Nos. 19-7880 and 19A976

In the Supreme Court of the United States

NATHANIEL WOODS,
Petitioner,
v.
JEFFERSON DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

STEVE MARSHALL
Alabama Attorney General

Edmund G. LaCour Jr.
Solicitor General

Lauren A. Simpson
Assistant Attorney General
*Counsel of Record

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Lauren.Simpson@AlabamaAG.gov

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CAPITAL CASE

QUESTIONS PRESENTED
(Restated)

1. Has the State of Alabama violated an inmate's equal protection, due process, and Eighth Amendment rights by scheduling his execution by lethal injection when the inmate (1) has exhausted his conventional appeals, (2) did not elect nitrogen hypoxia as his method of execution, (3) was represented by counsel and could have asked counsel questions during the election period, and (4) received the same election period and notice from the State as every other similarly situated inmate, but the State did not inform inmates that it had yet to finalize a hypoxia protocol during the election period?

2. Is a death-sentenced inmate entitled to a last-minute stay of execution where the lower courts agreed that the inmate failed to show a substantial likelihood of success on the merits of his claims and that he inexcusably delayed in moving for a stay?

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INTRODUCTION

The Court has before it a petition for certiorari and an untimely request for a stay of execution arising out of a 42 U.S.C. § 1983 petition that could have been filed months ago instead of on the eve of execution. As this Court cautioned just last year, "[l]ast-minute stays should be the extreme exception, not the norm, and 'the last-minute nature of an application' that 'could have been brought' earlier, or 'an applicant's attempt at manipulation,' 'may be grounds for denial of a stay.'"[1] Moreover, the claims alleged are not cert-worthy.

Nathaniel Woods has been on death row in Alabama since 2005 for his participation in the murder of three police officers in Birmingham. In June 2018, following the introduction of nitrogen hypoxia as a statutory method of execution in Alabama, death-row inmates were given thirty days in which to elect hypoxia as their method of execution. Else, they would remain subject to execution by lethal injection. This period ran from June 1–30, 2018.[2]

Fifty inmates ultimately made timely hypoxia elections. The Alabama Department of Corrections (ADOC) will honor those elections as long as the statute remains in force; as such, the State cannot move for these inmates' executions to be set until the ADOC finalizes a hypoxia protocol. While the ADOC has diligently worked to formulate a safe and effective protocol since 2018, this process takes time, and a protocol has not yet been announced. Indeed, no state that has adopted hypoxia

1. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)).
2. Ala. Laws Act 2018-353; ALA. CODE 15-18-82.1.

has yet conducted an execution by that method.

Woods received the same election period as every other inmate. He, along with the other death-row inmates at Holman Correctional Facility, was even given an election form near the end of June 2018. Woods was represented by local counsel throughout the election period—counsel who has represented him during his § 1983 proceedings[3]—and could have contacted his counsel if he had questions about hypoxia or whether he should elect. But Woods did nothing.

Last year, this Court considered the case of Christopher Price, another Holman death-row inmate who failed to make a timely hypoxia election.[4] When the State moved for his execution in January 2019, Price attempted to belatedly elect, then filed a § 1983 complaint alleging an equal protection violation and challenging the constitutionality of the ADOC's lethal injection protocol. After a slew of last-minute filings, a vacatur from this Court less than two hours after his first execution warrant expired, and a month of further proceedings, Price was executed in May 2019. Concurring in the denial of certiorari in *another* of Price's cases, Justice Thomas, joined by Justices Alito and Gorsuch, noted:

> [M]ore broadly, petitioner delayed in bringing this successive § 1983 action until almost a year after Alabama enacted the legislation authorizing nitrogen hypoxia as an alternative method, six months after he forwent electing it as his preferred method, and weeks after the State

3. J.D. Lloyd, who represented Woods during habeas, also represented him in the § 1983 proceedings in the district court and Eleventh Circuit.
4. *Price v. Dunn*, 139 S. Ct. 1542 (2019) (mem).; *Dunn v. Price*, 139 S. Ct. 1312 (2019) (mem.); *Price v. Dunn*, 139 S. Ct. 1794 (2019) (mem.); *see Price v. Dunn*, 139 S. Ct. 1533, 1533–40 (2019) (Thomas, J., concurring in denial of certiorari) (discussing failed April 11, 2019, execution date).

> sought to set an execution date. There is simply no plausible explanation for the delay other than litigation strategy. A stay under these circumstances—in which the petitioner inexcusably filed additional evidence hours before his scheduled execution after delaying bringing his challenge in the first place—only encourages the proliferation of dilatory litigation strategies that we have recently and repeatedly sought to discourage. *See Bucklew*, 139 S. Ct. at 1134; *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019).[5]

Woods's delay is even less excusable than Price's. The State moved for his execution on October 29, 2019. Not until January 23, 2020—nearly three months later—did Woods file a § 1983 petition alleging Eighth and Fourteenth Amendment violations, as well as three state-law claims. Not until January 31, the day after Woods's execution was set, did he submit an election form to the warden—nineteen months after the election period closed. And not until *February 24* did Woods move the district court to stay his scheduled March 5 execution, even though he had known since February 14 that the Alabama Supreme Court was disinclined to do so.

Respondents moved for summary judgment, and Woods filed a cross-motion. After a hearing, the district court granted summary judgment to Respondents in a well-reasoned order on March 2. The court also denied Woods's stay motion, holding that he had not satisfied the requirements for a stay to issue, including demonstrating a substantial likelihood of success on the merits. The court concluded that Woods had "engaged in inexcusable delay," which in itself constituted grounds to deny relief.[6] On March 4, the Eleventh Circuit Court of Appeals denied Woods's

5. *Price*, 139 S. Ct. at 1538 (Thomas, J., concurring in denial of certiorari) (citations edited).
6. Pet. App'x Ex. 2 at 45 (quoting *Hill*, 547 U.S. at 584).

emergency motion for stay of execution in a published order.[7]

Woods's petition for certiorari and motion for stay are just as meritless and untimely now as they were when he presented his allegations to the district court last month. As Woods has failed to show a denial of equal protection, a denial of due process, a violation of his Eighth Amendment rights, or a substantial likelihood of success on these claims, his petition for certiorari and stay motion should be denied.

STATEMENT OF THE CASE

A. Woods's capital conviction and appeals

Woods has been on death row since 2005 for the capital murder of three police officers and the attempted murder of a fourth. While Woods was not the triggerman, the evidence showed that he was a willing participant in the slayings.

On June 17, 2004, Officers Carlos Owen, Harley A. Chisolm III, Charles R. Bennett, and Michael Collins were on duty in Birmingham. Officer Owen left his patrol car on 18th Street at "the green apartments," an area a few blocks from the precinct that was known for drug problems. When Officer Collins arrived, he found Officer Owen standing near the back door of one of the apartments. A man inside—later identified as Nathaniel "Nate" Woods—had cursed and yelled at Officer Owen to get off his property. Officer Collins saw a woman inside the apartment behind Woods and noted someone else pulling the window covering back and repeatedly saying, "Fuck the police." Woods threatened to "fuck [Officer Owen] up."[8]

7. Pet. App'x Ex. 1.
8. *Woods v. State*, 13 So. 3d 1, 5 (Ala. Crim. App. 2007).

Shortly thereafter, Officer Collins checked Woods's name in the NCIC database and received a hit: a man by that name and with an address nearby had a misdemeanor warrant in Fairfield. He and Officer Owen asked Officer Chisolm to print a picture of the wanted man at the precinct and to contact the Fairfield Police Department to confirm that the warrant was outstanding. At 1:17 p.m., Officer Chisolm received confirmation, and he radioed the Birmingham dispatcher that he, Officer Owen, and Officer Collins would attempt to arrest Woods.[9]

The three officers returned to Woods's apartment to serve the warrant, where they met Officer Bennett. Officers Chisolm and Bennett went to the front door, while Officers Collins and Owen went to the back door. Woods, who was still standing behind his screen door, began to curse again and told the officers to leave. Officer Owen informed Woods that they had a warrant for his arrest and that he needed to come outside. Woods refused, even after the officers showed him the NCIC printout and his mugshot. He told the officers, "If you come in here, we'll fuck you up."[10]

Suddenly, Woods turned and ran deeper into the apartment. Officer Chisolm followed Woods from the front, while Officers Collins and Owen entered via the rear door. None of the officers had their weapons drawn. Woods quickly surrendered, asking the men not to spray him with mace. Officer Collins ran to the back door, planning to join Officer Bennett at the front and assist him when the others brought Woods outside. Instead, he heard shuffling behind him, then gunfire.[11]

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9. *Id.* at 5–6.
10. *Id.* at 7.
11. *Id.* at 7–8.

Fernando Belser, the "doorman" at the apartment, testified that the shooter was Woods's roommate, Kerry "Nookie" Spencer, who was armed with an SKS assault rifle.[12] As Officer Chisholm tried to retreat, Spencer shot him. Meanwhile, Woods attempted to escape through the front door. Opening it, Woods called to Spencer, "There's someone else—we got another one right here," and Spencer fired out the front.[13] Meanwhile, though shot, Officer Collins ran to his patrol car for cover, where he radioed a "double aught" call for all possible assistance. He saw Spencer standing in the doorway and shooting in his direction. Several bullets hit his vehicle.[14]

By the time help arrived, the other three officers were dead. Officer Bennett was discovered with a smoking hole in his face, and Officers Owen and Chisolm were found in the apartment. Each had died from multiple gunshot wounds. The officers' bulletproof vests had been pierced, typical of damage sustained by high-powered rifle fire.[15] There was no evidence that any of the officers fired a single shot.[16] The SKS and other weapons were recovered in and around the apartment.

When Woods was located, he was sitting on a nearby porch, apparently "very relaxed." He gave his full name and was found to have two .22 caliber bullets in his

12. R. 776–77. "C." and "R." citations refer to the clerk's record and the trial transcript in *Woods v. State*, CR-05-0448 (Ala. Crim. App.), respectively.
13. R. 777–79.
14. *Woods*, 13 So. 3d at 8.
15. *Id.* at 8, 12–13.
16. Officer Chisholm's gun was still holstered. R. 1006. Officer Collins's gun was shot and damaged in its holster. R. 664. Officer Owens's service revolver was recovered from the house in which Spencer was found. *Woods*, 13 So. 3d at 11. Officer Bennett's Glock was located near his body, fully loaded. *Id.* at 9, 12.

pocket. Spencer was eventually pulled out of a neighbor's attic. Belser testified that their apartment was a drug house and that Woods and Spencer sold mostly crack cocaine to 100–150 customers per day. Belser also testified about the guns kept in the house, including Woods's handgun and Spencer's assault rifle. He confirmed that the officers did not spray Woods with mace and that Spencer opened fire as the officers were taking Woods out of the apartment.[17] Other witnesses testified to Woods and Spencer's escape. According to Michael Scott, a customer of theirs, Woods claimed that he and Spencer "shot their asses."[18]

Woods was hardly a model inmate while awaiting trial. On December 14, he told a deputy sheriff that the deputy was "hiding behind [his] badge just like the other three mother fuckers" and promised to come looking for him if he won his case.[19] In June 2005, another deputy sheriff found a drawing on the wall of Woods's cell:

> The drawing depicts two men shooting firearms. One man is shooting an assault rifle and three flaming skulls are depicted in the blasts from that weapon, and the other man is shooting two handguns. The drawing contains a heading at the top, "NATE $ NOOKIE," and depicts street signs at an intersection of "18th Street and Ensley."[20]

In July, a third deputy sheriff found other concerning items in Woods's cell:

> After obtaining a search warrant, Deputy Crocker seized several items from the bunk where Woods slept. The items included a handwritten document and two copies each of two separate drawings depicting "Nate" and "Nookie" shooting on 18th Street. One of the drawings depicted flaming skulls coming from the blast of what appears to be an assault rifle and the other drawing depicted a police car with many bullet holes

17. *Woods*, 13 So. 3d at 9–10.
18. *Id.* at 11.
19. *Id.* at 14.
20. *Id.*

in it.[21]

The document, an adaptation of "I Drop Bombs Like Hiroshima" by Dr. Dre, was similarly themed; the speaker claimed to "drop pigs like Kerry Spencer."[22]

Woods was charged with four counts of capital murder: three counts of intentionally causing the death of a police officer in the line of duty, and one for killing two or more persons pursuant to one scheme or course of conduct.[23] On October 10, 2005, he was convicted of all charges.[24] The jury recommended 10–2 that Woods be sentenced to death, and after a separate sentencing hearing that December, the trial court adopted the jury's recommendation.[25] The court noted the existence of four aggravating circumstances: (1) Woods knowingly created a great risk of death to many persons, (2) the capital offense was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody, (3) the capital offense was committed to disrupt or hinder the lawful exercise of a government function or the enforcement of laws, and (4) Woods intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct.[26] The Alabama Court of Criminal Appeals affirmed Woods's convictions and sentence in 2007 after a remand for an amended sentencing order.[27] The Alabama Supreme Court ultimately

21. *Id.*
22. *Id.*
23. *Id.* at 4; *see* ALA. CODE §§ 13A-5-40(a)(5), (a)(10).
24. *Woods*, 13 So. 3d at 4.
25. *Id.* at 5.
26. C. 106.
27. *Woods*, 13 So. 3d at 40, 43.

denied Woods's out-of-time appeal in 2009,[28] and this Court denied certiorari.[29]

Through counsel from the Equal Justice Initiative, Woods filed a Rule 32 petition for state postconviction relief on December 30, 2008.[30] He also filed a motion to stay and hold the petition in abeyance pending his pursuit of an out-of-time direct appeal,[31] which was granted in January 2009.[32] In February 2010, new counsel entered notices of appearance,[33] and EJI withdrew.[34] The circuit court summarily dismissed the petition in December 2010.[35] The Court of Criminal Appeals affirmed in April 2016,[36] and the Alabama Supreme denied certiorari.[37]

Having exhausted his state remedies, Woods filed a habeas petition in the Northern District of Alabama on October 27, 2016,[38] and an amended petition three months later.[39] The court appointed J.D. Lloyd as new counsel, and he filed a second amended petition in May 2017.[40] After the State responded, the district court denied

28. *Ex parte Woods*, No. 1071037 (Ala. Aug. 24, 2009).
29. *Woods v. Alabama*, 559 U.S. 942 (2010) (mem.).
30. Vol. 27, Tab #R-58. Volume citations are to the habeas record filed in *Woods v. Stewart*, 2:16-cv-01758-LSC (N.D. Ala.).
31. Vol. 28 at C. 461–65.
32. Vol. 26 at C. 7.
33. Vol. 28 at C. 472–73.
34. Vol. 28 at C. 476–77.
35. Vol. 30, Tab #R-62.
36. *Woods v. State*, CR-10-0695, 2016 WL 1728750 (Ala. Crim. App. Apr. 29, 2016).
37. Vol. 32, Tab #R-70.
38. Petition, *Woods v. Stewart*, 2:16-cv-01758-LSC (N.D. Ala. Oct. 27, 2016), Doc. 1.
39. Amended Petition, *Woods v. Stewart*, 2:16-cv-01758-LSC (N.D. Ala. Feb. 2, 2017), Doc. 7.
40. Second Amended Petition, *Woods v. Stewart*, 2:16-cv-01758-LSC (N.D. Ala. May 30, 2017), Doc. 23.

relief and summarily dismissed the petition in July 2018.[41] Further, the court denied a certificate of appealability.[42] Woods moved the Eleventh Circuit to grant a certificate of appealability, but in February 2019, the Honorable William H. Pryor Jr. denied the motion.[43] This Court denied certiorari on October 7, 2019,[44] thus concluding Woods's conventional appeals.

B. The introduction of nitrogen hypoxia as a method of execution

i. The act and the election period

On March 22, 2018, Governor Kay Ivey signed Alabama Laws Act 2018-353, which made nitrogen hypoxia a statutorily approved method of execution in Alabama. Pursuant to section 15-18-82.1(b)(2) of the Code of Alabama, an inmate whose conviction was final prior to June 1, 2018, had thirty days from that date to inform his or her warden that he was electing to be executed by nitrogen hypoxia. Inmates sentenced after the enactment of the law would have a thirty-day election period from the date that their death sentence became final.

The law—like most state and federal laws—did not include any provision requiring that any particular individual be given special notice of its enactment, nor did it specify how an inmate should make an election beyond stating that it should be "in writing." The ADOC thus did not create a standardized election form for this

41. Memorandum of Opinion, *Woods v. Stewart*, 2:16-cv-01758-LSC (N.D. Ala. Jul. 18, 2018), Doc. 30.
42. *Id.* at 154.
43. *Woods v. Warden Holman CF*, No. 18-14690-P (11th Cir. Feb. 22, 2019).
44. *Woods v. Stewart*, 140 S. Ct. 67 (2019) (mem.).

purpose. Moreover, nothing in the law mandated that the ADOC have a working hypoxia protocol in place at the time that the law took effect.

On June 22, 2018, an attorney for the Federal Defenders for the Middle District of Alabama drafted an election form, which was given to death-row inmates represented by that organization, allegedly on June 26.[45] Respondent Cynthia Stewart, Warden of Holman Correctional Facility, obtained a copy of the form, then directed Captain Jeff Emberton to give every death-row inmate at Holman a copy of the form and an envelope in which he could return it to the warden, should he decide to make the election.[46] Captain Emberton did as instructed before the end of June. The form stated that the inmate's election was made pursuant to Act 2018-353, and its date blank read, "Done this ___ day of June, 2018."[47] Fifty Alabama inmates ultimately elected nitrogen hypoxia, including inmates not represented by the Federal Defenders. Woods was not among the inmates who made the election, though he was represented at that time by his current local counsel.

ii. *In re: Alabama Lethal Injection Protocol Litigation*

At the time that nitrogen hypoxia was adopted, the Federal Defenders were involved in prolonged multi-plaintiff § 1983 litigation concerning the ADOC's lethal injection protocol, ultimately captioned "*In re: Alabama Lethal Injection Protocol*

45. Affidavit of John A. Palombi at 2, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Mar. 29, 2019), Doc. 29-3.
46. Affidavit of Captain Jeff Emberton at 1, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Mar. 29, 2019), Doc. 19-1.
47. Ex. A, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Mar. 29, 2019), Doc. 29-3.

Litigation."[48] In their final amended complaint, the plaintiffs alleged nitrogen asphyxiation as an alternative to the midazolam protocol.[49] In that matter, the State did not offer terms to these inmates or to their counsel. Rather, on July 10, 2018, the parties jointly moved to dismiss the litigation as moot because the plaintiffs had made a timely election of nitrogen hypoxia,[50] and the motion was granted.[51]

iii. The *Price* litigation and nitrogen hypoxia's "availability"

Holman inmate Christopher Price was among those who, like Woods, neglected to make a timely election.[52] The State moved the Alabama Supreme Court to set Price's execution date on January 11, 2019, and Price alleged that his counsel only learned of the election opportunity on January 12.[53] On January 27, Price sent a letter to Warden Stewart attempting to elect hypoxia, but the belated request was denied.[54] Price's counsel contacted counsel for the State on February 4 and was likewise informed that the election period had ended.[55] Thus stymied, Price filed a § 1983 complaint in the Southern District of Alabama on February 8, nearly one month after

48. 2:12-cv-000316-WKW-CSC (M.D. Ala.).
49. Amended Complaint at 32–33, *In re: Alabama Lethal Injection Protocol Litigation*, 2:12-cv-000316-WKW-CSC (M.D. Ala. Nov. 29, 2017), Doc. 348.
50. Joint Motion to Dismiss, *In re: Alabama Lethal Injection Protocol Litigation*, 2:12-cv-00316-WKW-CSC (M.D. Ala. July 10, 2018), Doc. 427.
51. Order, *In re: Alabama Lethal Injection Protocol Litigation*, 2:12-cv-00316-WKW-CSC (M.D. Ala. July 11, 2018), Doc. 429.
52. *Price v. Comm'r, Ala. Dep't of Corrs.*, 752 F. App'x 701, 703 n.3 (11th Cir. 2018).
53. Complaint ¶ 32, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Feb. 8, 2019), Doc. 1.
54. Ex. C, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Mar. 4, 2019), Doc. 19-3.
55. Ex. D, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Mar. 4, 2019), Doc. 19-4.

the State moved for an execution date, alleging an equal protection violation because he was not allowed to elect hypoxia.[56] On March 1, the Alabama Supreme Court set Price's execution for April 11.[57]

As Price's litigation was ongoing in the district court, this Court announced its decision in *Bucklew v. Precythe*,[58] a method-of-execution challenge in which a Missouri inmate named nitrogen hypoxia as his alternative without proving its ready availability. In that case, the Court made clear that under *Baze v. Rees*[59] and *Glossip v. Gross*,[60] simply naming an alternative method of execution, without more, is insufficient to satisfy an inmate's burden:

> *First*, an inmate must show that his proposed alternative method is not just theoretically "'feasible'" but also "'readily implemented.'" *Glossip*, 135 S. Ct., at 2737–38. This means the inmate's proposal must be sufficiently detailed to permit a finding that the State could carry it out "relatively easily and reasonably quickly." *McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017); *Arthur v. Comm'r, Ala. Dep't of Corrs.*, 840 F.3d 1268, 1300 (11th Cir. 2016). Mr. Bucklew's bare-bones proposal falls well short of that standard. He has presented no evidence on essential questions like how nitrogen gas should be administered (using a gas chamber, a tent, a hood, a mask, or some other delivery device); in what concentration (pure nitrogen or some mixture of gases); how quickly and for how long it should be introduced; or how the State might ensure the safety of the execution team, including protecting them against the risk of gas leaks. Instead of presenting the State with a readily implemented alternative method, Mr. Bucklew (and the principal dissent) point to reports from correctional authorities in other States indicating that additional study is needed to develop a protocol for execution by nitrogen hypoxia. . . . That is a proposal for more

56. Complaint ¶¶ 87–93, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Feb. 8, 2019), Doc. 1.
57. Ex. E, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Mar. 4, 2019), Doc. 19-5.
58. 132 S. Ct. 1112 (2019).
59. 553 U.S. 35 (2008).
60. 135 S. Ct. 2726 (2015).

> research, not the readily implemented alternative that *Baze* and *Glossip* require.[61]

Price, like Bucklew, failed to make this critical showing. He pointed to nitrogen hypoxia as a statutory method of execution, but the ADOC did not have a hypoxia protocol at that time, and he failed to offer the ADOC a protocol that could be readily used. Instead, Price noted that Oklahoma had conducted preliminary research on the issue[62] and showed that his counsel's associate was able to purchase a tank of nitrogen in Massachusetts.[63] Not until he was denied relief and filed a motion for reconsideration did Price offer a protocol of sorts, one purportedly based on two books published by right-to-die organizations.[64] Aside from the fact that this proposed protocol was offered only six days before Price's scheduled execution, Price still failed to show that it was an available method for the ADOC to employ. His claim that the necessary components "can be purchased from commercial sources, no questions asked (including from sources such as Amazon.com)"[65] was belied by the fact that he failed to identify a commercial source willing to sell the ADOC a so-called "exit bag," a key component of his protocol.

On April 5, the district court, citing *Bucklew*, found that Price had failed to

61. *Bucklew*, 132 S. Ct. at 1129 (citations edited).
62. Affidavit of Aaron M. Katz, Ex. A, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Mar. 29, 2019), Doc. 29-2.
63. Affidavit of Sean B. Kennedy, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Mar. 29, 2019), Doc. 29-4.
64. Motion for Relief from Judgment and for Reconsideration at 4 & n.2, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Apr. 5, 2019), Doc. 33.
65. *Id.* at 5.

carry his burden of proving that nitrogen hypoxia was readily available to the ADOC.[66] The court remained unpersuaded in its order of April 6 after Price moved for reconsideration, holding that Price failed to show that his proposed protocol was readily implemented by the ADOC.[67]

But the Eleventh Circuit disagreed with that analysis. The panel denied a stay because Price could not show a substantial likelihood of success; indeed, Price had relied upon a draft report from East Central University clearly marked "Do Not Cite." However, the panel held that hypoxia was available to Price—an inquiry this Court has always treated as a factual matter—solely because the method of execution was authorized by statute. In brief, the panel believed that *Bucklew* was distinguishable because hypoxia was not contemplated by statute in Missouri, whereas it was in Alabama.[68] The problem with this reasoning is that the distinction it drew was no distinction at all. As Justice Breyer noted, "Bucklew identified as an alternative method of execution the use of nitrogen hypoxia, which is a form of execution by lethal gas. **Missouri law permits the use of this method of execution**."[69] The panel's decision, therefore, was based on overlooked facts that led it to misinterpret *Bucklew*.

Perhaps unaware of the full facts of Bucklew's case and how similar it was to

66. Order at 20, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Apr. 5, 2019), Doc. 32.
67. Order at 2, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Apr. 6, 2019), Doc. 35 (internal citation edited).
68. *Price v. Comm'r, Ala. Dep't of Corrs.*, 920 F.3d 1317, 1326–29 (11th Cir. 2019).
69. *Bucklew*, 139 S. Ct. at 1142 (Breyer, J., dissenting) (citing MO. REV. STAT. § 546.720 (2002)) (emphasis added).

Price's—an understandable position, given the rushed nature of last-minute execution litigation—the Eleventh Circuit concluded that "nitrogen hypoxia is an available method of execution for [Price] because the Alabama legislature has authorized it."[70] Departing from *Bucklew*, the panel held that "[i]f a State adopts a particular method of execution—as the State of Alabama did in March 2018—it thereby concedes that the method of execution is available to its inmates."[71] But as the facts and reasoning of *Bucklew* make clear, statutory authorization alone does not make a method of execution "available" for *Baze* and *Glossip*'s purposes. Bucklew could not satisfy this requirement, and neither could Price.[72]

Price avoided his scheduled execution on April 11 because he buried the courts in last-minute filings, the district court improvidently granted a stay without jurisdiction, and the Eleventh Circuit declined to rule on that question on mere hours' notice. The Court vacated the stay at approximately 1:30 AM on April 12, after the execution warrant had expired.[73] In vacating, the Court explained that Price did not make a timely hypoxia election in June 2018, though he was aware of the election period, that he waited until February 2019 to initiate his § 1983 action, and that he filed additional evidence on his execution day.[74] The Alabama Supreme Court reset

70. *Price*, 920 F.3d at 1326.
71. *Id.* at 1327–28.
72. *Id.* at 1328 ("We agree that Price did not come forward with sufficient detail about how the State could implement nitrogen hypoxia to satisfy *Bucklew*'s requirement where the inmate proposes a new method of execution."). While the State moved for rehearing en banc in *Price*, the Eleventh Circuit denied the petition on May 30, 2019, the day that Price was ultimately executed.
73. *Dunn v. Price*, 139 S. Ct. 1312 (2019).
74. *Id.* at 1312.

Price's execution for May 30, and he was ultimately executed by lethal injection.

Justice Thomas, joined by Justices Alito and Gorsuch, filed a concurrence to the denial of certiorari in *another of Price's cases* that May explaining what went wrong in April, how Price had unjustifiably delayed, and how he had failed to show a substantial likelihood of success on the merits. The concurrence concluded:

> Petitioner's strategy is no secret, for it is the same strategy adopted by many death-row inmates with an impending execution: bring last-minute claims that will delay the execution, no matter how groundless. The proper response to this maneuvering is to deny meritless requests expeditiously. The Court instead failed to issue an order before the expiration of the warrant at midnight, forcing the State to "cal[l] off" the execution. *Price*, 139 S. Ct. at 1314 (Breyer, J., dissenting). To the extent the Court's failure to issue a timely order was attributable to our own dallying, such delay both rewards gamesmanship and threatens to make last-minute stay applications the norm instead of the exception. *See Bucklew*, 139 S. Ct. at 1114.[75]

C. Woods's pending execution and § 1983 challenge

There is no dispute that Woods did not elect nitrogen hypoxia during the June 2018 election period. Nor is there any dispute that Woods made no attempt to elect hypoxia during the *Price* litigation in 2019. And—borrowing from Woods's stay motion[76]—even after the State made clear on August 2, 2019, that it would not move forward with the execution of Jarrod Taylor because Taylor had elected nitrogen hypoxia, Woods did not attempt to elect hypoxia. Instead, he waited.

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75. *Price v. Dunn*, 139 S. Ct. at 1540 (Thomas, J., concurring in denial of certiorari) (citations edited).
76. App. 1–3.

On October 29, 2019, the State moved the Alabama Supreme Court to set Woods's execution date, setting forth the facts of his crime and the resolution of his appeals.[77] Nearly three months later, on January 23, 2020, Woods filed a § 1983 complaint, the subject of the present litigation. Therein, he did not actually attempt to elect hypoxia—rather, he waffled, asking the district court to force Respondents to turn over the hypoxia protocol and give him an additional thirty days to mull it over with counsel before deciding whether he would like to make the election.[78]

On January 30, one week after Woods filed his complaint, the Alabama Supreme Court set his execution for March 5.[79] The next morning, Woods finally attempted to elect hypoxia. According to Jennifer Parker, an administrative support assistant at Holman Correctional Facility:

> On Friday, January 31, 2020, I, Jennifer R. Parker, notarized an ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA form for inmate Nathaniel Woods B/Z-721. The form was dated for June 2018. I advised inmate Woods that I would not alter the date of the form but I would notarize that I witnessed his signature on the form dated for today's date, January 31, 2020.[80]

Respondents filed a motion to dismiss and, in the alternative, motion for summary judgment on February 6.[81] After unsuccessfully moving the Alabama Supreme Court for a stay of execution on February 11, Woods countered with a cross-

77. Doc. 19-1. Unless otherwise specified, document numbers refer to the ECF filings in the underlying district court litigation.
78. Doc. 1 at 23–24 (Prayer for Relief, parts (iv)–(v)).
79. Doc. 19-2.
80. Doc. 19-3.
81. Doc. 19.

motion for summary judgment on February 13,[82] then finally asked the district court for a stay of execution on February 24.[83] The court held a hearing on all pending motions on February 26, then issued an order on March 2 (1) granting Respondents' motion for summary judgment, (2) denying Woods's cross-motion, (3) dismissing Woods's state-law claims, (4) denying Woods's motion for stay of execution, and (5) dismissing the claims against Respondents in their individual capacities.[84]

Woods filed notice of appeal the next morning, followed by an emergency motion for stay of execution. On March 4, the Eleventh Circuit Court of Appeals denied a stay for two reasons: (1) equity weighed against a stay, as Woods's delay was unjustified, and (2) Woods failed to show a substantial likelihood of success on the merits of his claims.[85]

The present petition for writ of certiorari and application for stay of execution followed.

82. Doc. 22.
83. Doc. 29.
84. Pet. App'x Ex. 2.
85. Pet. App'x Ex. 1.

REASONS THE PETITION SHOULD BE DENIED

As two courts have now held, Woods has unduly delayed in bringing his claims and seeking a stay of execution, and he has failed to show a substantial likelihood of success on the merits sufficient to warrant a stay. This Court should likewise deny certiorari and a stay of execution.

Woods failed to show a genuine issue of material fact as to his constitutional claims. Concerning his Eighth Amendment claims, Woods has not been "targeted" for execution, and the State has not set his execution in an arbitrary, capricious, or cruel and unusual fashion. Concerning his equal protection claim, Woods was given the same opportunity to elect nitrogen hypoxia as every other inmate, he is not now similarly situated to those inmates who made timely elections, and the State has a rational basis for limiting the time in which an inmate may elect hypoxia. Concerning his due process claim, Woods has not been unconstitutionally deprived of a life or liberty interest without due process of law. Finally, the district court was correct to decline to exercise supplemental jurisdiction over Woods's state-law claims.

The lower courts' analysis of these claims is sound. Therefore, Woods's petition and last-minute stay request should be denied.

I. The Court should deny certiorari as to Woods's Eighth Amendment claims.

Woods presents the Court with two grounds for certiorari concerning his Eighth Amendment claims: the Court should "decide whether the Eighth Amendment

applies to how the State carries out the death penalty,"[86] and the Court should "decide the bounds of discretion in the context of death penalty administration."[87] Neither claim is cert-worthy.

In the district court, Woods alleged that he was being "targeted" for execution because he did not elect hypoxia and that the State had abandoned its customary method of moving for execution dates—i.e., requesting a date once an inmate finished his appeals—because electing inmates who had completed their appeals had not been set for execution. He relied on Justice O'Connor's concurrence in *Caldwell v. Mississippi*, which states in relevant part:

> I believe the prosecutor's misleading emphasis on appellate review misinformed the jury concerning the finality of its decision, thereby creating an unacceptable risk that "the death penalty [may have been] meted out arbitrarily or capriciously," *California v. Ramos,* 463 U.S. 992, 999 (1983), or through "whim . . . or mistake," *Eddings v. Oklahoma,* 455 U.S. 104, 118 (1982) (concurring opinion).[88]

The district court correctly explained that *Caldwell* was inapposite to Woods's case:

> Caldwell concerned the jury's recommendation that the defendant be sentenced to death; it did not concern the method of execution. The imposition of a death sentence is not synonymous with the State's performance of a court-imposed death sentence. Woods confuses these two distinctly different acts, and consequently, *Caldwell* provides no support for Woods' argument. His reliance on *Caldwell* is misplaced, as is his reliance on *Gregg v. Georgia*, 428 U.S. 153 (1976), which also concerned the imposition of a death sentence, not the execution of a death sentence.[89]

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86. Pet. 11–12.
87. Pet. 12–14.
88. 472 U.S. 320, 343 (1983) (O'Connor, J., concurring in part) (citations edited).
89. Pet. App'x Ex. 2 at 35.

Moreover, the district court correctly rejected Woods's targeting claim because the "underlying facts" show that Respondents' actions "cannot reasonably be categorized as targeting."[90] The State is unable to execute any hypoxia-electing inmate until such time as a hypoxia protocol is developed (and, presumably, litigated). Respondents were not obligated to disclose the status of the hypoxia protocol during the election period, and as the district court noted, "Woods concedes that a determination that the State did not improperly withhold information defeats his Eighth Amendment targeting claim."[91] That court concluded:

> [T]he undisputed evidence shows that Woods is not being targeted for execution because he did not elect nitrogen hypoxia. Rather, the undisputed evidence shows that, on October 29, 2019, the State requested an execution date for Woods because he had exhausted his appeals, and because the State has the means by which to perform lethal injection executions, the default method of execution absent an election of an alternative method. After Woods exhausted his appeals, there was no legal impediment to prohibit the State from moving forward to seek his execution date. Had Woods elected nitrogen hypoxia, the State, logically, could not have requested an execution date for him because there is no nitrogen hypoxia protocol. But since Woods did not elect nitrogen hypoxia, he remains subject to execution by Alabama's default execution method, lethal injection. The State's conduct in seeking Woods' execution date is not constitutionally suspect.[92]

The Eleventh Circuit agreed with the district court's analysis as to Wood's targeting claim:

> Woods argues in his emergency motion for a stay that he "is likely to succeed in showing the State has violated his Eighth Amendment rights by targeting him for speedier execution" based on his refusal to select nitrogen hypoxia. *See Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring in part and concurring in the judgment). But

90. Pet. App'x Ex. 2 at 35.
91. *Id.* at 36.
92. *Id.*

> he has failed to establish a substantial likelihood of success on this claim, as the district court ably explained in rejecting this claim. The district court correctly rejected Woods's attempt to equate his situation—the *carrying out* of his death sentence—with the *imposition* of a death sentence.[93]

Woods's first ground for certiorari stretches the Eleventh Circuit's holding far beyond what the court actually stated and injects the specter of inmates being marched off to execution solely based on race.[94] No one—not Respondents, not the district court, and not the Eleventh Circuit—suggests that such a method of setting execution dates would be constitutional. But what provision of the Constitution is violated when the State schedules executions it can carry out before those executions it cannot presently carry out? There is nothing arbitrary, much less cruel and unusual, about the State seeking to execute an inmate via his chosen method of execution once he is eligible for his sentence to be carried out, and Woods's claims of arbitrariness and targeting ignore the fact that he is not similarly situated to inmates who elected hypoxia. Once the ADOC has finalized a hypoxia protocol, the State will move to set execution dates for those electing inmates who, like Woods, have exhausted their appeals. Thus, this claim is not worthy of certiorari.

In Woods's second ground for certiorari, he would have this Court dictate to the states the order in which they must seek to execute their inmates. Such a step would constitute an unwarranted intrusion into the states' abilities to manage their own inmate populations and carry out sentences. While Woods cites *Ford v.*

93. Pet. App'x Ex. 1 at 13–14.
94. Pet. 11.

Wainwright[95] here, that case offers no support for his proposition. There, in a case concerning the execution of a potentially insane inmate, the Court stated:

> Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being. Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding.[96]

In Woods's case, the "further fact" upon which the timing of his execution relies is that he did not elect hypoxia, setting him apart from those inmates who did, and who cannot be executed until the protocol is finalized. That Woods's execution has been set now instead of after inmates "ahead of him" who cannot be executed until the hypoxia protocol is ready does not fall afoul of the Eighth Amendment. Thus, this claim is not worthy of certiorari.

II. The Court should deny certiorari as to Woods's Fourteenth Amendment claims.

Woods's third ground for certiorari is largely a recitation of the due process and equal protection claims he presented to the lower courts.[97] For the reasons that follow, this claim is not cert-worthy.

95. 477 U.S. 399 (1986).
96. *Id.* at 411–12.
97. Pet. 14–19.

A. The Court should deny certiorari as to Woods's due process claim.

The Court should deny certiorari because the district court correctly denied Woods's cross-motion for summary judgment and motion for stay of execution as to his due process claim. Here, Woods failed to show the unconstitutional deprivation of a life or liberty interest and failed to show a substantial likelihood of success on the merits of this claim.

Below, Woods argued that he was denied due process as to three interests: (1) his "residual life interest," (2) his interest under the Eighth Amendment to be free from an unconstitutional death, and (3) his interest, supposedly created by the amendment to the Alabama statute, in selecting his method of execution. In the Eleventh Circuit, "a § 1983 claim alleging a denial of procedural due process requires proof of three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally inadequate process."[98] The district court found that Woods failed to show that his rights as to any of these interests, or as to any liberty interest, had been violated, either under *Grayden v. Rhodes* or under *Mathews v. Eldridge*.[99]

98. *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003).
99. 424 U.S. 319, 335 (1976) (private interest affected by official action, risk of erroneous deprivation and value of additional/substitute safeguards, and government's interest).

i. Woods was not denied due process as to a residual life interest.

Woods contends that although he has been sentenced to death, he has a "residual life interest"[100] as to which he had been denied due process because Respondents did not inform him during the election period that the hypoxia protocol had not yet been finalized.[101]

The district court disagreed, finding *Zink v. Lombardi*,[102] a method-of-execution challenge in the Eighth Circuit, instructive. In *Zink*, the plaintiffs first alleged that their due process rights had been violated because they had not been given adequate notice of the lethal injection methods, and then, citing *Mathews*, they claimed that they had a life interest entitling them "to notice of material information about the lethal drug with which they will be executed."[103] The Eighth Circuit held that *Mathews* did not apply and explained, "The prisoners in this case already have received due process for the deprivation of their life interest: They were convicted and sentenced to death after a trial in Missouri court, and their convictions and sentences were upheld on appeal."[104]

Likewise, the district court correctly rejected Woods's "residual life interest" claim:

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100. *Ohio Adult Parole Auth. v. Woodward*, 523 U.S. 272, 281 (1998) (Rehnquist, C.J.) ("We agree that respondent maintains a residual life interest, *e.g.*, in not being summarily executed by prison guards.").
101. Pet. 15–16.
102. 783 F.3d 1089 (8th Cir. 2015).
103. *Id.* at 1108.
104. *Id.* at 1109.

> Here, as in *Zink*, Woods has received all the process that he is due for the deprivation of his life interest: he was convicted and sentenced to death after a trial in state court, and his conviction and sentence were upheld on appeal. In fact, Woods received additional process when, under the undisputed facts, he filed an opposition to the Alabama Attorney General's motion to set his execution date, and when he petitioned the Alabama Supreme Court to temporarily stay his execution.[105]

While a death-sentenced inmate is not "deprived of all interest in his life before his execution,"[106] he has no right to determine the time and date of his execution once there is no longer a judicial impediment to his sentence being carried out. He may have an interest "in not being summarily executed by prison guards,"[107] but murder in his cell is a far cry from the State exercising its lawful authority to execute him when his appeals are exhausted. This is the case in the present matter: Woods has no private interest being affected by an official action because his "residual life interest" does not extend so far as to prohibit the State from employing a constitutional method of execution to carry out his lawfully imposed sentence. Thus, certiorari should be denied.

ii. Woods has not established a risk of erroneous deprivation.

Woods alleges that he could not protect his residual life interest without sufficient information about the development of the hypoxia protocol.[108] But there was no erroneous deprivation in this matter: as the district court noted, "death row

105. Pet. App'x Ex. 2 at 25.
106. *Ohio Adult Parole Auth.*, 523 U.S. at 289 (O'Connor, J., concurring in part).
107. *Id.* at 281 (plurality opinion).
108. Pet. 16–17.

inmates do not have a due process right to disclosure of a state's execution protocol because there is no cognizable liberty interest in such information."[109]

The district court looked to the Eleventh Circuit's decision in *Price* for guidance. While Price raised an equal protection claim instead of a due process claim, he contended that the State failed to sufficiently explain his rights in the election form and that he was denied equal protection because many of the electing inmates were represented by the Federal Defenders and received an explanation of their rights from their counsel.[110] The Eleventh Circuit rejected Price's claim, explaining:

> Price was represented by counsel, so any doubts Price had about the form could have been resolved by consulting with his attorney. . . . Price takes issue with the fact that most of the inmates that timely elected nitrogen hypoxia were represented by the Federal Public Defender's Office and that they were given an explanation of their rights by that office before receiving the form. But as we have noted, Price was also represented by counsel, and he could have asked for an explanation of the form.[111]

In other words, just because other inmates had allegedly been given better information by their *counsel* did not mean that the *State* had treated them unequally.[112]

The district court found the Eleventh Circuit's analysis applicable to Woods's due process claim:

> Like the plaintiff in *Price*, Woods was represented by counsel on March 22, 2018 when the Governor of Alabama signed into law an amendment to the state's execution statute adding nitrogen hypoxia as an alterative method of execution. He was represented by counsel on June 1, 2018

109. Pet. App'x Ex. 2 at 27.
110. *Price*, 920 F.3d at 1324.
111. *Id.* at 1325.
112. *Id.*

> when the law became effective. He was represented by counsel during the entirety of the thirty-day election period. And like the *Price* plaintiff, Woods could have contacted his attorney to discuss doubts about or seek explanation of the election form or the implications of the election. Indeed, Woods' attorney could have reached out to him to inform him of his rights under the newly passed election statute and resolve any issues surrounding the election form.
>
> Because no communication occurred between Woods and his attorney, Woods now argues that it was the State's obligation, under due process considerations, to provide him with the "vital information necessary to make a knowing and informed decision surrounding his execution." However, any explanation of rights or legal consultation should have come from Woods' attorney, not the State. *See Price v. Dunn*, 385 F. Supp. 3d 1215, 1229 (S.D. Ala. 2019) (finding that the plaintiff "fail[ed] to state an equal protection claim based on the assertion that he did not receive an adequate explanation of his rights in conjunction with receiving the waiver form.").[113]

The district court also rejected Woods's claim that Respondents knew during the election period all of the information he allegedly needed to make an informed decision. In June 2018, the State did not know that Woods would exhaust his appeals in October 2019, that the hypoxia protocol would not yet be finalized, or that the ADOC would be still able to acquire the drugs necessary to carry out lethal injection.[114] The court concluded, "As a matter of logic, the State does not have a due process obligation to disclose information that it does not, and cannot, reasonably know."[115] The Eleventh Circuit agreed that Woods failed to establish a substantial likelihood of success on this claim.[116] As Woods has not established an erroneous deprivation, certiorari should be denied.

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113. Pet. App'x Ex. 2 at 31 (internal citation omitted).
114. *Id.* at 31–33.
115. *Id.* at 33.
116. Pet. App'x Ex. 1 at 9–11.

B. The Court should deny certiorari as to Woods's equal protection claim.

The Court should deny certiorari because the district court correctly denied Woods's cross-motion for summary judgment and motion for stay of execution as to his equal protection claim. Woods failed to demonstrate that there is a genuine dispute of a material fact suggesting that he was treated any differently from his fellow Holman death-row inmates and failed to show a substantial likelihood of success on the merits of this claim.

Woods argued that his right to equal protection was violated in two ways: (1) the State set his execution while other inmates who had exhausted their appeals (but had also elected hypoxia) had not had their executions set, and (2) the State treated him differently than the inmates in *In re: Alabama Lethal Injection Protocol Litigation*. "To prevail on an equal-protection claim, a plaintiff must demonstrate that (1) he is similarly situated with other persons who receive more favorable treatment, and (2) the defendants acted with discriminatory intent based on some constitutionally protected interest, such as race."[117] Woods did not make this showing, and certiorari is unwarranted.

i. Woods is not similarly situated to inmates who elected hypoxia.

Woods contends that he has been subject to disparate treatment from similarly

117. *Jones v. Ray*, 279 F.3d 944, 946–47 (11th Cir. 2001); *e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

situated inmates.[118] But Woods and other non-electing inmates are not similarly situated to those inmates who made a timely hypoxia election. Discussing the Eleventh Circuit's findings in the *Price* litigation, the district court explained:

> *Price* arose from facts similar to those in this case in that inmates were given a thirty-day period in which to elect nitrogen hypoxia as a method of execution, but the *Price* plaintiff did not so-elect. There, the plaintiff subsequently brought a claim for violation of equal protection based on the theory that he was treated differently from inmates who were allowed to elect nitrogen hypoxia as a method of execution because their election was timely. The Eleventh Circuit concluded that the plaintiff had not shown that he was similarly situated to inmates who made a timely election of nitrogen hypoxia, and also that even if he was similarly situated to other inmates, he could not show that he was treated differently because every inmate had the same period of time in which to make the election. The court expressly held that "[b]ecause Price did not timely elect the new protocol, he is not similarly situated in all material respects to the inmates who did make such an election within the thirty-day timeframe." The court noted that the plaintiff did not contend that he did not receive an election form or was not given the option to make the same election. The court reasoned that while the plaintiff took issue with the fact that most of the inmates who elected nitrogen hypoxia were represented by the Federal Defender's Office, Price also was represented by counsel and that actions by the Federal Defender's Office were not actions of the State. The Eleventh Circuit further held that a rational basis existed for the thirty-day election period; namely, the efficient and orderly use of state resources in planning and preparing for executions.[119]

While Woods argued that there was a material difference between his case and Price's because the Eleventh Circuit "did not have before it the State's custom to schedule executions based on whether the inmate had chosen nitrogen hypoxia,"[120] the district court was unpersuaded, writing, "The additional fact of exhaustion of

118. Pet. 18–19.
119. Pet. App'x Ex. 2 at 15–16 (citing *Price*, 920 F.3d at 1323–25) (internal citations omitted).
120. *Id.* at 16.

appeals, which Woods and an inmate who elected nitrogen hypoxia may have in common, does not remove the material difference recognized in *Price* of timely election, or non-election, of nitrogen hypoxia for purposes of State action in carrying out executions."[121] Thus, the district court correctly found that Woods was not similarly situated to electing inmates and had not been denied equal protection.

The district court also correctly denied summary judgment as to Woods's claim that he had been treated differently from the inmates in *In re: Alabama Lethal Injection Protocol Litigation*. Woods's evidence as to this claim included an article from *The Montgomery Advertiser* and an affidavit from the *Price* litigation by John Palombi, who had been counsel for the plaintiffs in *In re: Alabama Lethal Injection Protocol Litigation*. As the district court explained, the newspaper article was not "persuasive evidence of State action to facilitate legal advice,"[122] and Mr. Palombi's affidavit merely stated that he was allowed to meet with his clients at Holman Correctional Facility on June 26, 2018, not that the State offered special facilitation for this meeting.[123] The court concluded:

> There is no genuine issue of fact as to whether the State facilitated meetings between certain inmates and their attorneys in order for those attorneys to provide information about the nitrogen hypoxia election. Before the Court, instead, are the undisputed facts that Woods was represented by, and was not prevented by the State from conferring with, counsel. During oral argument, counsel for Woods intimated that an attorney meeting with a group of inmate-clients was a deviation from prison rules. Even assuming that there is a question of fact as to that specific departure from the prison rules, such question would not be of a material fact, because the mere fact that an attorney met with multiple

121. *Id.* at 17 (citing *Price*, 920 F.3d at 1325).
122. *Id.* at 19 (citing *Macuba v. Deboer*, 193 F.3d 1316, 1323 (11th Cir. 1999)).
123. *Id.* at 19–20; *see* Doc. 22-1 at 3.

> clients would not undermine the undisputed fact that Woods also had access to his own attorney. As in *Price*, Woods could have asked for an explanation from his attorney of the election form. Therefore, even accepting as fact that the attorneys of the Federal Defender's Office met with multiple clients at the prison while attempting to resolve the three-drug protocol litigation, because it is undisputed that Woods also could have consulted with his attorney, there is no genuine issue of fact as to whether Woods was treated differently *through State action* from other inmates in the disclosure of information about nitrogen hypoxia.[124]

Thus, the district court correctly granted summary judgment to Respondents, denied summary judgment to Woods, and denied Woods's motion for stay of execution as to his equal protection claim, and the Eleventh Circuit correctly denied a stay. This Court should deny certiorari.

ii. Rational basis scrutiny is appropriate.

Woods alleges that the lower courts should have applied strict scrutiny in this matter.[125] But as the district court found, rational basis was the appropriate standard, and the State had a rational basis for its thirty-day election period. Noting the similarity between the thirty-day period challenged in *Price* and Woods's claim challenging "the State's custom of setting executions of inmates by considering whether appeals have been exhausted and also considering whether the inmate elected nitrogen hypoxia as a method of execution,"[126] the court held that rational basis scrutiny applied, just as it did in *Price*. The court concluded, "[T]he rational basis test is met by the State's interest, articulated at oral argument and in brief, in

124. Pet. App'x Ex. 2 at 21–22 (internal citations and footnote omitted).
125. Pet. 19.
126. Pet. App'x Ex. 2 at 18.

carrying out executions required by state law as expeditiously and fiscally responsible as possible."[127]

As Woods is not similarly situated to electing inmates, has not been erroneously deprived of information that the State was obligated to disclose, and cannot show a violation of his right to equal protection, certiorari is unwarranted.

III. Woods's emergency motion for stay of execution is due to be denied.

As this Court has repeatedly explained, "a stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts."[128] Therefore, "inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits."[129] Further, "[a] court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'"[130]

Woods is not entitled to a stay of execution. The district court and the Eleventh Circuit correctly found that he failed to show a substantial likelihood of success on the merits as to his claims and that his motions for stay were untimely. As the Court

127. *Id.* (internal citation omitted).
128. *Hill*, 547 U.S. at 584.
129. *Id.*
130. *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)).

set forth last year in *Bucklew*:

> Last-minute stays should be the extreme exception, not the norm, and "the last-minute nature of an application" that "could have been brought" earlier, or "an applicant's attempt at manipulation," "may be grounds for denial of a stay." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (internal quotation marks omitted). So, for example, we have vacated a stay entered by a lower court as an abuse of discretion where the inmate waited to bring an available claim until just 10 days before his scheduled execution for a murder he had committed 24 years earlier. *See Dunn* v. *Ray*, 139 S. Ct. 661 (2019). If litigation is allowed to proceed, federal courts "can and should" protect settled state judgments from "undue interference" by invoking their "equitable powers" to dismiss or curtail suits that are pursued in a "dilatory" fashion or based on "speculative" theories. *Hill*, 547 U.S. at 584–85.[131]

Woods provides a textbook example of the sort of last-minute challenge against which the Court cautioned. He did not initiate his § 1983 lawsuit until January 2020, nearly three months after the State moved for his execution date, and then he waited *another month still* (until February 24) to request a stay from the district court. Setting forth all the opportunities Woods had to make a timelier request for a stay of execution, the district court held, "Woods has not surmounted the 'strong equitable presumption' against granting a stay and has engaged in inexcusable delay, which is grounds for this Court to deny equitable relief."[132]

Considering the factors a movant must satisfy for a stay to issue—that "(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; *and* (4) if issued, the injunction would not be adverse to the public

131. 139 S. Ct. at 1134 (citations edited, footnote omitted).
132. Pet. App'x Ex. 2 at 45 (quoting *Hill*, 547 U.S. at 584).

interest"[133]—the district court found that Woods had not carried his burden of persuasion. He failed to show a substantial likelihood of success on the merits, as the court granted summary judgment to Respondents on his constitutional claims and declined to exercise jurisdiction over his state-law claims. Balancing his meritless claims and his untimeliness against the State's "strong interest in . . . seeing lawfully imposed sentences carried out in a timely manner,"[134] the district court correctly found that the equities weighed against the issuance of a stay. The Eleventh Circuit agreed.[135]

Here, the rights of the victims of Woods's crime, the State, and the public interest at large heavily outweigh Woods's request for a stay. Carrying out Woods's lawful sentence pursuant to a state conviction "acquires an added moral dimension" because his postconviction proceedings have run their course.[136] Woods has been on death row for more than fifteen years for a crime he committed in 2004. His actions led to the deaths of three police officers in the line of duty. His conviction and sentence are valid, and a competent state court with jurisdiction over his case properly set his execution date according to Alabama law.

Woods's emergency motion for stay of execution offers this Court nothing that was not presented to the district court and the Eleventh Circuit. The lower courts' analyses are thorough and sound. And as "[this] Court . . . reiterated . . . three times

133. *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016) (citations omitted).
134. *Ledford v. Comm'r, Ga. Dep't of Corrs.*, 856 F.3d 1312, 1319 (11th Cir. 2017).
135. Pet. App'x Ex. 1 at 7–9.
136. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

[last] year," courts should apply "a 'strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'"[137] As the district court correctly denied a stay, so too should this Court strongly consider Alabama's interest in enforcing its criminal judgment and deny Woods's application for stay.

CONCLUSION

This Court should deny certiorari and the application for stay of execution.

Respectfully submitted,

STEVE MARSHALL
Alabama Attorney General

Edmund G. LaCour Jr.
Solicitor General

/s/ Lauren A. Simpson
Lauren A. Simpson
Assistant Attorney General
*Counsel of Record

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Lauren.Simpson@AlabamaAG.gov

137. *Long v. Sec'y, Dep't of Corr.*, 924 F.3d 1171, 1176 (11th Cir.), *cert. denied sub nom. Long v. Inch*, 139 S. Ct. 2635 (2019) (quoting *Nelson*, 541 U.S. at 650).