No. 22-580

In The
Supreme Court of the United States

JOHN Q. HAMM, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

KENNETH EUGENE SMITH,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

In 2018, Alabama authorized nitrogen hypoxia as a method of execution and made it immediately available to all then-condemned people and to all people condemned after the effective date of the statute. *See* Ala. Code § 15-18-82.1(b)(2). At least 48 condemned people in Alabama are slated to be executed by nitrogen hypoxia. *See Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019). Alabama remains publicly committed to executing those condemned people by that method and continues to make nitrogen hypoxia available as a method of execution for people who are convicted of capital crimes and sentenced to death. Only two months ago, Alabama settled litigation with a condemned person by agreeing to execute him only by means of nitrogen hypoxia, not lethal injection. The question presented is:

Are allegations that Alabama currently plans to execute condemned people by nitrogen hypoxia and remains publicly committed to making nitrogen hypoxia available to condemned people as a method of execution sufficient under Federal Rule of Civil Procedure 8(a) to plausibly allege that nitrogen hypoxia is a feasible and readily implemented alternative to lethal injection in an action by a condemned person in Alabama challenging lethal injection as the method of his execution under 42 U.S.C. § 1983?

PARTIES

The parties listed in the caption were the parties in the court below. Since the Eleventh Circuit issued the judgment that is the subject of the petition, the following parties who are not listed in the caption have been added as defendants in the district court: Terry Raybon, Warden of the William C. Holman Correctional Facility, Steve Marshall, Attorney General of the State of Alabama, Michael Wood, Deputy Warden of the G.K. Fountain Correctional Facility, and John Does 1-3.

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INTRODUCTION

Petitioner has not satisfied his burden to show that this is one of the "truly extraordinary cases involving categories of errors that strike at the heart of our legal system" that merit this Court's attention and warrant the remedy he seeks. *Andrus v. Texas* 142 S. Ct. 1866, 1879 (2022) (Sotomayor, J., dissenting from denial of certiorari); *see also Mireles v. Waco*, 502 U.S. 9, 15 (1991) (Scalia, J., dissenting) ("A summary reversal . . . is a rare and exceptional disposition, usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." (internal quotation marks and citations omitted)).

To succeed on a claim that a State's planned method of execution violates the Eighth Amendment, a condemned person must (1) "establish that the State's method of execution presents a 'substantial risk of serious harm,' " and (2) " 'identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]' the risk of harm involved." *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)); *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019). The petition addresses only Mr. Smith's allegations concerning the second element and then only whether he has adequately alleged that nitrogen hypoxia is a feasible, readily implemented, alternative method of execution in Alabama where at least 48 condemned persons await execution by that method.

Nitrogen hypoxia has been an authorized method of execution in Alabama since 2018. *See* Ala. Code § 15-18-82.1. Alabama has not only made nitrogen hypoxia a theoretical option for the Alabama Department of Corrections ("ADOC") should it choose in its discretion to use that method, the State has made that method of execution immediately available to all condemned people whose convictions and death sentences were final when the legislation became effective and available to all condemned people whose convictions and death sentences became or will become final thereafter. Alabama currently plans to execute at least 48 condemned people by nitrogen hypoxia. *See Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019). And the State continues to make nitrogen hypoxia available as a method of execution to people convicted of capital crimes and sentenced to death. Most recently, Alabama settled litigation with a condemned person by agreeing to execute him *only* by nitrogen hypoxia.

Under the 2018 legislation, Alabama held out and continues to hold out nitrogen hypoxia as a "feasible and readily implemented" alternative method of execution. As the Eleventh Circuit found, by virtue of the 2018 legislation, Alabama "adopted," "offer[ed]," and "made [nitrogen hypoxia] available" to all its condemned inmates, "requir[ing] it to develop a protocol for it." *Price v. Comm'r, Dep't of Corrs.*, 920 F.3d 1317, 1328–29 (11th Cir. 2019) (per curiam). Consequently, "*under the particular circumstances here* . . . an inmate may satisfy his burden to demonstrate that the method of execution is feasible and readily implemented by

pointing to the executing state's official adoption of that method of execution." *Id.* at 1328 (emphasis added).

The Eleventh Circuit's limited holding does no violence to this Court's precedents. Unlike in *Bucklew*, where "the *inmate* was *proposing* a new alternative method of execution that had not yet been approved by the state," a condemned person in Alabama who alleges that nitrogen hypoxia is a feasible and readily implemented alternative method of execution "point[s] to one that the State already made available" and has committed to implementing. *Id.* at 1328–29 (emphasis in original). And Petitioner's contentions about consequences that supposedly follow from *Price* outside its limited holding are belied by his failure to cite any examples of such consequences in the nearly four years since *Price* was decided.

The petition does not warrant this Court's review for additional reasons. Petitioner has not identified any conflict in the courts of appeals for this Court to resolve. Alabama is the only state that currently plans to execute condemned people by nitrogen hypoxia and that has made and continues to make execution by nitrogen hypoxia available to condemned people. While Mississippi and Oklahoma have authorized nitrogen hypoxia as a method of execution, in Mississippi the choice of execution method is left to the discretion of the State, which expressly prefers lethal injection, and, in Oklahoma, nitrogen hypoxia is an authorized method of execution *only* if lethal injection is held unconstitutional or otherwise unavailable. *See* Miss. Code Ann. § 99-19-51; 22 Okla. Stat. Ann. § 1014. Unlike

Alabama, neither state currently plans to execute any condemned inmate by nitrogen hypoxia, makes nitrogen hypoxia available to any inmate, or is required to develop a protocol for implementing executions by nitrogen hypoxia.

Resolution of the issue raised by the petition also will have little, if any, impact even in method-of-execution challenges brought by condemned inmates in Alabama. The State has represented that ADOC continues to develop and is close to finalizing a nitrogen hypoxia protocol. When ADOC does so that will moot the issue raised by the petition in any case then pending (including Mr. Smith's if it is still pending) and any similar case filed by a condemned person in Alabama thereafter.

Further, interlocutory review while the case is at the pleading stage would not terminate the litigation regardless of the outcome. Even if the Court reversed the Eleventh Circuit (which it should not), that the State plans to execute condemned people by nitrogen hypoxia, only two months ago committed to executing a condemned person only by nitrogen hypoxia, and has represented that it is close to finalizing a nitrogen hypoxia protocol raises a plausible inference that nitrogen hypoxia is a feasible and readily implemented alternative to lethal injection. And even if more were required, Mr. Smith would be entitled to an opportunity to amend his complaint.

Finally, on November 17, 2022, Petitioner represented to the district court through counsel that he

would not take an appeal to this Court from the Eleventh Circuit's decision when it was in his interests to affirm jurisdiction in the district court and proceed expeditiously there. Hours later, Alabama tried—but failed—to execute Mr. Smith by lethal injection, subjecting him to severe physical and emotional pain in the process. Following Petitioner's failed execution attempt, Mr. Smith sought and obtained leave of the district court to file a second amended complaint. His operative complaint alleges that a second attempt to execute him by lethal injection would violate his Eighth Amendment rights and he alleges that nitrogen hypoxia is an available alternative method of execution that would significantly reduce the risk of harm from lethal injection.

Petitioner has now reversed course by seeking certiorari on the Eleventh Circuit's decision—which addressed an earlier version of the complaint that is no longer operative—after expressly disclaiming an intent to do so before the district court in a hasty attempt to carry out an execution. The doctrine of judicial estoppel precludes Petitioner from taking a different position now that he seeks to delay proceedings in the district court where Mr. Smith's claims already have been pending for five months. *See New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001).

The Court should deny the petition.

STATEMENT OF THE CASE

In April 1996, Mr. Smith was convicted of capital murder. App. 2. By a vote of 11 to 1, the same jury that convicted him determined that he should be sentenced to life imprisonment without the possibility of parole. *Id.* However, the trial court overrode the jury's determination and sentenced Mr. Smith to death. *Id.*[1] Mr. Smith unsuccessfully appealed his conviction and sentence, and this Court denied Mr. Smith's petition for a writ of certiorari in October 2005. *See Smith v. Alabama*, 546 U.S. 928 (2005). Thereafter Mr. Smith unsuccessfully sought postconviction relief in state and federal courts, culminating in this Court's denial of his petition for a writ of certiorari in February 2022. *See Smith v. Hamm*, 142 S. Ct. 1108 (2022). On June 24, 2022, the State moved to set an execution date for Mr. Smith. App. 2.

A. Mr. Smith Filed an Action Challenging the State's Proposed Method of Execution Following a Botched Execution in July 2022

Since the State moved to set his execution date, the State has botched three consecutive executions by lethal injection—including most recently its failed attempt to execute Mr. Smith on November 17, 2022. In

[1] Mr. Smith would not be on death row if he had been tried under Alabama's current capital sentencing scheme because, in 2017, Alabama prospectively repealed the authority of trial courts to override capital jury sentencing determinations. *Id.* n.1.

each case, ADOC struggled or failed to place intravenous ("IV") lines by either of the only two methods authorized by its lethal injection protocol ("Protocol")—the "standard procedure" or, failing that, "a central line procedure." App. 5 n.4. And, in each case, ADOC continued its efforts well past the point when they became unnecessarily cruel, painful, and torturous.

The first of these executions occurred on July 28, 2022 when the State subjected Joe Nathan James to a three-and one-half-hour ordeal during his execution by lethal injection. DE 71 at ¶¶ 71–92.[2] For approximately three hours while Mr. James was strapped to a gurney outside public view, ADOC personnel repeatedly poked, prodded, and cut him well past the point where it had become cruel, painful, and torturous. *Id.* at ¶¶ 72–73. After three hours when ADOC finally opened the execution procedure to public witnesses, Mr. James appeared nonresponsive, suggesting that he had been sedated or otherwise rendered unconscious during ADOC's efforts to set IV lines and before ADOC administered the lethal drugs. *Id.* at ¶¶ 83–84.

On August 18, 2022, before his execution was scheduled and three weeks after ADOC's execution of Mr. James, fearing that he would be subjected to the same or similar cruel and unusual treatment (as he eventually was), Mr. Smith commenced an action in the district court. Mr. Smith asserted a claim under 42

[2] Citations to "DE __" refer to docket entries in *Smith v. Hamm*, No. 2:22-CV-497 (M.D. Ala.). As the petition seeks review of an interlocutory decision at the pleading stage, the record consists of allegations in Mr. Smith's complaint.

U.S.C. § 1983 alleging that his execution by lethal injection would expose him to an intolerable risk of cruel and unusual punishment in violation of his Eighth and Fourteenth Amendment rights to the U.S. Constitution and seeking declaratory and injunctive relief. DE 1.[3]

B. Mr. Smith's Complaint Alleged that Nitrogen Hypoxia is an Available Alternative Method of Execution

This Court's precedents require, among other things, that a condemned person asserting an Eighth Amendment challenge to a state's planned method of execution "must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain. . . ." *Bucklew*, 139 S. Ct. at 1125 (citing *Glossip*, 576 U.S. at 868–80; *Baze v. Rees*, 553 U.S. 35, 52 (2008)). To plead that element, Mr. Smith's complaint alleges that "nitrogen hypoxia is an available and feasible alternative method of execution." DE 71 at ¶ 250. In addition, Mr. Smith alleges that "[e]xecution by inhalation of nitrogen gas would eliminate the need to establish intravenous access," which necessarily would significantly reduce the risk of severe pain from ADOC's continuing difficulty and/or failure placing IV lines. *Id.* at ¶ 251; *see also id.* at ¶ 264. Execution by nitrogen hypoxia also "would reduce the risk that a condemned person would suffer pulmonary edema,

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[3] Mr. Smith also asserted a claim for violation of his due process rights under the Fourteenth Amendment. That claim was subsequently dismissed and is not at issue.

which autopsies show has occurred in condemned people executed by lethal injection, and which would cause the condemned inmate to experience the sensation of choking or drowning if conscious." *Id.* at ¶ 251.

In 2018, the Alabama legislature authorized nitrogen hypoxia as a method of execution. Sponsors of the legislation described nitrogen hypoxia as a "more humane" method of execution than lethal injection. DE 24-1 at ¶ 77. The legislation did more than merely provide ADOC discretion to execute condemned people by nitrogen hypoxia if it chose to pursue that option. Under the 2018 legislation, effective June 1, 2018, the State made execution by nitrogen hypoxia immediately available to all then-condemned people and available to all people condemned thereafter in Alabama:

> (b) A person convicted and sentenced to death for a capital crime at any time shall have one opportunity to elect that his or her death sentence be executed by . . . nitrogen hypoxia.
>
> . . .
>
> > (2) The election for death by nitrogen hypoxia is waived unless it is personally made by the person in writing and delivered to the warden of the correctional facility within 30 days after the certificate of judgment pursuant to a decision by the Alabama Supreme Court affirming the sentence of death. If a certificate of judgment is issued before June 1, 2018, the

> election must be made and delivered to the warden within 30 days of that date.

Ala. Code § 15-18-82.1(b)(2).[4]

The statute provides that a condemned person's election of an execution method may be overridden if that method is held to be unconstitutional by this Court or the Alabama Supreme Court or if this Court declines to review such a holding by the Alabama Supreme Court or the Eleventh Circuit. Ala. Code § 15-18-82.1(c). An election of an execution method also does not "supersede the means of execution available to the Department of Corrections." Ala. Code § 15-18-82.1(i). No court has declared the use of nitrogen hypoxia to execute condemned people unconstitutional. Nor has the State purported that the election of any condemned person to be executed by nitrogen hypoxia has been superseded by that method's supposed unavailability. Thus, Alabama has made and continues to make execution by nitrogen hypoxia available to all condemned people whenever convicted. To that end, Petitioner told the district court: "The status of nitrogen hypoxia with the Alabama Department of Corrections is that it is being developed, but we do not have [a] protocol at this point." DE 32 at 4:17–19; *see also id.*

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[4] The legislation mooted then-pending litigation brought by certain condemned people who challenged the constitutionality of lethal injection and alleged that nitrogen hypoxia was an available alternative method. *See James v. Marshall*, No. 1:22-cv-241, 2022 WL 2679429, at *4 (S.D. Ala. July 11, 2022) ("the addition of nitrogen hypoxia essentially mooted the ongoing litigation" and "the consolidated action was dismissed without prejudice").

at 42:6–8 (“earnest efforts are being made to bring it [a nitrogen hypoxia protocol] to completion, but it is not there yet”).

At least 48 condemned people elected to be executed by nitrogen hypoxia when Alabama first made that method available in 2018. *See Dunn*, 139 S. Ct. at 1312.[5] Alabama is publicly committed to executing those condemned people by nitrogen hypoxia and still makes nitrogen hypoxia available as a method for executing condemned people. Indeed, only two months ago, Alabama settled another condemned person’s challenge to the State’s planned second attempt to execute him by lethal injection by “agree[ing] that any future effort to execute [his] sentence of death can only be by means of nitrogen hypoxia.” *Miller v. Hamm*, No. 2:22-cv-506, DE 124 at ¶ 3 (M.D. Ala. Nov. 28, 2022).

In support of his allegation that nitrogen hypoxia is a feasible and available alternative method of execution in Alabama, Mr. Smith relied on the Eleventh Circuit’s holding in *Price v. Commissioner, Department of Corrections*, 920 F.3d 1317, 1327–28 (11th Cir. 2019) (per curiam). *See* DE 71 at ¶ 250 (citing *Price*). There, the Eleventh Circuit found that “Alabama’s official legislature-enacted policy is that nitrogen hypoxia is an available method of execution in the State” given the State’s enactment of the 2018 legislation and the fact

[5] Mr. Smith does not know how many other condemned people whose convictions and death sentences became final after the effective date of the 2018 legislation are slated to be executed by nitrogen hypoxia.

that "inmates have been electing nitrogen hypoxia since June 2018." *Id.* at 1328. The court concluded that "[a] State may not simultaneously offer a particular method of execution and deny it as 'unavailable'" and "reject[ed] the State's argument that nitrogen hypoxia is not 'available' to Price simply because the State has not yet developed a protocol to administer this method of execution." *Id.* Instead, the Eleventh Circuit held that "under the particular circumstances here . . . an inmate may satisfy his burden to demonstrate that the method of execution is feasible and readily implemented by pointing to the executing state's official adoption of that method of execution." *Id.*

In so holding, the Eleventh Circuit noted "a key distinction between *Bucklew* and our case." *Id.* "[I]n *Bucklew*, the *inmate* was *proposing* a new alternative method of execution that had not yet been approved by the state." *Id.* (emphasis in original). In contrast, under the Alabama statute, "Price did not 'propose' a new method of execution; he pointed to one that the State already made available." *Id.* at 1329. Consequently, "the State bears the responsibility to formulate a protocol detailing how to effectuate execution by nitrogen hypoxia," which it undertook when it "adopted the particular method of execution" and made it available to condemned people, "requir[ing] [the State] to develop a protocol for it." *Id.*

C. Although the District Court Granted Petitioner's Motion to Dismiss, It Concluded that Mr. Smith Had Adequately Pleaded that Nitrogen Hypoxia is an Available Alternative Method of Execution

Petitioner moved to dismiss the complaint on August 26. DE 10. In the meantime, on September 30, the Alabama Supreme Court scheduled Mr. Smith's execution for November 17. DE 13-1. On October 11, given the scheduled execution date, Mr. Smith moved for "the Court to set a schedule for briefing, discovery, and a hearing" on his forthcoming preliminary injunction motion "so that the motion can be resolved sufficiently in advance of the Execution Date to permit appellate review, if necessary." DE 17 at 1.

On October 16, 2022, the district court granted Petitioner's motion and dismissed the complaint with prejudice. DE 23. The district court construed Mr. Smith's claim as a general challenge to the Protocol or, alternatively, a challenge based solely on the risk that ADOC would subject Mr. Smith to a cutdown procedure or intramuscular sedation like Mr. Smith alleged it had subjected Mr. James. *See Smith v. Hamm*, No. 2:22-CV-497, 2022 WL 10198154, at *4–5 (M.D. Ala. Oct. 16, 2022). The district court concluded that the former challenge was time-barred and the latter challenge was moot based on Petitioner's representation that ADOC would "not employ a 'cutdown' procedure or intramuscular sedation during the execution of Smith set for November 17, 2022." *Id.* at *5. Given the

district court's ruling, the court denied Mr. Smith's motion for a scheduling order and expedited discovery as moot. DE 23.

On October 19, Mr. Smith moved to alter or amend the judgment and for expedited consideration given the approaching execution date. DE 24. With his motion, Mr. Smith submitted a proposed amended complaint and requested leave to file it. DE 24-1. Among other things, Mr. Smith's proposed amended complaint added allegations about ADOC's failed attempt to execute Alan Eugene Miller on September 22. By Mr. Miller's account, two unidentified men in medical scrubs with unknown medical credentials repeatedly slapped, poked, prodded, and punctured his arms, hands, and feet for nearly two hours in an unsuccessful attempt to set IV lines while ignoring his expressions of excruciating pain. *Id.* at ¶¶ 47–52. This futile, painful, and cruel process stopped only when the death warrant expired at midnight, although it should have been evident to Mr. Miller's executioners before then that they would not be able to place IV lines by either of the authorized methods. *Id.* at ¶ 53.

On the afternoon of November 9, the district court denied Mr. Smith's motion. The district court "agree[d] with Smith that his proposed Amended Complaint is not plainly time-barred under the relevant statute of limitations." App. 28. However, the district court held that "the proposed Amended Complaint fails to state sufficient factual detail to raise a plausible Eighth Amendment method of execution challenge" for reasons neither briefed nor addressed on Petitioner's

underlying motion to dismiss. *Id.* 31. Citing *Price*, the district court noted, "however, that nitrogen hypoxia is an available alternative method, even though the State disclosed at oral argument that it has yet to establish a protocol for carrying out executions via nitrogen hypoxia." *Id.* 38 n.4.

D. The Eleventh Circuit Agreed that Mr. Smith Adequately Pleaded that Nitrogen Hypoxia is an Available Alternative Method of Execution

On November 17, after oral argument the preceding day, the Eleventh Circuit majority reversed: "After reviewing Smith's proposed amended complaint de novo, we conclude that he pleaded sufficient facts to plausibly support an Eighth Amendment method-of-execution claim that is not barred by the applicable statute of limitations, and thus amendment would not have been futile." App. 10. With respect to Mr. Smith's allegation that nitrogen hypoxia is an available alternative method of execution, the Eleventh Circuit held:

> We also find that Smith plausibly pleads that there is an available alternative method that will reduce the risk of severe pain. In *Price v. Commissioner, Department of Corrections*, we found that Alabama's statutorily authorized method of execution (nitrogen hypoxia) could not be considered unavailable simply because no mechanism to implement the procedure had been finalized. 920 F.3d 1317, 1328 (11th Cir. 2019) (per curiam). Yet the Commissioner

> continues to argue that Smith failed to provide an available alternative method. The Commissioner completely misses our point from *Price*. We find that nitrogen hypoxia is an available alternative method for method-of-execution claims. Further, Smith has sufficiently pleaded that nitrogen hypoxia will significantly reduce his pain.

Id. 13–14.[6]

The Eleventh Circuit denied Mr. Smith's motion for a stay pending appeal as moot. App. 15.

E. The State Tried and Failed to Execute Mr. Smith

After receiving the Eleventh Circuit's decision, Mr. Smith immediately moved in the district court for a stay of his execution and separately for a preliminary injunction. DE 43, 47. At argument on those motions, the State represented to the district court that it would not appeal to this Court:

> THE COURT: . . . Let's first talk about where we are. The Eleventh Circuit has made its

[6] The dissent did not address Mr. Smith's allegations about nitrogen hypoxia. The dissent concluded that Mr. Smith's claim was time barred, although it stated that his "concern about the Alabama Department of Corrections's difficulties with efficiently starting an IV line for its lethal injection protocol is understandable—as is his concern that the Department may be willing to disregard its protocol altogether if it is unable to start an IV line in the usual way." App. 19–20.

> ruling. Am I correct that the State is not going to appeal that to the U.S. Supreme Court?
>
> MR. ANDERSON: That is correct, Your Honor.

DE 69 at 3:9–13. The State's representation having "put[] [the case] back with" the district court, *id.* at 3:14, at about 5:55 p.m. CST, minutes before the scheduled execution was supposed to begin, the district court denied the motions on the ground that Mr. "Smith inexcusably delayed in seeking a stay." DE 50 at 7.

Mr. Smith immediately appealed and sought a stay of execution from the Eleventh Circuit. About 8 p.m. CST, the Eleventh Circuit unanimously entered a temporary stay of execution, finding, contrary to the district court, that "[w]hen Smith filed his complaint, there was no active death warrant" and that since "the district court dismissed Smith's complaint with prejudice . . . Smith has continuously sought to rectify that dismissal . . . and has pursued his claims diligently through the district court and here." DE 57. Later that evening, about 10:15 p.m. CST, this Court vacated the stay. *See Hamm v. Smith*, 143 S. Ct. 440 (2022).

In the meantime, shortly before 8 p.m. CST while Mr. Smith's stay application was still pending before the Eleventh Circuit, corrections officers removed Mr. Smith from his holding cell, escorted him to the execution chamber, and strapped him to a gurney. DE 71 at ¶¶ 149–59. Mr. Smith remained strapped to the gurney for nearly four hours even after the Eleventh Circuit entered a stay of execution about which he was not informed. *Id.* at ¶ 161. During that time, ADOC

subjected Mr. Smith "to precisely the unnecessary and wanton infliction of pain that the Eighth Amendment was intended to prohibit" and that "he sought to enjoin by filing [his] lawsuit on August 18, 2022." DE 71 at ¶ 236.

Beginning a little after 10 p.m. CST, unidentified ADOC personnel with unknown medical credentials, poked, prodded, and jabbed Mr. Smith's arms and hands in a failed attempt to set IV lines by the standard procedure. *Id.* at ¶¶ 170–89. Then, without explanation to Mr. Smith, they attempted a central line procedure involving injection of an unknown substance and numerous attempts to insert a large needle under Mr. Smith's collarbone to access a central vein while ignoring his expressions of pain and his pleas to contact his counsel or the district court. *Id.* at ¶¶ 190–213. The attempted central line procedure also failed. ADOC ceased its efforts only when the warrant expired at midnight, but not before causing Mr. Smith severe and lingering physical and emotional pain.

After his ordeal concluded around midnight and Mr. Smith was released from the gurney restraints, he was hyperventilating and unable to lift his arms, sit up, stand, walk, undress or dress without assistance from corrections officers. *Id.* at ¶¶ 224–30. Since his failed execution, Mr. Smith continues to experience physical and emotional pain, including lingering pain in his arm, near his collarbone, back spasms, difficulty sleeping, and likely post-traumatic stress disorder. *Id.* at ¶¶ 234–36.

On December 6 with leave of the district court, Mr. Smith amended his complaint to add allegations about his failed execution and to join additional defendants in their official and individual capacities who participated in it. Mr. Smith seeks declaratory and injunctive relief to prohibit defendants from making a second attempt to execute him by lethal injection and monetary damages for injuries he sustained during their first attempt. DE 71.

F. Following the Failed Attempt to Execute Mr. Smith, the Governor of Alabama Announced a Review of ADOC's Execution Protocol

The week after Mr. Smith's failed execution, Alabama's Governor announced that she had asked ADOC to "undertake a top-to-bottom review of the state's execution process" and asked the Attorney General to withdraw two motions before the Alabama Supreme Court to set execution dates and to refrain from seeking additional execution dates pending that review. Alonso & Cole, *Alabama governor asks to pause executions and review system after recent lethal injections halted*, CNN, Nov. 21, 2022, available at https://www.cnn.com/2022/11/21/politics/alabama-executions-pause-review-ivey/index.html. The State has not provided any public information about the details of or the timeline for the review. To Mr. Smith's knowledge, no independent parties are participating in the review.

REASONS TO DENY THE PETITION

I. THE DECISION BELOW FAITHFULLY APPLIES THIS COURT'S PRECEDENTS

This Court's Eighth Amendment jurisprudence requires condemned people challenging the method by which the state proposes to execute them to establish that there is "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain. . . ." *Bucklew*, 139 S. Ct. at 1125. Here, when the State enacted legislation in 2018 permitting condemned people to elect nitrogen hypoxia as the method for their executions, it presented that method as a feasible and available alternative to lethal injection.

When Alabama enacted the 2018 legislation, the State accomplished two things. First, it authorized ADOC to use nitrogen hypoxia to execute condemned inmates, making it at least "theoretically feasible" that ADOC might do so. *Bucklew*, 139 S. Ct. at 1129 (internal quotation marks omitted). Second, the State made that method immediately available to all its then-condemned people and available to all condemned people thereafter. In other words, the State made nitrogen hypoxia immediately available to all condemned people regardless of when they were convicted and regardless of when they were (or would become) eligible for execution—at least 48 of whom the State currently plans to execute by nitrogen hypoxia. And the State currently makes execution by nitrogen hypoxia available

to condemned people when their convictions and sentences become final.

Surely when the Legislature chose to make execution by nitrogen hypoxia immediately available to all its condemned people, the Legislature and other stakeholders viewed that method as both "feasible" and "readily implemented." *Id.* (internal quotation marks omitted). If not, as the district court noted at oral argument, it begs the question why the Legislature enacted and the Governor signed the legislation. DE 32 at 42:12–16 ("And the reason I ask it [whether ADOC was involved in the promulgation of the statute] is, why would DOC or the State be agreeing to an execution protocol that they had no idea how to perform or what one would look like. It just seemed to me they were saying something to settle a lawsuit not knowing what the ramifications may have been.").

As the Eleventh Circuit found, by virtue of the 2018 legislation, Alabama "adopted," "offer[ed]," and "made [nitrogen hypoxia] available" to all condemned people, which "required [the State] to develop a protocol for it." *Price*, 920 F.3d at 1328–29. That the process of developing that protocol may be taking longer than the State had hoped is beside the point. Alabama still makes execution by nitrogen hypoxia available to all condemned people when their convictions and sentences become final. Indeed, the State settled a lawsuit by agreeing to execute a condemned person only by nitrogen hypoxia instead of lethal injection just two months ago, confirming its belief that the method is both feasible and will be readily implemented.

As a matter of *fact*—not theoretical possibility—the State now indisputably holds out nitrogen hypoxia as an available alternative to lethal injection under *Bucklew* for at least 48 condemned people and for all condemned people as their convictions and sentences become final. The State's choice to make nitrogen hypoxia immediately available to its condemned people mooted a challenge to its lethal injection protocol that was pending in 2018. *See* n.4, *supra*. It should not now be permitted to deny that nitrogen hypoxia is an available alternative under *Bucklew* to Mr. Smith. *See Price*, 920 F.3d at 1328 ("If nitrogen hypoxia is otherwise 'available' to inmates under *Bucklew*, that the State chooses to offer the chance to opt for it for a period of only 30 days does not somehow render it 'unavailable' by *Bucklew*'s criteria.").

Petitioner's contention that the Alabama "law contemplates methods of executions' unavailability" and "acknowledges that the State may lack 'the means' to carry out an execution by nitrogen hypoxia" is telling. Pet. 23 n.7 (citing Ala. Code § 15-18-82.1(i)). The State's actions speak louder than its words. To date, the State has not purported to claim that any condemned person's choice of nitrogen hypoxia has been superseded on the supposed ground that nitrogen hypoxia is "unavailable" because the State lacks "the means" to carry out executions by that method. To the contrary, Petitioner admits that a nitrogen hypoxia protocol "is being developed" even if it is not yet final. DE 32 at 4:17–19.

In addition, Petitioner's construction of Alabama law would render illusory the Legislature's provision of an opportunity for condemned people to elect nitrogen hypoxia. Under Petitioner's construction, the State could nullify a condemned person's choice of nitrogen hypoxia simply by deciding not to develop a protocol for implementing it. *See Price*, 920 F.3d at 1328 (permitting a state to "simultaneously offer a particular method of execution and deny it as 'unavailable' . . . would lead to [the] absurd result" that "[s]tates could adopt a method of execution, take no action at all to implement a protocol to effectuate it, and then defeat an inmate's Eighth Amendment challenge by simply claiming the method is not 'available' due to a lack of protocol"). The Alabama Legislature plainly did not intend that result when it made nitrogen hypoxia immediately available to all condemned people. Petitioner's construction violates the " 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' " *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted).

The only reasonable construction of the statute is that the Legislature intended to provide for situations where the actions of a third-party render a method of execution unavailable—for example, when there is no source that will supply the drugs used in ADOC's lethal drug cocktail. That construction dovetails with this Court's holdings that a method of execution is unavailable when the actions of third parties make it

impossible for a state to use. *See Glossip*, 576 U.S. at 878–79 (proposed alternative drugs were unavailable where "Oklahoma has been unable to procure those drugs despite a good faith effort to do so"); *Baze*, 553 U.S. at 66 (Alito, J., concurring) ("a suggested modification of a lethal injection protocol cannot be regarded as 'feasible' or 'readily' available if the modification would require participation—either in carrying out the execution or in training those who carry out the execution—by persons whose professional ethics rules or traditions impede their participation").

Petitioner contends that the Eleventh Circuit's holding in *Price* is inconsistent with *Glossip*. According to Petitioner, under *Price*, an execution "method that 'anti-death penalty advocates' have rendered unavailable (*Glossip*, 576 U.S. at 870) remains a valid comparator if an inmate can 'point[] to' a statute that arguably authorizes the method." Pet. 22–23. Petitioner does not cite any Eleventh Circuit case that so holds and *Price* does not support that result. To the contrary, Petitioner's contention is belied by Eleventh Circuit authority, including a decision by the same *Price* panel, which affirmed the denial of a method-of-execution claim challenging the use of midazolam in Alabama's three-drug lethal cocktail because the plaintiff failed to demonstrate that " 'there is *now* a source for pentobarbital [the plaintiff's proposed alternative] *that would sell it to the ADOC* for use in executions.' " *Price v. Comm'r, Ala. Dep't of Corrs.*, 752 F. App'x 701, 713 (11th Cir. 2018) (per curiam) (emphasis in original, citation omitted); *see also Brooks v. Warden*,

810 F.3d 812, 819 (11th Cir. 2016) (same); *Chavez v. Florida SP Warden*, 742 F.3d 1267, 1274 n.1 (11th Cir. 2014) (Carnes, J., concurring) (same).

Petitioner's discussion of *Bucklew* also misses the mark. Petitioner suggests that *Price* is inconsistent with *Bucklew* by relying on statements in the merits reply brief in that case that "'Missouri allows [lethal gas] by statute' and thus . . . '[t]he method is available to Missouri, should it choose to try to develop a protocol for it.'" Pet. 18. That argument treats "lethal gas" as synonymous with "nitrogen hypoxia," which is a dubious proposition at best.

Missouri, along with several other states, authorized lethal gas in the early decades of the twentieth century. *See* Clermont, *Your Lethal Injection Bill: A Fight to the Death Over an Expensive Yellow Jacket*, 24 St. Thomas L. Rev. 248, 271 (2012); *see also Glossip*, 576 U.S. at 868 (in 1921, Nevada became the first state to authorize executions by lethal gas). The Missouri Department of Corrections "last utilized lethal gas for an execution in 1965" and "used cyanide gas"—not nitrogen—when it executed condemned people by lethal gas. *Bucklew v. Lombardi*, No. 14-8000-CV, 2017 WL 11683573, at *3–4 (W.D. Mo. Apr. 11, 2017). When the *Bucklew* defendants were asked in discovery "to describe the chemicals that are, or might be, used by DOC when using lethal gas as the means of execution," they represented "that there currently are no such chemicals." *Id.* at *4. Considered in context, Missouri's current authorization to use lethal gas in executions seems more a vestige of a bygone era than a present

intention to execute any condemned person by lethal gas, much less nitrogen, which, in any event, is not a "lethal gas." *See* Dixon, *No More Drugs! What Will North Carolina Do When Its Supplier Stops Supplying?*, 8 Biotechnology & Pharmaceutical L. Rev. 88, 97 (2015).[7]

In any event, it is undisputed that when *Bucklew* was decided, unlike Alabama, Missouri had not then offered or made available nitrogen hypoxia as a method for executing condemned people, did not plan to execute any condemned person by nitrogen hypoxia, and had no protocol for doing so or any stated intent to develop one. Thus, as the Eleventh Circuit correctly found, "in *Bucklew*, the *inmate* was *proposing* a new alternative method of execution that had not yet been approved by the state." *Price*, 920 F.3d at 1328 (emphasis in original). And, although "choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it," *Bucklew*, 139 S. Ct. at 1130, that rationale does not apply in this case. Alabama has authorized execution by nitrogen hypoxia, made it available to condemned people, and committed to using it. Unlike Missouri, Alabama has chosen to be the first to do so.

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[7] The air we breathe is comprised of 80% nitrogen. DE 24-1, Zivot Dec. ¶ 22. Nitrogen is no more a "lethal gas" than oxygen, which also is toxic if inhaled in its pure form. *Id.*

II. THE PETITION DOES NOT RAISE ANY ISSUES THAT WARRANT THIS COURT'S REVIEW

Resolution of the issue raised in the petition would not have broad impact beyond this case. It would not impact cases brought by condemned people outside Alabama because Alabama is the only state that currently plans to execute condemned people by nitrogen hypoxia and makes that method of execution available to condemned people. And it would not have broad impact on cases brought by condemned people in Alabama because ADOC is working on, and reportedly close to finalizing, a protocol for executing condemned people by nitrogen hypoxia.

A. Alabama's Statute is Unique

The petition does not identify any conflict among the courts of appeals, and one is not likely to arise because the Eleventh Circuit's holding in *Price* is limited to the "particular circumstances here," and those circumstances are unique. *Price*, 920 F.3d at 1328. Alabama is the only State that currently plans to execute condemned people by nitrogen hypoxia and currently makes nitrogen hypoxia available to condemned people as a method of execution. Two other states—Mississippi and Oklahoma—have authorized nitrogen hypoxia as a method of execution. *See* Miss. Code Ann. § 99-19-51; 22 Okla. Stat. Ann. § 1014. But unlike Alabama, neither state has purported to make nitrogen hypoxia available to condemned people as a method of their execution.

In Mississippi, the choice among four potential execution methods is in the "discretion of the Commissioner" and other representatives of the Mississippi Department of Corrections. Miss. Code Ann. § 99-19-51(1). And "[i]t is the policy of the State of Mississippi that intravenous injection of a substance or substances in a lethal quantity into the body shall be the preferred method of execution." *Id.* Consistent with that policy, lethal injection has been the method used for executions in Mississippi since 2002 through its most recent execution in December 2022. *See* Mississippi Department of Corrections, The Death Penalty in Mississippi, Executions, available at https://www.mdoc.ms.gov/Death-Row/Pages/The-Death-Penalty-in-Mississippi-Executions.aspx.

Oklahoma law provides that "[t]he punishment of death shall be carried out by the administration of a lethal quantity of a drug or drugs until death is pronounced by a licensed physician according to accepted standards of medical practice." 22 Okla. Stat. Ann. § 1014(A). Nitrogen hypoxia is authorized *only* "[i]f the execution of the sentence of death [by lethal injection] is held unconstitutional by an appellate court of competent jurisdiction or is otherwise unavailable." 22 Okla. Stat. Ann. § 1014(B). Neither of those conditions has been satisfied. *See* Oklahoma Corrections, Death Row, Death Penalty Information (between 1990 and 2022 all executions in Oklahoma have been by lethal injection), available at https://oklahoma.gov/doc/offender-info/death-row.html.

Unlike Alabama, neither Mississippi nor Oklahoma has current plans to execute any condemned person by nitrogen hypoxia. Nor has either state made nitrogen hypoxia available to any of its condemned people like Alabama has. Nothing in either state's law "require[s] [that state] to develop a protocol" for executing condemned people by nitrogen hypoxia as the Alabama statute requires ADOC to do. *Price*, 920 F.3d at 1329.

B. Upcoming Events May Moot the Issue Raised in the Petition

Any question about the availability of nitrogen hypoxia will become moot when Alabama finalizes its nitrogen hypoxia protocol. According to Petitioner: "The status of nitrogen hypoxia with the Alabama Department of Corrections is that it is being developed, but we do not have [a] protocol at this point." DE 32 at 4:17–19; *see also id.* at 42:6–8 ("earnest efforts are being made to bring it [a nitrogen hypoxia protocol] to completion, but it is not there yet"). As the district court noted, the timeline for finalizing a nitrogen hypoxia protocol has "been somewhat of a moving target" and is solely in the possession of the State. *Id.* at 3:20; *see also id.* at 40:24. However, recent representations by state agents indicate that ADOC is close to doing so.

For example, in September 2022, in a different case brought by another condemned person, a deputy assistant attorney general told the district court: "The

nitrogen hypoxia protocol has to be nested within an existing electrocution protocol and lethal injection protocol. . . . That nesting has not occurred. . . . That does not mean that the nitrogen hypoxia portion is not prepared and ready to go and be nested, but you have to go through and make sure there are no conflicts. The protocol is there." *Miller v. Hamm*, No. 2:22-cv-506, DE 58 at 7:24–8:8 (M.D. Ala. Sept. 12, 2022). Additionally, the district court indicated that "during a hearing in the [same] case, it was also represented to me that there was going to be some announcement in October [2022]" about a nitrogen hypoxia protocol. DE 32 at 41:16–18. Although ADOC ultimately concluded that it could not use nitrogen hypoxia in September and an October announcement was not forthcoming, the representations plainly indicate momentum toward finalizing the protocol.

When ADOC finalizes the protocol, the issue of whether nitrogen hypoxia is a feasible and available alternative will be moot in any method-of-execution challenge brought by a condemned person in Alabama, including Mr. Smith if his case remains pending at that time. In addition, the outcome of the State's "top to bottom review of [its] execution process" also may materially impact the underlying litigation. That review may result in changes to ADOC's lethal injection process or other changes that could render the issue raised in the petition moot. There is no reason for this Court to intervene.

C. Resolution of the Issue Raised in the Petition Would Not Be Dispositive in This Case

The petition seeks interlocutory review of a ruling on a motion to dismiss at the pleading stage. Each of *Baze*, *Glossip*, *Bucklew*, and the Eleventh Circuit's *Price* decision were decided on an evidentiary record after discovery. In contrast, Mr. Smith has had no opportunity for discovery into the status of ADOC's efforts to finalize its nitrogen hypoxia protocol or any other issue. Petitioner nevertheless holds Mr. Smith to a standard of proof that does not apply at this stage and assumes that an outcome adverse to Mr. Smith would terminate his lawsuit. It would not.

Petitioner contends that Mr. "Smith has not sought to prove that Alabama has the protocol necessary to implement nitrogen hypoxia." Pet. 11. But Mr. Smith does not bear that burden at the pleading stage. Mr. Smith has not had an opportunity to *prove* anything because for five months since he filed his initial complaint, Petitioner has managed to delay consideration of the merits of Mr. Smith's claim based on development of an evidentiary record through discovery and to shield from accountability facts that the State will not disclose willingly about what has happened and why in its recent botched executions.

The question at the pleading stage is whether Mr. Smith has "plead[ed] facts sufficient to show that [his]

claim has substantive plausibility." *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 12 (2014). Petitioner treats Mr. Smith's acknowledgment that ADOC's nitrogen hypoxia protocol has not been finalized as fatal to his claim. But that is not dispositive of whether Mr. Smith has pleaded facts sufficient to plausibly allege that one is feasible and readily implemented. Indeed, a condemned person can identify a feasible and readily implemented alternative that is not "presently authorized by a particular State's law." *Bucklew*, 139 S. Ct. at 1128.

Equally misplaced is Petitioner's repeated reliance on a statement by one of Mr. Smith's medical experts—Dr. Joel B. Zivot—as a concession that nitrogen hypoxia is unavailable under *Bucklew*. Dr. Zivot is a physician who believes that medical ethics prohibit him from participating in executions. DE 24-1, Zivot Dec. ¶ 22 ("I am duty bound as a physician not to guide or advise ADOC or any other prison system on how nitrogen may be used for execution," but "I am qualified to explain how inhaling nitrogen gas would cause death"), ¶ 30 ("I agree with national physician associations and medical boards, which object to physician participation in executions"). That "[t]o date, ADOC has released no protocol for accomplishing that" and, therefore, "[h]ow it will be done remains unknown" to Dr. Zivot," *id.* ¶ 21, does not establish whether execution by nitrogen hypoxia is feasible and readily implemented.

That the State plans to execute at least 48 condemned people by nitrogen hypoxia, continues to make that method available to condemned people whose convictions and death sentences become final, has recently settled method-of-execution litigation by agreeing to execute a condemned person only by nitrogen hypoxia instead of lethal injection, and has represented that it is close to finalizing a nitrogen hypoxia protocol raises a plausible inference that nitrogen hypoxia is a feasible and readily implemented method of execution. Even if more were required (and Mr. Smith does not concede that is the case), it would not terminate Mr. Smith's lawsuit. Mr. Smith's allegations about an available alternative are made in good faith reliance on governing Eleventh Circuit precedent. If this Court decides that precedent was in error (and the Court should not), then Mr. Smith should be permitted an opportunity to amend his complaint to conform to whatever standard this Court imposes.

D. Petitioner Should Be Held to His Representation That He Would Not Appeal to this Court

After the Eleventh Circuit issued its decision, Petitioner represented unequivocally to the district court that he would not appeal to this Court. DE 32 at 3:9–13. In making that choice, Petitioner agreed to accept the Eleventh Circuit's decision, including its holding that Mr. Smith adequately alleged that nitrogen hypoxia is an available alternative method of execution in Alabama. That served Petitioner's interest at the

time because vesting jurisdiction in this Court would have delayed his goal of proceeding with Mr. Smith's execution.

Now that his interests have changed, Petitioner seeks review in this Court despite his representation to the district court. Mr. Smith's complaint has been pending for five months already. By seeking interlocutory review in this Court, Petitioner seeks to delay it further still and to delay discovery. Under the doctrine of judicial estoppel, "'[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). The Court should not reward Petitioner's gamesmanship.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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