -- were there
22 issues about -- I thought there were issues involving
23 the veins and the ability to make an intravenous
24 connection?
25 MS. KONRAD: There were problems with the

1 catheter, but -- but Mr. Lockett received enough
2 midazolam such that he was unconscious and the doctor --
3 the physician executioner found that he was unconscious
4 and then he regained consciousness. And that is the key
5 issue here before this Court, that --
6 JUSTICE SCALIA: Not if he didn't -- not if
7 he didn't receive the proper dosage. So you're saying
8 it's okay that he didn't receive the proper dosage so
9 long as he was unconscious.
10 MS. KONRAD: He --
11 JUSTICE SCALIA: I don't -- I don't see how
12 that follows. I mean, if in fact the execution was not
13 properly conducted, I don't see how you can blame it on
14 the -- on the drug.
15 MS. KONRAD: What we know about this drug,
16 Justice Scalia, is that it can never maintain the deep
17 coma-like unconsciousness that is necessary to prevent
18 a prisoner from feeling the painful effects of the --
19 I'm sorry, of the potassium chloride.
20 JUSTICE KAGAN: How do we know that? I
21 thought that what we knew was something different. I
22 thought that what we knew was just what we can't know;
23 in other words, that there's this huge range of
24 uncertainty about what happens when somebody is -- is
25 given this drug.

1 You're suggesting something more than that,
2 which is that we know what happens, we know that the
3 drug can't maintain deep -- deep unconsciousness.
4 Which -- which is right?
5 MS. KONRAD: Justice Kagan, we know because
6 of the pharmacological properties of this drug, the way
7 that -- that when the drug was being tested and being
8 introduced, it is not used for the sole purpose of
9 preventing somebody from feeling pain during a painful
10 procedure.
11 JUSTICE KAGAN: Well, I thought it wasn't
12 used for that purpose just because we don't know whether
13 it's capable of being used for that purpose, as opposed
14 to we know it's incapable of being used for that
15 purpose, if you see the difference.
16 MS. KONRAD: I do see the difference, but I
17 think what's important here is this Court in Baze
18 explained that it's important to reemphasize that a
19 proper dose of sodium thiopental obviates the concern
20 that the prisoner will not be sufficiently sedated.
21 That was the key aspect of Baze. And in --
22 JUSTICE ALITO: And why is Oklahoma not
23 using sodium thiopental? Why is it not using that drug?
24 MS. KONRAD: It isn't using it -- you'll --
25 you could ask my friend here, but --

1 JUSTICE ALITO: You don't know?
2 MS. KONRAD: The -- the finding here is that
3 it was unavailable at that time of the hearing.
4 JUSTICE ALITO: Yes. I mean, let's be
5 honest about what's going on here. Executions could be
6 carried out painlessly. There are many jurisdictions --
7 there are jurisdictions in this country, there are
8 jurisdictions abroad that allow assisted suicide, and I
9 assume that those are carried out with little, if any,
10 pain. Oklahoma and other States could carry out
11 executions painlessly.
12 Now, this Court has held that the death
13 penalty is constitutional. It's controversial as a
14 constitutional matter. It certainly is controversial as
15 a policy matter. Those who oppose the death penalty are
16 free to try to persuade legislatures to abolish the
17 death penalty. Some of those efforts have been
18 successful. They're free to ask this Court to overrule
19 the death penalty.
20 But until that occurs, is it appropriate for
21 the judiciary to countenance what amounts to a guerilla
22 war against the death penalty which consists of efforts
23 to make it impossible for the States to obtain drugs
24 that could be used to carry out capital punishment with
25 little, if any, pain? And so the States are reduced to

1 using drugs like this one which give rise to disputes
2 about whether, in fact, every possibility of pain is
3 eliminated.
4 Now, what is your response to that?
5 MS. KONRAD: Well, Justice Alito, the
6 purpose of the courts is to decide whether a method of
7 execution or the way that the State is going to carry
8 out an execution is, in fact, constitutional, and it --
9 whether we're going to tolerate -- is it objectively
10 intolerable to allow the States to carry out a method in
11 this way. And so --
12 JUSTICE SCALIA: And I guess -- I guess I
13 would be more inclined to find that it was intolerable
14 if there was even some doubt about this drug when there
15 was a perfectly safe other drug available. But the
16 States have gone through two different drugs, and those
17 drugs have been rendered unavailable by the abolitionist
18 movement putting pressure on the companies that
19 manufacture them so that the States cannot obtain those
20 two other drugs.
21 And now you want to come before the Court
22 and say, well, this third drug is not 100 percent sure.
23 The reason it isn't 100 percent sure is because the
24 abolitionists have rendered it impossible to get the
25 100 percent sure drugs, and you think we should not view

1 that as -- as relevant to the decision that -- that
2 you're putting before us?
3 MS. KONRAD: Justice Scalia, I don't think
4 that it's relevant to the decision as to what's
5 available because what this Court needs to look at is
6 whether the drug that the State is intending to use to
7 cause what they say is a -- put the prisoner in a -- in
8 a place where he will not feel pain, that that drug is
9 good enough. This drug is anything --
10 JUSTICE SOTOMAYOR: Counselor, I --
11 JUSTICE GINSBURG: Is any State -- is any
12 State using a lethal injection protocol without this
13 questionable drug? We know that two are not available.
14 Is there another combination that has been used by
15 States that doesn't involve this questionable drug?
16 MS. KONRAD: Yes, Justice Ginsburg. And, in
17 fact, there have been 11 executions using pentobarbital
18 just this year by other States.
19 JUSTICE SCALIA: But is that --
20 JUSTICE KENNEDY: That doesn't answer
21 Justice Scalia's and Justice Alito's question. The
22 question is: What bearing, if any, should we put on the
23 fact that there is a method, but that it's not available
24 because of -- because of opposition to the death
25 penalty? What relevance does that have? None?

1 MS. KONRAD: Justice Kennedy, the fact that
2 the State chooses a certain method should not -- should
3 not have bearing on whether that method is
4 constitutional.
5 JUSTICE SOTOMAYOR: Counsel, if there is
6 no --
7 JUSTICE KENNEDY: I -- I would like an
8 answer to the question. You've been interrupted several
9 times, and you still haven't given -- is it relevant or
10 not?
11 MS. KONRAD: No. It's not relevant. The
12 availability of another --
13 JUSTICE SOTOMAYOR: There are other ways to
14 kill people regrettably.
15 MS. KONRAD: There are, Justice Sotomayor.
16 JUSTICE SOTOMAYOR: That are painless. It
17 doesn't have to be a drug protocol that we elect that
18 has a substantial risk of burning a person alive who's
19 paralyzed, correct?
20 MS. KONRAD: That is correct, Justice
21 Sotomayor.
22 JUSTICE SOTOMAYOR: I know that you'll get
23 up and argue that those other ways are -- are not
24 constitutional either potentially, but people do that
25 with every protocol. But the little bit of research

1 I've done has shown that the reason people don't use the
2 other methods it's because it offends them to look at
3 them. Like you could use gas, that renders people not
4 even knowing that they're going to sleep to die. And
5 people probably don't want to use that protocol because
6 of what happened during World War II. But there are
7 alternatives. Oklahoma has found some. It's -- it can
8 use the -- a firing squad now.
9 So I don't know what the absence of a drug,
10 what pertinence it has when alternatives exist.
11 MS. KONRAD: I would agree, Justice
12 Sotomayor, that --
13 JUSTICE GINSBURG: Doesn't -- doesn't a
14 firing squad cause pain?
15 MS. KONRAD: Justice Ginsburg, we don't
16 know -- we don't know how, if the State chose to carry
17 out an execution by firing squad, whether, in fact, it
18 would cause -- rise to the level of unconstitutional
19 pain and suffering under the Eighth Amendment.
20 CHIEF JUSTICE ROBERTS: Well, you don't
21 know. Do you have a guess? I mean, is there a reason
22 that the States moved progressively to what I understand
23 to be more humane methods of execution? Hanging, firing
24 squad, electric chair, death -- you know, gas chamber?
25 MS. KONRAD: Yes.

1 CHIEF JUSTICE ROBERTS: And -- and you're
2 not suggesting that those other methods are preferable
3 to the method in this case, are you?
4 MS. KONRAD: I'm not suggesting that, Mr.
5 Chief Justice, but the reason why States moved to more
6 humane methods is, as we learn more, and as we learn
7 more about science, and develop, then, as a society, we
8 move forward. We have evolving standards of decency.
9 CHIEF JUSTICE ROBERTS: But you have no
10 suggestion as what -- to what would be an acceptable
11 alternative to what you propose right now for Oklahoma.
12 Do you have any -- I mean, the case comes to us in a
13 posture where it's recognized that your client is guilty
14 of a capital offense, it's recognized that your client
15 is eligible for the death penalty, that that has been
16 duly imposed. And yet you put us in a position with
17 your argument that he can't be executed, even though he
18 satisfies all of those requirements.
19 MS. KONRAD: I would --
20 CHIEF JUSTICE ROBERTS: And you have no
21 suggested alternative that is more humane.
22 MS. KONRAD: I would actually disagree with
23 the characterization that it's -- that he can't be
24 executed. Oklahoma has just passed a new statute, and
25 they are continuously looking for methods and ways to --

1 CHIEF JUSTICE ROBERTS: What does the new
2 statute provide?
3 MS. KONRAD: The new statute provides that
4 if the lethal injection protocol is found
5 unconstitutional, or drugs are unavailable, then they
6 can go to other methods.
7 CHIEF JUSTICE ROBERTS: What other method?
8 MS. KONRAD: They go to nitrogen gas, and
9 then go to --
10 CHIEF JUSTICE ROBERTS: And are you
11 suggesting that that's okay with you?
12 MS. KONRAD: I'm not -- I don't know
13 anything about that protocol. They have not --
14 CHIEF JUSTICE ROBERTS: Well, what do you
15 think? Do you have an instinct about whether or not the
16 gas chamber is preferable to this lethal injection or
17 not?
18 MS. KONRAD: Mr. Chief Justice, it's hard
19 for me in the abstract to say whether it's preferable.
20 The -- the legislature has said that this could be a
21 painless method. I don't know -- they haven't come out
22 with any information about how it will be carried out.
23 JUSTICE BREYER: Suppose it were true --
24 JUSTICE SCALIA: If I understand the facts
25 here, your client was already in jail with a life

1 sentence, right, for murder? And while in jail on that
2 life sentence, he stabbed and killed a prison guard, and
3 that's the crime for which Oklahoma is seeking to
4 execute him. That's the facts we have before us, isn't
5 it?
6 MS. KONRAD: One of the Petitioners here
7 before the Court, but --
8 JUSTICE BREYER: Perhaps there is that
9 larger question, that if, in fact, for whatever set of
10 reasons, it's not you, you didn't purposely hide these
11 other kinds of drugs, if there is no method of executing
12 a person that does not cause unacceptable pain, that, in
13 addition to other things, might show that the death
14 penalty is not consistent with the Eighth Amendment. Is
15 that so or not, in your opinion?
16 MS. KONRAD: That -- that perhaps could be
17 true, Justice Breyer, but the narrow issue --
18 JUSTICE ALITO: And is that -- is that your
19 argument?
20 MS. KONRAD: No.
21 JUSTICE ALITO: You're marking -- you can
22 make one of two arguments. And one is that the death
23 penalty is unconstitutional because there is no method
24 that has been used in the past or that can be devised
25 that is capable of carrying that sentence out without

1 inflicting some pain, pain that's unacceptable. That's
2 an argument that you can make. But I don't understand
3 you to be making that argument; am I right?
4 MS. KONRAD: You are correct, Justice Alito.
5 JUSTICE ALITO: So you are arguing -- you
6 want us to reverse a finding of fact of the district
7 court on the ground that it is clearly erroneous. When
8 was the last time we did that?
9 MS. KONRAD: The Court in Comcast in -- we
10 cited that opinion, it was a few years ago, and
11 explained that where there are clearly -- clearly
12 erroneous findings. In this case, this is obviously an
13 exceptionally erroneous. Looking at the -- the findings
14 based on no scientific evidence, no studies, and all of
15 the evidence shows that this drug does not work in the
16 way that the State intended it to work.
17 JUSTICE ALITO: But 500 milligrams is a
18 lethal dose, isn't it?
19 MS. KONRAD: That --
20 JUSTICE ALITO: Itself it's capable of
21 causing death; is that right?
22 MS. KONRAD: That, I don't know, Justice
23 Alito, that -- if the -- the expert who testified for
24 the State talked about a potential toxic dose, but
25 there's no information of -- of, yes, this dose will

1 cause death. We don't know that, and that's not --

2 JUSTICE ALITO: Well --

3 JUSTICE KAGAN: Does the --

4 JUSTICE ALITO: -- isn't there a therapeutic

5 dose -- is there -- is it ever administered in that

6 quantity for any therapeutic reason?

7 MS. KONRAD: No, but --

8 JUSTICE KAGAN: Does the fact that something

9 is a lethal dose necessarily mean that it's not

10 incredibly painful?

11 MS. KONRAD: No, Justice Kagan, and that's

12 --

13 JUSTICE KAGAN: It could be a lethal dose

14 and be incredibly painful.

15 JUSTICE ALITO: No, that -- but that's not

16 the point. The point is, if it's a lethal dose, or it's

17 potentially a lethal dose, then how are you going to do

18 a study to determine whether, in fact, it renders the

19 person insensate?

20 MS. KONRAD: Justice Alito, you don't need

21 to do a study in this case because we already know from

22 science and the pharmacology of the drug, how the drug

23 works. And so that's what the district court got wrong,

24 and there's clear error here.

25 JUSTICE BREYER: Is it -- now let's get to

1 that -- I'd like to get --

2 JUSTICE KAGAN: Well, maybe to the extent

3 that you can't --

4 CHIEF JUSTICE ROBERTS: Justice Kagan, I

5 think it's your turn.

6 JUSTICE KAGAN: Please, go ahead.

7 JUSTICE BREYER: I'd just like -- since

8 we're on the narrow question. The narrow question that

9 you want to present, I would like to hear the argument.

10 As far as I know, we held in Baze in this context that

11 if a person is not rendered unconscious where the other

12 two drugs come in, there is a constitutionally

13 unacceptable risk of suffocation and pain. That's the

14 holding.

15 And in this case, the court of appeals says

16 that the district court found that this drug that you're

17 talking about, midazolam, will result in central nervous

18 depression, rendering the person unconscious and

19 insensate during the rest of the procedure, a sufficient

20 level of unconsciousness to resist the major stimuli of

21 the later two drugs. That's his finding.

22 You had an expert testify that that is not

23 the case. That expert said that -- I'm citing an

24 article. He said that it would not reliably put the

25 person in a coma. Isn't that what he said?

1 MS. KONRAD: That is correct, Justice
2 Breyer.
3 JUSTICE BREYER: All right. Then the other
4 side produced the expert which just said the contrary.
5 All right. So you have to say that that conclusion,
6 namely, quote, the 500 milligrams will be at a -- will
7 make it a virtual certainty that he will be at a
8 sufficient level of unconsciousness to resist the
9 stimuli of the other two drugs. So I'm sorry, you
10 don't -- I've run out of your time. Maybe I'll ask the
11 other side the same question. I want to know what
12 underlies that sufficient to make you say, clearly
13 wrong. But the other side is just as good to ask that
14 question. And I want you to reserve your time.
15 MS. KONRAD: Okay.
16 JUSTICE BREYER: Okay.
17 CHIEF JUSTICE ROBERTS: Mr. Wyrick.
18 MR. WYRICK: That's better.
19 JUSTICE SCALIA: You could ask me, maybe.
20 CHIEF JUSTICE ROBERTS: Mr. Wyrick.
21 ORAL ARGUMENT OF PATRICK R. WYRICK
22 ON BEHALF OF THE RESPONDENTS
23 MR. WYRICK: Mr. Chief Justice, and may it
24 please the Court:
25 The district court found, as a matter of

1 fact, that a 500-milligram dose of midazolam would, with
2 near certainty, render these Petitioners unconscious and
3 unable to feel pain. Now, regardless of our other
4 disagreements about proper legal standards, all parties
5 agree that Petitioners bear the threshold burden of
6 establishing that there is a substantial or objectively
7 intolerable risk that they will feel the pain from the
8 second and third drugs.
9 Unless that finding of fact, a finding of
10 fact affirmed by the court of appeals, mirrored by three
11 other trial courts in Florida, affirmed by three other
12 appeals courts in Florida, is set aside, they cannot
13 satisfy that threshold burden. Now --
14 JUSTICE KAGAN: Mr. Wyrick, as -- as I
15 understand it, there were three subsidiary findings that
16 underlay this conclusion.
17 The first is the one that we talked a little
18 bit about with Ms. Konrad, which has to do with the
19 ceiling effect, which, as I understand it you, don't at
20 all defend.
21 The second is the idea that 500 milligrams
22 of this drug would likely kill a patient in 30 minutes
23 or an hour, which seems to me irrelevant given that a
24 lethal dose is completely consistent with unbearable
25 pain.

1 And the third is that that dose of midazolam
2 would keep a patient unconscious while a needle is
3 inserted into his thigh, which also seems irrelevant
4 given the -- what everybody understands to be the much,
5 much, much greater potential for pain of potassium
6 chloride.
7 So those were the three subsidiary findings.
8 One of them nobody thinks is anything other than
9 gobbledygook, and the other two are irrelevant. Is that
10 not the case?
11 MR. WYRICK: Well, I'm going to take those
12 in reverse order. I -- I think the third actually is
13 relevant. These Petitioners, in their amended
14 complaint, at paragraph 139, described the setting of a
15 femoral IV as an invasive surgical procedure involving
16 not just pain, great pain. That's how they described
17 it.
18 JUSTICE KAGAN: Well, it does not sound
19 pleasant to have a needle put in your thigh. But when
20 you read these descriptions of what midazolam does, that
21 it gives the feeling of being burned alive, it sounds
22 really considerably more than having a needle put in
23 your thigh.
24 MR. WYRICK: And -- and this is what I want
25 to clarify as to your first point. Midazolam itself,

1 there is no evidence and no one -- no one argues that it
2 causes any pain upon -- upon injection. It is a
3 sedative hypnotic. It is the second and third drug --
4 JUSTICE KAGAN: No, no, no. I'm sorry.
5 Potassium chloride.
6 MR. WYRICK: -- it's talking about. So, you
7 know, earlier some of the questions you said about
8 whether this is lethal or not is irrelevant because it
9 would involve great pain, no, a lethal dose of
10 midazolam would not cause pain. It -- it -- just not --
11 JUSTICE KAGAN: No, no, no.
12 MR. WYRICK: It's a central --
13 JUSTICE KAGAN: There's --
14 MR. WYRICK: -- nervous system --
15 JUSTICE KAGAN: No, no, no. That's not --
16 that's not the point. It's a lethal dose of
17 potassium -- of midazolam, it will take 30 minutes to
18 die. In the meantime, the potassium chloride can be
19 wreaking extraordinary pain on the individual. So in
20 that sense, the fact that this is a lethal dose of
21 midazolam has nothing to do with the question that is
22 before us, whether, before that 30 minutes or hour
23 passes, the potassium chloride is wreaking unbearable
24 pain on the individual.
25 MR. WYRICK: The question before the Court

1 is whether the district court's factual finding that
2 they would be unconscious and insensate is clearly
3 erroneous.
4 And on that point, let's look at the record
5 case that these Petitioners put on before the district
6 court. They said that there were three reasons why
7 midazolam was inappropriate.
8 They said paradoxical reactions. Those have
9 disappeared from the case. You won't even see those in
10 the reply brief. We pointed out that they're
11 extraordinarily rare, and to the extent that they
12 happen, trained medical -- our trained medical staff
13 would catch those and never call the person unconscious.
14 Secondly, they said lack of -- lack of
15 analgesia. We pointed out sodium thiopental and
16 pentobarbital, those weren't analgesics either. That's
17 never been relevant to the question because the question
18 is, does the drug render them unconscious and insensate.
19 JUSTICE GINSBURG: Would any doctor -- would
20 any doctor --
21 JUSTICE KAGAN: They are pain relief
22 medications.
23 JUSTICE SCALIA: What -- what's the third
24 point you had? I -- I was anxious to hear your third
25 point.

1 JUSTICE KENNEDY: As was I.

2 MR. WYRICK: In response to Justice Kagan's

3 question?

4 CHIEF JUSTICE ROBERTS: Yes.

5 MR. WYRICK: Yes. Your -- I forget now your

6 second point, your -- the second factual finding or

7 second underpinning --

8 JUSTICE KAGAN: You know --

9 MR. WYRICK: -- which was a factual

10 finding --

11 JUSTICE KAGAN: There is --

12 MR. WYRICK: -- but --

13 JUSTICE KAGAN: There is the fact that this

14 is a lethal dose, again, completely consistent with the

15 possibility of potassium chloride causing great pain.

16 There is the fact that it rendered -- it keeps a patient

17 unconscious with a needle, completely consistent with it

18 not keeping a patient unconscious with potassium

19 chloride running through his body, and, again, this --

20 this statement that nobody can figure out about the

21 ceilingeffect.

22 MR. WYRICK: Right. And it's the ceiling

23 effect that I want to focus on, because the -- what the

24 district court said is whatever the ceiling effect may

25 be, what we're concerned about is whether this can keep

1 someone unconscious and unaware of pain. And what he
2 talked about that's the phenomenon that's not
3 anesthesia, what he was referring to is their expert,
4 Dr. Lubarsky, he said in the medical sense, to have true
5 anesthesia, you have to have unconsciousness, inability
6 to feel pain and immobility.
7 Our district court was saying, well, what we
8 care about with midazolam is it -- will it render them
9 unconscious and unable to feel pain. Under their
10 expert's definition, they may not -- that may not be
11 anesthesia in the medical sense, but it's the
12 constitutionally relevant question.
13 JUSTICE GINSBURG: What do we do with this
14 brief of the pharmacology professors that state, flat
15 out, midazolam cannot induce coma-like unconsciousness?
16 MR. WYRICK: They actually go further and
17 say, you know, in several respects that it can induce
18 unconsciousness, and that's something that no one agrees
19 with. Even the FDA label indicates that induction of
20 anesthesia is a commonly accepted use.
21 JUSTICE BREYER: Can I -- can I ask --
22 JUSTICE SOTOMAYOR: What -- what's the --
23 JUSTICE BREYER: -- the same question, which
24 is I -- I've had this one question, and that is, as I
25 read this record -- you remember what I said was the

1 standard from Baze. You remember what I said was the
2 district court's finding. You remember that I believe
3 that what this is about is whether that finding is
4 clearly erroneous. And what I have are two sentences.
5 The first sentence is from their expert.
6 And he, quote, when you could be unconscious, he means
7 that this drug, midazolam, is an antianxiety drug, like
8 Xanax. People use it to go to sleep every night, and it
9 can render you unconscious and not reacting to minor
10 stimuli. That's their expert.
11 But when major stimuli such as the
12 introduction of the next two drugs that we're talking
13 about here come into play, you are jolted into
14 consciousness, and you are quite aware, and you wake up.
15 Now, if we stop there, you'd lose, right?
16 MR. WYRICK: If any of that were --
17 JUSTICE BREYER: If we stop there.
18 MR. WYRICK: If any of that were supported
19 by the medical literature.
20 JUSTICE BREYER: But he pointed to -- he
21 pointed to two articles. He based that statement -- but
22 I'll look at the two articles. It seemed to me he was
23 basing the statement on medical articles, but, okay, we
24 have to look at the support for that.
25 MR. WYRICK: Yes. And, Justice --

1 JUSTICE BREYER: Now let's look at the other
2 side, because your side then says -- he says right here
3 that -- he says it will put you into a coma. That's his
4 point. But his reasoning was that if you take enough of
5 it, you'll be dead. And then he says this is
6 essentially an extrapolation from a toxic effect, by
7 which he means if you take a lot, you'll be dead, but
8 before you're dead, you're in a coma. And that's his
9 reasoning. And I didn't find any other reasoning.
10 Now, the obvious thing -- are two. One, a
11 lot of things kill you without putting you into a coma,
12 such as the next two drugs. Lots of things do. And,
13 two, he didn't point to anything in support of this
14 putting into a coma. It was just the extrapolation.
15 Now, that's what I want you to focus on,
16 because if what I've just said is correct, then I think
17 there is no support in this record for his conclusion.
18 If what I have said is incorrect, there might be
19 support.
20 MR. WYRICK: Well, a couple of things.
21 First, that assumes that a deep coma-like level of
22 unconsciousness is the relevant question. They argue
23 that this Court's cases and the Constitution requires
24 that.
25 Now, that's beyond a surgical plane of

1 anesthesia that we would use in an operating room to
2 remove one of your limbs. A coma is -- is brain-dead,
3 EEG silence.
4 JUSTICE GINSBURG: Would any doctor --
5 MR. WYRICK: It's beyond --
6 JUSTICE GINSBURG: -- use this drug -- any
7 doctor who is conducting a surgical procedure, doesn't
8 want the patient to suffer pain, wants to induce this
9 unconscious state, would any doctor in the country give
10 this as the drug to induce that -- that coma-like
11 unconsciousness?
12 MR. WYRICK: It is routinely used to induce
13 anesthesia. It is not commonly used anymore for the
14 maintenance of anesthesia for -- for hours for
15 surgeries. Now, their source, this is the Saari
16 article, and that's spelled S-A-A-R-I, that their expert
17 cited -- and you can find this in the JA at 2-43 in his
18 report. He cited this article. And if you actually
19 read the article, it explains why midazolam is no longer
20 used for maintenance of general anesthesia. It says,
21 and I'm quoting, "Midazolam has been used to induce and
22 maintain general anesthesia. The recovery period of
23 midazolam is approximately three times longer than
24 propofol." Propofol is the drug that's more commonly
25 used now. "Therefore the genuine use of midazolam is

1 the sole induction and maintenance agent for general
2 anesthesia. It is nowadays exceptionally uncommon and
3 has been replaced by induction and maintenance of
4 fusions of propofol. For organizational and economic
5 reasons, fast-track recovery has gained popularity.
6 That's why midazolam" --
7 JUSTICE SOTOMAYOR: I -- I have a real
8 problem with whatever you're reading, because I'm going
9 to have to go back to that article. I am substantially
10 disturbed that in your brief you made factual statements
11 that were not supported by the cited -- of those sources
12 and in fact directly contradicted.
13 I'm going to give you just three small
14 examples among many I found. So nothing you say or read
15 to me am I going to believe, frankly, until I see it
16 with my own eyes the context, okay?
17 I'll give you a -- the three examples. On
18 pages 4 and 5 of your brief you cite, "This drug's FDA
19 approved label as holding that" -- "that this drug can
20 get you to mild sedation and to deep levels of sedation
21 virtually equivalent to the state of general anesthesia
22 where the patient may require external support for vital
23 functions."
24 But this quote was not on general use. This
25 quote came from the section of the FDA label where it

1 was saying that this drug's effects, when taken with
2 other drugs that suppress the central nervous system,
3 this can happen. That to me is -- really there is no
4 other central nervous system drug at play in this
5 protocol.
6 On page 6, you cite the --
7 JUSTICE SCALIA: Do you have an answer to
8 that one?
9 MR. WYRICK: Respectfully, Justice
10 Sotomayor, in the brief we explained that --
11 JUSTICE SOTOMAYOR: No, sir. Go --
12 MR. WYRICK: The FDA -- the FDA label says
13 that the effects of the drug depend upon three things:
14 The rate of infusion -- I think it's the -- the
15 maintenance -- the infusion -- the rate -- the dosage of
16 the rate of infusion and whether it's used in
17 conjunction with other CNS depressants and --
18 JUSTICE SOTOMAYOR: But you didn't -- you
19 quoted this for the proposition that it could cause a
20 fatality because of the depression of -- or it could
21 produce general anesthesia.
22 MR. WYRICK: At JA 217, their expert agrees
23 that it can cause a fatality. He agrees that it caused
24 80 fatalities.
25 JUSTICE SOTOMAYOR: Sure, but he said it's

1 in old people.

2 I'm -- you know, there have been 80 deaths

3 from therapeutic doses of this drug. It's -- this is

4 almost like you saying because 80 people have died from

5 the use of one aspirin, that means that if I give people

6 100 aspirins, they're going to die. It's just not

7 logical. Obviously, people die from anything that you

8 give them, that's why there are hospital fatalities in

9 every procedure and why there's -- that -- but 80 among

10 the millions that are given this drug don't die.

11 So my point is, what -- the FDA is saying

12 the general anesthesia effect is only going to happen

13 when you have a central nervous drug -- central nervous

14 system drug.

15 MR. WYRICK: The FDA has said no such thing.

16 JUSTICE SOTOMAYOR: Well, they put it in

17 that section.

18 MR. WYRICK: They described in that section

19 the potential effects and they described -- they said 3

20 things matter when you're looking at the effects. How

21 much of the drug you're giving, the rate at which you're

22 giving it, and whether it's given with another drug.

23 JUSTICE SOTOMAYOR: Exactly.

24 MR. WYRICK: Now, their -- their expert

25 said -- unqualifiedly he said the FDA tested this drug

1 and injected --

2 JUSTICE SOTOMAYOR: All right. Let me give

3 you a second example: The Melvin study. The Melvin

4 study says this is how it happened. It gave this drug

5 in doses of .02 to .06, and what it showed was that at

6 .06 dose, there was less effect than at .02.

7 And he said, this suggests that there is a

8 ceiling effect to this drug and that it is less potent

9 as you go in higher doses.

10 Now, you quoted for saying -- and you took

11 out the eclipse -- there may be a ceiling -- you quote

12 it by saying that, "The Melvin study for the position

13 that studies on humans have found that the anesthetic

14 effect of midazolam increased linearly with dosage and

15 estimate that 2 milligrams is enough for full surgical

16 anesthetic."

17 But what Melvin actually said, after

18 pointing out that the ceiling effect is shown by his

19 study, he says, "But presuming there were no ceiling

20 effect, extrapolation of our data suggests that such a

21 dose would be sufficient." You took out that --

22 MR. WYRICK: Respectfully, Justice

23 Sotomayor, what they were comparing was a .2 milligram

24 per kilogram dose of a different drug to a .6 milligram

25 dose -- per kilogram dose of midazolam. They said we

1 would have expected midazolam to have a greater effect
2 than the other drug because it's more potent than the
3 other drug. But as it turns out, there's two things
4 going on. Either there's some dose-dependent
5 relationship with the other drug, or they said, there
6 may be some ceiling effect here. They -- they
7 hypothesized that there may be.
8 They say if there's not a ceiling effect and
9 you extrapolate out what we know about the drug, you get
10 the full anesthesia 2 milligrams per kilogram.
11 JUSTICE SOTOMAYOR: Well, we're back. Well,
12 we're back to is their a ceiling effect? The judge here
13 said, does it matter?
14 MR. WYRICK: And let's talk about their
15 evidence. First of all, neither of their experts could
16 say at what level a ceiling effect occurs. And it's not
17 relevant whether there is or is not a ceiling effect.
18 Their expert said all drugs have a ceiling effect at
19 some point.
20 What matters is, is there a ceiling effect
21 that kicks in before we get to a level where they're
22 unconscious and unaware of the pain? That's the
23 constitutionally relevant inquiry. And on this point,
24 they presented the district court with two pieces of
25 evidence: Dr. Lubarsky, a Material Safety Data Sheet

1 for midazolam, that as we pointed out in our brief,
2 never even mentioned ceiling effect.
3 JUSTICE KAGAN: But Mr. Wyrick, it would be
4 very different if the court had said, look, we don't
5 think you've presented enough evidence that the ceiling
6 effect kicks in at this point, right? But that's not
7 what the court said. The court had this alternative
8 theory, which is that it didn't have to concern itself
9 with whether the ceiling effect had kicked in. And
10 that's the thing that not -- you don't defend as well.
11 But that was what the court said.
12 MR. WYRICK: I -- I -- that's not quite how
13 we read the district court's opinion. What we said --
14 he recounted their explanation of what the ceiling
15 effect was -- I think this is at JA 77 or 78 -- and
16 says whatever it may be with respect to anesthesia, he
17 said, which occurs at the spinal cord level, he said --
18 JUSTICE KAGAN: Yes. Whatever it might be,
19 we don't have to worry about it because all we have to
20 worry about is the brain and not the spinal cord, and in
21 the brain, there is no ceiling effect. And that's just
22 wrong. You know that's wrong.
23 MR. WYRICK: We know the central nervous
24 system depressant works throughout the central nervous
25 system, right? So it -- it's affecting these GABA

1 receptors which are located in the spinal cord and in
2 the brain.
3 Now, his point was perhaps those GABA
4 receptors could be fully saturated with GABA at the
5 spinal cord level, but the question is at the brain
6 level. Are we, in his words, paralyzing the brain to
7 such an extent that the person is unconscious and
8 unaware of pain? And he said he thought the evidence
9 was sufficient to -- to conclude that it was. And we
10 look at the evidence --
11 JUSTICE KAGAN: Well, I just read it -- I
12 think if we go back and read it, it will show that what
13 he was saying was we just don't have to worry about the
14 ceiling effect because at the brain level, the ceiling
15 effect has no relevance.
16 Let me ask you another question. Maybe this
17 is one we'll agree on. Maybe not. I'm not sure.
18 Do you think that if we conclude that there
19 is just a lot of uncertainty about this drug, in other
20 words, you know, you might be right, or Ms. Konrad might
21 be right, and it's really just impossible to tell.
22 Given that nobody does studies on this drug, it would be
23 unethical to do studies on this drug, we simply can't
24 know the answer to these questions. If that's the state
25 of the world, do you think it's a violation of the

1 Eighth Amendment to use it?

2 MR. WYRICK: If there is a risk of serious

3 pain that rises to a substantial or objectively

4 intolerable.

5 JUSTICE KAGAN: No. Well, you're just

6 repeating the standard. But I'm giving you a set of --

7 we just don't know. It might be substantial pain; it

8 might not be substantial pain. I mean, we can't -- we

9 can't -- we can't quantify it at all.

10 MR. WYRICK: If what you're suggesting is

11 shifting the burden to the State to show that there's

12 some medical consensus that a drug can, in fact, do this

13 at these dosages, we know that --

14 JUSTICE KAGAN: I guess I'm not talking

15 about burdens. I'm talking about a district court who's

16 presented with evidence. Just put yourself in the

17 position of a district judge. And the evidence is who

18 can tell? Nobody can tell. What is a district court

19 supposed to do at that point?

20 MR. WYRICK: Well, this Court in Brewer v.

21 Landrigan, which was an appeal from the Ninth Circuit in

22 a -- of a similarly postured case, it was a temporary

23 injunction, that was a challenge to the efficacy of

24 lethal injection drugs vacated a -- a temporary

25 injunction granted by lower courts and said the burden

1 is on the petitioner to show that it is sure or very
2 likely that they will suffer from the harm. They said
3 speculative evidence isn't enough. So that's the burden
4 that they bear.
5 JUSTICE KAGAN: So then I think I have not
6 found a place where I agree with you, because that
7 seems -- that seems quite something to me. I mean, that
8 would be like saying -- people say that this potassium
9 chloride, it's like being burned alive. We've actually
10 talked about being burned at the stake, and -- and
11 everybody agrees that that's cruel and unusual
12 punishment.
13 So suppose that we said, we're going to burn
14 you at the stake, but before we do, we're going to use
15 an anesthetic of completely unknown properties and
16 unknown effects. Maybe you won't feel it, maybe you
17 will. We just can't tell. And -- and you think that
18 that would be okay.
19 MR. WYRICK: I think that that -- a
20 Petitioner in that case would have no trouble meeting --
21 satisfying the burden this Court imposed in Baze, which
22 is showing that that puts me at a substantial risk,
23 objectively intolerable risk of severe pain. That --
24 that threshold showing would be incredibly easy to make
25 in that case.

1 JUSTICE KAGAN: No, I'm -- I'm saying,
2 because you just don't know about the anesthesia. Maybe
3 the anesthesia will cover all that -- the pain of being
4 burned at the stake or maybe it won't. The court
5 doesn't know.
6 MR. WYRICK: That isn't the world that we
7 live in, and it's certainly not the world that this
8 district court lived in. We know -- we know for a fact,
9 these are the conceded facts. Their expert said, this
10 dosage of midazolam will render these Petitioners
11 unconscious in no more than 60 to 90 seconds. We know
12 that induction of anesthesia is an FDA-approved
13 indication for this drug.
14 JUSTICE KAGAN: Induction, but not
15 maintenance.
16 MR. WYRICK: For certain, yes.
17 JUSTICE KAGAN: And there is the world of
18 difference between the two, isn't there?
19 MR. WYRICK: Induction is the creation of
20 anesthesia. Maintenance is the keeping it at that state
21 for many hours for a surgery. That's not -- we're
22 not --
23 JUSTICE KAGAN: Or for -- or for the time it
24 takes for the potassium chloride to kill somebody.
25 MR. WYRICK: And we also put on evidence

1 that this drug is approved for usage and is commonly
2 used for painful, invasive procedures like setting of a
3 femoral IV. I think the intubation example is a very
4 good example, because we pointed out that this drug,
5 midazolam, is regularly and routinely used for rapid
6 sequence intubation.
7 JUSTICE BREYER: What you have here, their
8 expert saying, as I previously said, that this drug will
9 not keep you asleep. Once these two others are
10 introduced, you will be jolted into consciousness; that
11 is his testimony. I believe he supported that with
12 medical articles, but I'll look to see.
13 If it turns out it is supported, we have to
14 look to the other side to see what was refuting it. And
15 what on the other side is refuting it, on 327 -- and I
16 agree with you that this ceiling effect is a big red
17 herring here -- what actually he said that would go
18 against it was that he said there is an extrapolation
19 from his conclusion that 500 milligrams could cause
20 death, and so if that much is likely to cause death,
21 it's certainly likely to cause a coma. And a coma would
22 prevent the person from -- from pain.
23 But his evidence for that was zero. We know
24 that, in fact, lots of drugs can kill people without
25 first putting them into a coma. And so we look to see

1 what is it he thinks that if this kills you will first
2 put you into a coma. And when I looked -- or asked my
3 clerks and others to look -- we found zero.
4 Now, that's my question. What can you point
5 me to which will show that what I think is the key
6 refutation of their expert rests upon zero, that's what
7 I'm asking you. That's what I've tried to ask,
8 inarticulately, perhaps, but now it's more articulate,
9 so --
10 MR. WYRICK: Again, and I have to make this
11 point, whether it creates a coma or not is not the
12 constitutionally relevant question.
13 JUSTICE BREYER: Oh, well --
14 MR. WYRICK: But based on how a central
15 nervous system depressant works, that a central nervous
16 --
17 JUSTICE BREYER: Let me put it differently.
18 Not the word "coma". I think what he was driving at,
19 your expert, was that you were in a state such that you
20 would feel no pain. And the reason he thought you were
21 in that state is because 500 mg will probably kill you.
22 And if it's going to kill you, it must, of course, at
23 least first put you in that state.
24 So I'm asking the same question, but I am
25 using the words "that state" in substitution for the

1 word "coma".

2 MR. WYRICK: Because of how a central

3 nervous system depressant works. It works by

4 depressing --

5 JUSTICE BREYER: I'm not asking you for

6 even -- I really want to know where in the record does

7 he provide support for that statement, that the, quote,

8 that state, end quote, precedes the death caused by this

9 drug.

10 MR. WYRICK: Well, he describes a couple of

11 things. First, he describes the action by which the

12 drug works as a central nervous system depressant.

13 It -- it -- by causing death --

14 JUSTICE SOTOMAYOR: But --

15 MR. WYRICK: -- it works by paralyzing the

16 brain to such an extent that your respiratory drive is

17 knocked out. Your brain --

18 JUSTICE SOTOMAYOR: But that's the clear

19 error here. It starts right there. Because the reason

20 Evans thought that it worked -- paralyzed the brain is

21 because he thought this worked on the spinal cord. And

22 nobody argues it works on the spinal cord, number one.

23 And, number two, this is not a central nervous system

24 drug. That's the barbiturates. This is -- works very

25 differently than barbiturates.

1 MR. WYRICK: This is a central nervous
2 system depressant, just like a barbiturate.
3 JUSTICE SOTOMAYOR: Depressant, but it's
4 not a --
5 MR. WYRICK: It's not -- it's not a
6 barbiturate, but makes -- they are both --
7 JUSTICE SOTOMAYOR: Exactly. It has no
8 pain-relieving qualities.
9 MR. WYRICK: No, but they're both central
10 nervous system depressants. The barbiturates have no
11 pain-relieving qualities either. That's -- that's
12 undisputed on the record. So I want --
13 JUSTICE SOTOMAYOR: You're right, it --
14 it -- but it's still -- I don't know where you're
15 getting -- Justice -- Justice Breyer said, the proof of
16 that.
17 MR. WYRICK: Because it's a conceded fact on
18 this record that a 500 milligram dose will render them
19 unconscious within a matter of 60 to 90 seconds. That
20 means that the central nervous system depressant is
21 working to such a state to paralyze their brain and
22 render them unconscious. It is a conceded fact that
23 they will be --
24 JUSTICE SOTOMAYOR: You're unconscious, but
25 that doesn't tell me that you're not feeling pain, or

1 that a noxious stimulant like being burned alive won't
2 cause pain.
3 Look at what happens with the intubations.
4 They paralyze your throat, they give you this drug, but
5 they're paralyzing your throat, and that has its own
6 anesthetic effect and pain relief.
7 So what you're arguing is very different
8 from what's happening here. They're putting a chemical
9 inside of you that's burning you to death. That is the
10 most noxious stimuli I can think of.
11 MR. WYRICK: Respectfully, you have that
12 backwards on intubation. They give the paralytic -- the
13 same paralytic that's the second drug here -- first to
14 keep the patient from -- or they give the midazolam
15 first to anesthetize them, and then give them the
16 paralytic to keep them from moving. The same paralytic
17 that these Petitioners say cause the unconstitutional
18 agonizing suffering. And I'm telling you, rapid
19 sequence intubation is done routinely, giving patients a
20 small dose of midazolam, paralyzing them with that
21 paralytic, causing the same --
22 JUSTICE SOTOMAYOR: No, they paralyze them
23 also with the throat local anesthetic. I mean, I read
24 it.
25 MR. WYRICK: The rapid sequence intubation

1 describes midazolam as the first-line choice.
2 JUSTICE SOTOMAYOR: Sure, it's a first line
3 in a lot of things --
4 MR. WYRICK: But we also --
5 JUSTICE SOTOMAYOR: But it doesn't keep you
6 in an anesthetic state forever. It doesn't keep you
7 during the procedure --
8 MR. WYRICK: I --
9 JUSTICE SOTOMAYOR: -- during surgeries.
10 MR. WYRICK: It can.
11 JUSTICE SOTOMAYOR: In some.
12 MR. WYRICK: Look at the Saari article cited
13 by their experts which describes the use of the
14 anesthetic.
15 The other thing I want to point out is the
16 16 professors' brief, because this really is their
17 ceiling effect in a nutshell, this -- this figure that's
18 in the brief. It shows that a benzodiazepine puts you
19 right to a surgical plane of anesthesia, but not beyond.
20 Now, first we would say a surgical plane of anesthesia
21 is sufficient. But go to that source. The source that
22 they cite for that chart, it's the Brenner textbook, and
23 read what it actually says with respect to this chart.
24 Here's what it says: Benzodiazepines
25 exhibit a ceiling effect which precludes severe CNS

1 depression after oral administration of these drugs.
2 Intravenous administration of benzodiazepines can
3 produce anesthesia. That's what the text actually says.
4 That's what the Saari article actually says.
5 You can produce anesthesia with these drugs. The fact
6 that they're not commonly used as general anesthetics is
7 because we have better choices, not because the drug is
8 incapable of producing that effect.
9 Now, remember, here's where their experts
10 started, here's where they started in the blue brief.
11 They said that because of the ceiling effect, this drug
12 is incapable of producing a coma. We said someone
13 forgot to tell the FDA, because the warning is right
14 there in the FDA label about coma. So they have
15 retreated now in the reply brief to, well, it can't
16 reliably produce a coma.
17 Well, if it can get someone to a coma, where
18 is the ceiling effect? Is there some basic
19 pharmacological principle with this drug that prevents
20 the drug from ever getting to a coma or not? We have
21 established there is not.
22 We ask you to also look at the cases out of
23 Florida. There, for instance, Dr. Markeith, an
24 anesthesiologist who was the anesthesiologist for inmate
25 Baze, in Baze v. Rees, testifying for an inmate in

1 Florida --
2 JUSTICE SOTOMAYOR: If I come out of this
3 argument, because you presented a lot of things to us
4 that wasn't before either the district court or the
5 court of appeals, wouldn't be -- and I believe that your
6 experts didn't prove their point at all and that they
7 showed enough. Why don't we let the district court
8 below sort out whether it still holds to its opinion
9 based on a plethora of materials you've given us?
10 MR. WYRICK: Two quick responses.
11 One is they didn't meet their burden under
12 Brewer v. Landrigan, a showing that is sure or very
13 likely on the record that they presented. Second, we
14 put plenty of rebuttal evidence on, enough to support
15 the district court's finding. There's no clear error
16 here. And the two-court rule applies, because we have a
17 court of appeals affirming that district court finding.
18 CHIEF JUSTICE ROBERTS: Mr. Wyrick, to an
19 extent that's unusual even in this Court, you have been
20 listening rather than talking. And so I'm happy to give
21 you an extra five minutes, if you'd like.
22 And, of course, we'll give additional time
23 to you, as well, Ms. Konrad. And hopefully we'll have a
24 chance to hear what you have to say.
25 MR. WYRICK: I appreciate that. And I want

1 to continue my point about ceiling effect and what
2 evidence they put on. I -- I told you about the first
3 source, which was the Material Safety Data Sheet. It
4 says nothing about a ceiling effect. We pointed that
5 out. Nothing in the reply brief on that.
6 Their second was the study about rats, the
7 Hovinga study. We pointed out again -- we read that
8 study. There's no mention of a ceiling effect. Again,
9 no response in the reply brief. Now, that's the
10 evidence that they put before the district court on what
11 they said clearly demonstrates that there's a ceiling
12 effect.
13 Now, after the fact, when we were at the
14 court of appeals, their expert submitted an additional
15 declaration and cited two more sources. He cited this
16 Hall study, which was the dog study, where they took 5
17 dogs, gave them a big dose of midazolam and clamped
18 their tails. And that study concluded, well, we see the
19 midazolam -- the effect of the drug begins to slow at a
20 certain point and hypothesized, well, there may be a
21 ceiling effect, because the drug -- the -- the effects
22 of the drug are beginning to slow.
23 But that study concluded, as we pointed out
24 in the response brief, that if you take the results and
25 you extrapolate out, once you get to about 30 milligrams

1 per kilogram for a dog, you would achieve full surgical
2 anesthesia, full surgical anesthesia.
3 Now, their other expert, he cited the Saari
4 article for the proposition that there is a ceiling
5 effect. It just cites back to Hall, the dog study, and
6 says, well, there may be a ceiling effect. And then it
7 goes on to say that, in fact, this drug has been used
8 for general anesthesia as the sole drug, and that its
9 use was discontinued because propofol came along, and it
10 was a better choice.
11 That was their record case for a ceiling
12 effect. So when they stand up and say that they clearly
13 demonstrated that there was, in fact, a ceiling effect,
14 they're just wrong.
15 Now, the other study that Dr. Lubarsky cited
16 in his after-the-fact declaration that was never
17 submitted to the district court, was the Greenblatt
18 study. And he claimed that that study showed that at .3
19 milligrams per kilogram there was a ceiling effect. We
20 went and read the study. .3 milligrams per kilogram
21 were -- were never given to the patients in that study.
22 That study was about what happens if we give .1
23 milligrams per kilogram of this drug? At varying
24 dosages, what happens? We pointed that in -- that out
25 in the response brief. Nothing in the reply.

1 Their evidence on this ceiling effect is
2 indefensible because if you go and read the sources,
3 they just don't say what Dr. Lubarsky said that they
4 say.
5 Paradoxical effects have fallen out of the
6 case. This lack of analgesia, again, we've pointed out,
7 is only relevant if someone's not unconscious and
8 insensate. They just can't avoid the fact that the
9 district court here made this factual finding and said
10 it's a virtual certainty. If it's a virtual certainty
11 that they're unconscious and unaware of the pain, they
12 cannot establish a substantial probability or an
13 objectively intolerable risk.
14 Thank you.
15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 Ms. Konrad, why don't you take 8 minutes, up
17 to 8 minutes.
18 REBUTTAL ARGUMENT OF ROBIN C. KONRAD
19 ON BEHALF OF THE PETITIONERS
20 MS. KONRAD: Justice Kagan, I wanted to
21 address your hypothetical. And it -- in this case, if
22 the risk from using midazolam, if Petitioners are
23 correct, manifests itself, then there will be
24 unconstitutional pain and suffering. And my friend
25 admitted that, that if, in fact, a person is burned

1 alive and didn't have appropriate anesthesia, that would
2 be unconstitutional.
3 JUSTICE KAGAN: I guess the question I was
4 asking was if a person was burned alive and we didn't
5 know whether he had appropriate anesthesia, would that
6 be unconstitutional, too?
7 MS. KONRAD: That would be, Justice Kagan,
8 and that's -- the point here is that the district court
9 below found that there is a greater risk in using
10 midazolam, but found it was unquantifiable. And so if
11 that risk, in fact, manifests itself, there will be a
12 constitutionally intolerable execution. And this case
13 is different than Brewer v. Landrigan because in that
14 case, the drug formula at issue was using sodium
15 thiopental, which --
16 JUSTICE ALITO: If an -- if an
17 anesthesiologist rendered a person completely
18 unconscious, and then the person was burned alive, would
19 that be cruel and unusual punishment?
20 MS. KONRAD: Justice Alito, I think the
21 problem isn't rendering somebody unconscious. What the
22 problem is, and what is necessary, is to ensure that the
23 person maintains a -- a deep level of unconsciousness.
24 JUSTICE ALITO: Yes. So an anesthesiologist
25 is called in to make sure that this person feels no pain

1 whatsoever while being burned alive, and then the person
2 is burned alive, would that not be a violation of the
3 Eighth Amendment anyway?
4 MS. KONRAD: It could be. That's not the
5 question, though, before this Court, and the -- the --
6 JUSTICE KAGAN: Because potassium
7 chloride --
8 MS. KONRAD: An --
9 JUSTICE KAGAN: -- is kind of like that,
10 isn't it? It's being burned alive from the inside.
11 That's what it is.
12 MS. KONRAD: That's exactly what it is,
13 Justice Kagan, but what --
14 JUSTICE ALITO: But you're not sure that
15 being burned alive -- that you think there are
16 circumstances in which burning somebody at the stake
17 would be consistent with the Eighth Amendment?
18 MS. KONRAD: It is --
19 JUSTICE ALITO: It's an irrelevant point,
20 but you're -- you're not certain about that?
21 MS. KONRAD: Well, what I'm saying is that
22 this Court has -- the founders say burning at the stake
23 is unconstitutional. It creates an Eighth Amendment
24 violation. It's cruel and unusual. But in your
25 hypothetical, if there was a way to ensure that that was

1 done in a humane way, there could perhaps be. That -- I
2 don't think that any -- any State would go to try to do
3 that, because we move forward evolving --
4 JUSTICE ALITO: That's an incredible answer.
5 You think that there are circumstances in which burning
6 alive would not be a violation of the Eighth Amendment?
7 Burning somebody alive would not be a violation of the
8 Eighth Amendment?
9 JUSTICE KAGAN: You see, but potassium
10 chloride is burning somebody alive. It's just doing it
11 through the use in a -- of a drug.
12 MS. KONRAD: Which is what we have here and
13 here the district court found a risk, a risk that it
14 could not quantify. And that risk violates the Eighth
15 Amendment. Again, what this Court needs to understand
16 is that the barbiturates function differently.
17 In Baze and in Landrigan, the -- there was a
18 use of a barbiturate that was known to produce a deep
19 coma-like unconsciousness. And the reason why that's
20 important, it doesn't matter that barbiturates also
21 don't have analgesic properties because we know --
22 science and medicine tells us that those drugs will
23 reliably induce a deep coma-like unconsciousness.
24 Midazolam cannot do this.
25 And the -- my friend has -- has said that

1 there is no support for the ceiling effect. And we
2 would disagree. And -- and our expert cited studies.
3 The study on the rats that was cited in -- as Exhibit 2,
4 shows the sigmoidal Emax curve, which he explained in
5 his testimony. The State's expert had no explanation,
6 had no support for the testimony that he presented.
7 When he testified, he did not have data to
8 cite. He was incorrect. He made a mathematical error.
9 And, again, what this Court needs to understand is that
10 giving the drug, even if it could potentially cause a
11 toxic effect, that will not protect against the
12 unconstitutional pain and suffering from the second and
13 third drugs.
14 Thank you.
15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 The case is submitted.
17 (Whereupon, at 11:19 a.m., the case in the
18 above-entitled matter was submitted.)
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A

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