No. _____

In the Supreme Court of the United States

JOHN Q. HAMM,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
APPLICANT,
v.
KENNETH EUGENE SMITH,
RESPONDENT.

EMERGENCY APPLICATION TO VACATE STAY OF EXECUTION

To the Honorable Clarence Thomas,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Eleventh Circuit

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November 17, 2022

EXECUTION SCHEDULED NOVEMBER 17, 2022, 6:00 P.M. CST.

PARTIES TO THE PROCEEDING

The parties to the proceedings below are as follows:

Applicant John Q. Hamm, in his official capacity as Commissioner of the Alabama Department of Corrections, was the defendant in the district court and appellee in the court of appeals.

Respondent Kenneth Eugene Smith was plaintiff in the district court and appellant and movant in the court of appeals.

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TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Kenneth Eugene Smith is scheduled to be executed **today, November 17, 2022, at 6:00 p.m. central time** for a grisly murder-for-hire he committed in 1988. The State of Alabama moved for Smith's execution on June 24, 2022, and on September 30 the Alabama Supreme Court set his execution for today. So Smith has known about his impending execution for some time.

That is likely why he waited until *the day of his execution* to seek equitable relief in the district court. Why would Smith wait so long? Because waiting until the last minute forces a judicial emergency, in turn increasing the chances that his execution can be delayed through sheer, cynical maneuvering.

But the district court correctly rejected those maneuvers. It concluded that Smith had unduly delayed bringing his claim. As it explained, Smith "could have filed a motion for a stay when he filed his Complaint with this Court on August 17, 2022, or immediately thereafter; or immediately after the Alabama Supreme Court set his execution date on September 30, 2022; or at any time while his Complaint was pending before this Court prior to the Court's dismissal on October 16, 2022; or in conjunction with his motion to alter or amend this Court's judgment, which he filed on October 19, 2022; or at any time while the motion to alter or amend was pending." DE50:7. The court continued:

> Indeed, Smith's counsel represented to the Court during oral argument regarding the Commissioner's Motion to Dismiss on October 13, 2022 that he would file a motion for a preliminary injunction the following Wednesday, October 19, 2022. (Doc. 32 at 48.) During oral argument on the motion to stay, Smith offered no compelling justification for why he failed to file either of these motions earlier, and he identified no

> procedural basis why he could not have done so. Having waited until mere hours before his scheduled execution to file his motion for a stay, the Court concludes that Smith inexcusably delayed in seeking a stay, and therefore he has not "established his entitlement to the equitable remedy of a stay of execution."

DE50:7 (quoting *Woods v. Comm'r, Ala. Dep't or Corr.*, 951 F.3d 1288, 1293 (11th Cir. 2020)).

The district court did just what this Court said to do: "police carefully against attempts to use such challenges as tools to interpose unjustified delay" should have necessitated that the Court of Appeals reject Smith's eleventh-hour motion. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). As this Court just recently explained, "[w]hen a party seeking equitable relief 'has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him. These well-worn principles of equity apply in capital cases just as in all others." *Ramirez v. Collier*, 142 S. Ct. 1264, 1282 (2022) (internal quotation marks, citations omitted).

Those "well-worn principles of equity" plainly foreclosed Smith's gamesmanship. This Court has been unequivocal: "[F]ederal 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." *Bucklew*, 139 S. Ct. at 1134 (quoting *Hill v. McDonough*, 547 U.S. 573, 584-85 (2006)). "The proper response" to "death-row inmates with an impending execution[] bring[ing] last-minute claims that will delay the execution" is "to deny meritless requests expeditiously." *Price v. Dunn*, 139 S. Ct. 1533, 1540 (2019) (Thomas, J., concurring in denial of

certiorari); *Bucklew*, 139 S. Ct. at 1134 (noting that "'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'" (quoting *Hill*, 547 U.S. at 584)).

Yet remarkably, the Eleventh Circuit ignored this Court's repeated admonitions and granted Smith's last-minute request for a stay all the same. This Court should correct that abuse of discretion on the equities alone—and quickly—so Smith's lawful execution can still take place tonight before the death warrant expires at midnight.

Not that Smith's merits arguments fare any better. To the contrary, he asked the courts below *stay his execution*—extraordinary relief "not available as a matter of right," *Hill*, 547 U.S. at 584—just to conduct discovery in the hopes that he *might* find some evidence to support his claim. But that's a far cry from "ma[king] a strong showing that he is likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009). "It is not enough that the chance of success on the merits be better than negligible," *id.*, yet Smith is unable to provide any assurance that the discovery he seeks will even negligibly help his case, much less push his odds of success into substantial likelihood.

In fact, every piece of evidence adduced in this case has *cut against Smith*, and he offers no reason to believe that trend will reverse if this Court stays his execution. As explained further below, Smith's own experts fatally undermine the merits of his claims; Dr. Datnow's testimony refutes Smith's conclusory assertions; and, most recently, the Alabama Department of Forensic Sciences released the official autopsy of

Joe Nathan James (*see* DE45-1), which echoes Dr. Datnow's statements and further invalidates Dr. Zivot's claims. Indeed, all the evidence produced thus far provides every reason to believe that Dr. Zivot's expert opinion in this case will be as erroneous as it was in the *Bucklew v. Precythe* litigation, where, attempting to offer medical testimony in support of the prisoner, he "crossed up the numbers" and ended up reaching a patently erroneous medical conclusion by improperly extrapolating evidence from a "horse study" onto human beings. 139 S. Ct. at 1132.

And Smith's claim that alleging a plausible claim meant the district court was "compel[led]" to "enter a stay of execution to afford Mr. Smith the opportunity to litigate his preliminary injunction motion on a full record" (DE43:2) is a non-starter—indeed, precedent from this Court and the Eleventh Circuit leave no doubt that it becomes even "harder for a plaintiff to meet his burden" when proceeding on an "undeveloped record" and contesting "material allegations of facts." *Siegel v. LePore*, 234 F.3d 1163, 1175 (11th Cir. 2000) (*en banc*); *see also, e.g.*, *Firefighters Loc. Union No. 1784 v. Stotts*, 467 U.S. 561, 604 n.7 (1984) ("The time pressures involved in a request for a preliminary injunction require courts to make determinations without the aid of full briefing or factual development."); *Sole v. Wyner*, 551 U.S. 74, 84 (2007) (recognizing that preliminary injunction decisions may be made when "[t]he emergency proceeding allows no time for discovery").

Even worse, Smith has conceded that he cannot show—and has no intention of showing—"some other feasible and readily available method to carry out [his] lawful sentence." *Bucklew*, 139 S. Ct. at 1126-27. Indeed, he and his expert affirmatively

argue that "ADOC has released no protocol for accomplishing" execution by nitrogen hypoxia, and that "[h]ow it will be done remains unknown." DE24-1:34.[1] His position flagrantly contradicts this Court's recent admonition that to succeed on a method-of-execution challenge prisoners must "provid[e] the State with a veritable blueprint for carrying the death sentence out." *Nance v. Ward*, 142 S. Ct. 2214, 2223 (2022). Smith asked the court below to ignore the reality that nitrogen hypoxia is not "feasible and readily available" as a matter of fact, because, according to Smith's interpretation of dicta from an Eleventh Circuit opinion, it is theoretically available "[a]s a matter of law." DE24-1:19 (citing *Price v. Dunn*, 920 F.3d 1317 (11th Cir. 2019)). But creative metaphysics cannot trump this Court's "precedents and history." *Bucklew*, 139 S. Ct. at 1127. Because Smith will not (and cannot) "present a 'proposal' that is 'sufficiently detailed' to show that an alternative method is both 'feasible' and 'readily implemented,'" his Eighth Amendment claim cannot succeed, and the Eleventh Circuit erred by granting him relief. *Nance*, 142 S. Ct. at 2222.

Over *three decades* have passed since Smith brutally murdered Elizabeth Dorlene Sennett in exchange for $1,000. The State of Alabama lawfully scheduled Smith's execution for tonight. Further delaying his sentence would "countenance 'last-minute' claims relied on to forestall an execution," *Nance v. Ward*, 142 S. Ct. 2214, 2225 (2022), and eviscerate both the State's and the victims' "important interest in the timely enforcement of [Smith's] sentence," *Hill*, 547 U.S. at 584 . Yet that is precisely

[1] "DE" refers to docket entries in the district court in this litigation. The pin cite following the colon corresponds with CM/ECF pagination.

what Smith got the court below to do—on highly "speculative" theories that were "filed too late," no less. *Id.* at 575.

Elizabeth Sennett's family, loved ones, and community have suffered enough. The district court got it right: "Having waited *mere hours* before his scheduled execution to file his motion for a preliminary injunction, Smith inexcusably delayed in seeking relief." DE50:7-8. "The people of [Alabama], the surviving victims of Mr. [Smith's] crimes, and others like them deserve better" than last-minute attempts to abuse the judicial process to force the State to delay a lawful execution. *Bucklew*, 139 S. Ct. at 1134. "[T]he question of [Smith's] capital punishment belongs to the people [of Alabama] and their representatives." *Id.* This Court should ensure it remains with them by vacating the stay—and quickly.

STATEMENT

A. Smith's Crime

On April 7, 1988, Kenneth Eugene Smith was indicted for capital murder by the Grand Jury of Colbert County, Alabama, for murdering Elizabeth Dorlene Sennett in a sordid murder-for-hire plot. *Smith v. State*, 908 So. 2d 273, 279-81 (Ala. Crim. App. 2000). Smith's crime was not impulsive or spontaneous, but demonstrated planning and cold-blooded deception, including the active recruitment of others to participate in the murder. *Id.* at 280; *accord Smith v. State*, 588 So. 2d 561, 565 (Ala. Crim. App. 1991). Elizabeth welcomed Smith and his accomplice into her home, and they savagely beat her and stabbed the defenseless woman eight times in the chest and once on each side of the neck. *Id.* Smith was convicted of murder "done for a

pecuniary or other valuable consideration or pursuant to a contract or for hire," Ala. Code §13A-5-40(a)(7), a capital offense.

B. The Introduction of Nitrogen Hypoxia as a Method of Execution

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 Alabama Code §15-18-82.1(b)(2), as modified by the act, an inmate whose conviction was final before June 1, 2018, had thirty days from that date to inform the warden of the correctional facility in which he was housed that he was electing to be executed by nitrogen hypoxia.

The law did not include any provision requiring that any individual be given special notice of its enactment, nor did it specify how an inmate should make an election, other than "merely requir[ing] that the election be 'personally made by the [inmate] in writing and delivered to the warden'" within thirty days of the triggering date. *Price v. Dunn*, 139 S. Ct. 1533, 1535 (2019) (Thomas, J., concurring in the denial of certiorari) (quoting Ala. Code §15–18–82.1(b)(2)). And, as discussed further below, the law expressly states that "[a]n election for a choice of a method of execution made by a convict shall at no time supersede the means of execution available to the Department of Corrections." Ala. Code §15-18-82.1(i). That is, the law never guaranteed a right to nitrogen hypoxia, but rather offered a thirty-day window to elect for execution-by-nitrogen-hypoxia, which would be granted only insofar as those "means of execution" were "available to the Department of Corrections." *Id.*

As the district court found, "Smith did not elect nitrogen hypoxia during the election window." DE22:4.

C. Proceedings in this Case

On June 24, 2022, the State of Alabama moved for the Alabama Supreme Court to set an execution date for Smith, and on September 30, that court did so, setting Smith's execution for November 17, 2022. DE13-1:2.

On August 18, 2022, Smith sued Commissioner Dunn and ADOC on the theories that (1) "Defendant's lethal injection process will subject Plaintiff to an intolerable risk of torture, cruelty, or substantial pain," and (2) "Defendants failed to provide Plaintiff with information necessary to make a knowing and voluntary waiver" of the "right to elect to be executed by nitrogen hypoxia." DE1:16-17. Defendants filed a motion to dismiss (DE10), and on October 16 the district court issued a memorandum opinion granting the motion (DE22)[2] and entered final judgment dismissing the case with prejudice (DE23). In its opinion dismissing Smith's claims, the court ordered Defendant "to strictly adhere to, and not deviate from, the ADOC's established lethal injection protocol during Smith's execution." DE22:15. "In particular," the court continued, "the Commissioner and his agents shall not perform a cutdown procedure or use intramuscular sedation on Smith." *Id.*

Smith filed a "Motion to Alter or Amend the Judgment under Federal Rule of Civil Procedure 59(e)" (DE24) three days later, requesting the opportunity to amend his complaint and attaching a proposed amended complaint to his filing. DE24-1. In his proposed amended complaint, Smith abandoned his Fourteenth Amendment

[2] In its memorandum opinion, the district court granted Defendants' motion to dismiss as to the Commissioner and dismissed "Smith's claims against the ADOC … upon Smith's consent," DE22:15, leaving the Commissioner the lone Defendant.

claim and doubled down on his Eighth Amendment argument. *Id.* Briefing on the motion was completed less than a week later. DE26. Six days after that, the court ordered supplemental briefing. DE27. Five days after the conclusion of supplemental briefing, on November 9, the court rejected Smith's request to amend, "find[ing] that the proposed Amended Complaint fail[ed] to state sufficient factual detail to raise a plausible Eighth Amendment method of execution challenge." DE33:11.

On November 10—seven days before his scheduled execution—Smith appealed. DE34. Four days later, on November 14, he **for the first time** asked a court for injunctive relief—bypassing the district court to request a stay of execution from the Eleventh Circuit **88 days after initially filing suit**. At no point before that had he moved for a stay or a preliminary injunction in the district court, despite acknowledging in October his need to do so. DE17.

On November 17 at 2:09 p.m. C.T., the Eleventh Circuit reversed the Court's dismissal of Smith's claim and remanded for further proceedings. DE41. The court concluded that Smith had stated a plausible Eighth Amendment claim that was not time-barred. *See* Opinion, *Smith v. Commissioner*, No. 22-13781 (11th Cir. Nov. 17, 2022). It denied Smith's stay motion as moot. *Id.*

Smith finally filed his first motions for equitable relief—a motion for stay of execution and for a preliminary injunction—in the district court on November 17, 2022 at 2:34 p.m., less than four hours before his execution was scheduled to begin—and **91 days** after he filed his initial Complaint. The district court denied both motions. DE50:8

At 8:00 p.m. C.T., the Eleventh Circuit granted Smith's last-minute stay request. *See Smith v. Comm'r, Ala. Dep't of Corrs.*, No. 22-13846 (11th Cir. Nov. 17, 2022).

Smith's execution is scheduled for **tonight** at **6:00 p.m.**, and the warrant to execute him expires by midnight central time.

REASONS FOR GRANTING THE APPLICATION

I. Smith Was Not Entitled To Equitable Relief Because He Could Have Brought His Claims Years Ago, And He Could Have Sought An Injunction *In This Case* Months Ago.

"[S]mith is not entitled to [injunctive relief] 'as a matter of course' simply because he brought a §1983 claim." *Long v. Sec'y, Dep't of Corr.*, 924 F.3d 1171, 1176 (11th Cir. 2019). Rather, as this Court has made clear time and again, "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." *Bucklew*, 139 S. Ct. at1134 (quoting *Hill*, 547 U.S. at 584-85). Indeed, "[t]he proper response" to "death-row inmates with an impending execution[] bring[ing] last-minute claims that will delay the execution" is "to deny meritless requests expeditiously." *Price*, 139 S. Ct. at 1540 (Thomas, J., concurring in denial of certiorari); *Bucklew*, 139 S. Ct. at 1134 (noting that "'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'" (quoting *Hill*, 547 U.S. at 584)); *Gomez v. U.S. Dist. Ct. for N. Dist. Of Cal.*, 503 U.S. 653, 654 (1992) (per curiam) ("[e]quity must take into consideration" an inmate's "attempt at manipulation").

Accordingly, "before granting a stay of execution, a court *must* 'consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim.'" *Long*, 924 F.3d at1176 (emphasis added) (quoting *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004)). "There is 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.'" *Id.* (quoting *Nelson*, 541 U.S. at 650). And this Court has repeatedly denied injunctive relief to condemned inmates seeking last-minute stays of execution. *See id.* at 1176-77 (collecting cases). In *Dunn v. Price*, for example, the Court vacated another stay of execution entered by the Eleventh Circuit. 139 S. Ct. 1312, 1312 (2019). Similar to Smith, that inmate had waited until about two months before his scheduled execution to challenge Alabama's lethal injection protocol, and then waited until *the day of his scheduled execution* to submit additional evidence in support of his request for relief. *Id.* In vacating the stay, the "Court again relied on *Gomez* to instruct courts to consider the last-minute nature of a stay in determining whether equitable relief is appropriate." *Long*, 924 F.3d at 1177 (citing *Dunn*, 139 S. Ct. at 1312). These instructions from the Court accord both with traditional considerations of injunctive relief and the doctrine of laches, in which a plaintiff that has "delayed inexcusably in bringing the suit" and "unduly prejudiced defendants" is denied relief. *Equal Emp't Opportunity Comm'n v. Dresser Indus., Inc.*, 668 F.2d 1199, 1202 (11th Cir. 1982) (quotation omitted).

Smith's delay thus should have provided the Eleventh Circuit with an independent and sufficient ground for swiftly denying his last-minute attempt to stave off his lawful execution. When Smith filed suit back in August, he raised an Eighth Amendment claim challenging the lethal injection protocol and a Fourteenth Amendment claim alleging that his right to due process was violated when he failed to elect nitrogen hypoxia in 2018. Both claims were already too late when he brought them. Smith then compounded that problem by *never seeking injunctive relief in the district court until the day of his execution.*

Not only that, but the timing of Smith's claims themselves should have precluded relief. Smith's Fourteenth Amendment claim was perhaps the most untimely, as it is clearly "rooted in the thirty-day election window that closed on July 2, 2018." DE22:13. As the district court explained, "[t]he statute of limitation for such a claim expired in July 2020." *Id.* And even if he could somehow get around the statute of limitations bar, it is nevertheless clear that Smith could have brought his claim much earlier than he did—such as soon after the State moved in August 2019 to reset the execution date for another death-row inmate, Jarrod Taylor, after it was discovered that Taylor had elected nitrogen hypoxia. *See* DE14-1. Both the motion itself and contemporaneous media reports indicated that "the ADOC [was] not yet prepared to proceed with an execution by nitrogen hypoxia" in August of 2019. *See, e.g.*, *Mistake forces state to call off plans to execute triple-murderer*, AL.COM, August 15, 2022 (accessed on 10/3/22 at https://www.al.com/news/2019/08/mistake-forces-state-to-call-

off-plans-to-execute-triple-murderer.html). Instead, Smith decided to wait over *three years* until the State moved to set his execution to bring his challenge.

Nor did Smith attempt to show that he was "justifiably ignorant" of the facts underlying his claim. *Rozar v. Mullis*, 85 F.3d 556, 562 (11th Cir. 1996). "The statute of limitations on a section 1983 claim begins to run when 'the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights.'" *Van Poyck v. McCollum*, 646 F.3d 865, 867 (11th Cir. 2011) (quoting *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008)). And a plaintiff has constructive knowledge of an event that would support his cause of action when he is able to obtain needed information through inquiry. *U.S. v. Kubrick*, 444 U.S. 111, 122-23 (1979). In *Kubrick*, for instance, the Court noted that the plaintiff, though ignorant of his possible claim, "need only have made inquiry among doctors with average training and experience" to discover the relevant information. *Id.* at 123. Even more damning to the plaintiff's timeliness argument in that case was that he had access to doctors, yet chose not to inquire about the possible claim. *Id.* ("The difficulty is that it does not appear that Kubrick ever made any inquiry, although meanwhile he had consulted several specialists about his loss of hearing.").

So here. Smith has been represented by sophisticated counsel this entire time—including during Taylor's called-off execution—so either they or he could have learned the necessary facts they now rely on, particularly since the execution was covered in the media. Thus, either Smith failed to exercise reasonable diligence to discover those facts, or he knew of them and intentionally sat on them until filing a

complaint and seeking a last-minute stay would have the highest probability of delaying his execution. Either way, he acted too late.

As for his Eighth Amendment claim, Smith has primarily relied on allegations that Joe Nathan James suffered from an unlawful execution in July 2022 because (1) "ADOC staff attempted a cutdown procedure to access a vein," DE1:8, (2) "James was administered an intramuscular injection," *id.*, and (3) James's execution took roughly three hours and ADOC strapped him "to a gurney and poked, prodded and cut him attempting to access a vein," *id.* The first two concerns became moot when ADOC agreed, and the district court ordered, that ADOC employees would "strictly adhere to, and not deviate from, the ADOC's established lethal injection protocol during Smith's execution" and, "[i]n particular," to "not perform a cutdown procedure or use intramuscular sedation on Smith." DE22:15; *see Smith*, 11th Cir. No. 22-13781, Op. at 8 (agreeing these allegations were moot).

At that point, Smith moved to amend his complaint so that he could elaborate on his third concern—the timing and method of accessing a vein. In his amended complaint, Smith alleged that Alan Eugene Miller, another inmate, had spent nearly two hours strapped to a gurney during his September 2022 attempted execution, where he was "slapped, poked, prodded, and punctured" by ADOC personnel "in a futile attempt to establish intravenous access." DE24-1:13. If this happened to him, Smith said, it would violate his rights under the Eighth Amendment. *Id.* at 22-23.

To say nothing of the merits, a threshold problem with Smith refocusing on Miller's attempted execution is that the very concerns he highlights—the time and

multiple attempts it may take ADOC personnel to access a vein—were present in a much earlier attempted execution that Miller himself discussed in earlier pleadings: that of Doyle Lee Hamm on February 22, 2018. According to Smith, during Hamm's scheduled execution "there was a two- and one-half hour delay while ADOC staff attempted to establish an intravenous line. During that time, ADOC staff punctured Hamm at least 11 times in his limbs and groin, causing him to bleed profusely on the gurney. ADOC stopped the execution, on information and belief, only when the warrant was about to expire." DE1:5 (cleaned up and citation omitted); DE24-1:15. Indeed, Smith even cites contemporaneous news articles that undoubtedly put him on notice of the exact harms he alleges here. *See* DE1:5. Thus, if Smith's claim is that he fears that what happened to Hamm and Miller could happen to him, then Smith has had over *four years* to bring his claim. But he chose not to do that, either.

Nor did Smith's delay stop there. As noted, after filing his complaint on August 18, he waited until the day of his execution to seek a stay from the district court. As that court noted, Smith "could have filed a motion for a stay when he filed his Complaint with this Court on August 17, 2022, or immediately thereafter; or immediately after the Alabama Supreme Court set his execution date on September 30, 2022; or at any time while his Complaint was pending before this Court prior to the Court's dismissal on October 16, 2022; or in conjunction with his motion to alter or amend this Court's judgment, which he filed on October 19, 2022; or at any time while the motion to alter or amend was pending." DE50:7. "Indeed, Smith's counsel represented to the Court during oral argument regarding the Commissioner's Motion

to Dismiss on October 13, 2022 that he would file a motion for a preliminary injunction the following Wednesday, October 19, 2022," yet he didn't do that, either; when asked why not, his counsel "offered no compelling justification for why he failed to file either of these motions earlier, and he identified no procedural basis why he could not have done so." *Id.*

The district court thus "conclude[d] that Smith inexcusably delayed in seeking a stay." *Id.* So he did. "If [he] had truly intended to challenge [Alabama's] lethal injection protocol instead of just seeking to delay his execution, he would not have deliberately waited to [seek relief] until a decision … would require entry of a stay" or injunction. *Long*, 924 F.3d at 1178. Smith's delay alone thus warrants rejecting his last-minute attempt to avoid his sentence. He has not sought a "fair[] and expeditious[]" resolution of his claim. *Bucklew*, 139 S. Ct. at 1134.

II. Smith Failed To Show A Substantial Likelihood Of Success On The Merits.

A. Stating a Plausible Claim and Seeking Discovery Is Not Enough to Show a Substantial Likelihood of Success on the Merits.

Preliminary injunctive relief—whether a stay or a preliminary injunction—should not be granted unless the movant "has made a strong showing that he is likely to succeed on the merits." *Nken*, 556 U.S. at 434. "It is not enough that the chance of success on the merits be better than negligible." *Id.* (quotation marks and citation omitted). Though Smith titled his motion at the Court of Appeals a request for a stay, he was "asking for an injunction against enforcement of a presumptively constitutional" execution. *Respect Maine PAC v. McKee*, 562 U.S. 996 (2010). That sort of "a

request 'demands a significantly higher justification' than a request for a stay, because unlike a stay, an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Id.* (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). And it becomes even "harder for a plaintiff to meet his burden of proof" when proceeding on an "undeveloped record" and contesting "material allegations of facts." *Siegel v. LePore*, 234 F.3d 1163, 1175 (11th Cir. 2000) (*en banc*)..

The Eleventh Circuit determined that a stay was necessary. But when there is insufficient time for discovery, an undeveloped record supports *denial* of injunctive relief. *Id.* "Preliminary injunction motions are often, by necessity, litigated on an undeveloped record." *Id.*; *see also, e.g.*, *Firefighters Loc. Union No. 1784 v. Stotts*, 467 U.S. 561, 604 n.7 (1984) ("The time pressures involved in a request for a preliminary injunction require courts to make determinations without the aid of full briefing or factual development."); *Sole v. Wyner*, 551 U.S. 74, 84 (2007) (recognizing that preliminary injunction decisions may be made when "[t]he emergency proceeding allows no time for discovery").

In *Siegel*, for example, the *en banc* Eleventh Circuit affirmed denial of a preliminary injunction when "[n]o formal discovery ha[d] been undertaken, and, as yet, no evidentiary hearing ha[d] been held in this case," even though "[m]any highly material allegations of facts [were] vigorously contested." *Siegel*, 234 F.3d at 1175. Rather than warranting injunctive relief, this "undeveloped record … ma[de] it *harder*

for a plaintiff to meet his burden of proof." *Id.* (emphasis added). Thus, the court found no error in the district court's conclusion that "[p]laintiffs had failed to show a substantial likelihood of success on the merits." *Id.* When a party chooses to proceed on a "sparse record," "it is not entitled to have its disputed representations accepted as true." *Id.* at 1190 (Anderson, C.J., concurring).

Just as in *Siegel*, Smith's motion was, "by necessity, litigated on an undeveloped record." *Id.* at 1175. The "time pressures" of this case allowed "no time for discovery." *Stotts*, 467 U.S. at 604 n.7; *Sole*, 551 U.S. at 84. But the "undeveloped record" and "vigorously contested" facts should not have worked in Smith's favor, *Siegel*, 234 F.3d at 1175; to the contrary, they should have made it "harder for [him] to meet his burden of proof," *id.* By proceeding on a "sparse record," Smith was "not entitled to have [his] disputed representations accepted as true." *Id.* at 1190 (Anderson, C.J., concurring).

Indeed, while there is a great deal of caselaw discussing the need for expedited discovery *prior* to a hearing on a motion for preliminary injunction, Smith has pointed to no authority holding that the supposed *need for discovery* would itself warrant the imposition of a preliminary injunction or stay. As the district court found, Smith's Eighth Amendment claims relating to the James execution, whether in his original Complaint or the Amended Complaint, are rendered moot by Defendant's previous assertion that ADOC will not employ a cutdown or intramuscular sedation and by the district court's order that Defendant must "strictly comply" with the protocol. As to the preparations for Miller's execution, Smith has identified no evidence at all,

much less evidence to support a claim, that would not either be mooted by the district court's order to adhere to the protocol (such as a claim that ADOC deviated from the protocol) or be barred by the statute of limitations (such as a claim that the protocol doesn't limit the time for carrying out executions).

Smith sought a stay simply to carry out discovery and "find out" whether something happened during the unsuccessful preparations for Miller's execution that *might* help him prove his claim. This Court's case law forecloses that tactic. *Cuomo v. Clearing H. Ass'n, L.L.C.*, 557 U.S. 519, 531 (2009) ("Judges are trusted to prevent 'fishing expeditions' or an undirected rummaging through bank books and records for evidence of some unknown wrongdoing."); *see also Shoop v. Cunningham*, 21-1587, 2022 WL 16909166, at *6 (U.S. Nov. 14, 2022) (Thomas, J., dissenting from denial of certiorari) ("[B]are, unspecified, and unsubstantiated allegation[s] … are not enough to 'unlock the doors of discovery.'" (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009))). But here, Smith has failed to even suggest that discovery will "supplement [his] allegations," *id.*—instead, he poses open-ended questions (*e.g.*, "What else might [ADOC] do?" DE24-1:5) and fails to show that any discovery requests are likely to produce evidence useful to his claims (and, as discussed in the following section, all the evidence adduced to this point has only *undercut* Smith's claims).

At bottom, Smith's claimed need for discovery highlights the fact that mere speculation that Defendant *might* deviate from the protocol was insufficient to warrant a stay. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) ("To seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in fact'

that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical."); *see also Swain v. Junior*, 961 F.3d 1276, 1292 (11th Cir. 2020) ("As we have emphasized on many occasions, the asserted irreparable injury must be neither remote nor speculative, but actual and imminent.").

B. The Evidence That Is Known Cuts Against Smith's Claims, Further Dooming His Likelihood of Success.

Beyond the self-refuting claim that a prisoner warrants a stay of execution—extraordinary relief "not available as a matter of right," *Hill*, 547 U.S. at 584—just to conduct discovery, the facts cut sharply against Smith's allegations and further show that he cannot show a "substantial likelihood of success on the merits," *Chavez v Florida SP Warden*, 742 F.3d 1271 (11th Cir. 2014).

Smith continues to base his claims on an autopsy that he badly misrepresented to the courts below and that in fact undermines his claims. Smith's central allegation is that, "[b]ased upon the results of an autopsy on Mr. James performed by an independent pathologist … ADOC staff attempted a cutdown procedure to access a vein." DE24-1:10; *see also* DE1:8. Smith also alleges that "[t]he independent autopsy further revealed evidence … which suggest[s] that Mr. James was administered an intramuscular injection." DE24-1:11. In making these claims, Smith cites the Declaration of Dr. Joel Zivot,[3] an anesthesiologist who purported to provide "an opinion" based on

[3] Dr. Zivot is no stranger to this Court. He was enlisted as a medical expert in the *Bucklew v. Precythe* case. 139 S. Ct. 1112 (2019). Attempting to offer medical testimony in support of the prisoner, Dr. Zivot "crossed up the numbers" and ended up reaching a patently erroneous medical conclusion by improperly extrapolating evidence from a "horse study" onto human beings. *Id.* at 1132; *see also id.* at 1133 (further discussing "Dr. Zivot's incorrect testimony about the horse study").

"the autopsy findings of JN James." DE24-1:28-29. But Dr. Zivot acknowledged that he never conducted the autopsy. The pathologist who conducted the autopsy to which Dr. Zitnow refers was Dr. Boris Datnow. *Id.*

As the pathologist who conducted the James autopsy, Dr. Datnow speaks authoritatively on the results of that autopsy. And Dr. Datnow vehemently refutes Dr. Zivot's account of the autopsy and its findings. *Id.* at 3-4. Moreover, as shown by Dr. Datnow's affidavit and his attached autopsy report (DE31-1), the autopsy itself revealed "*no evidence* that a cutdown procedure was performed or attempted on Mr. James." *Id.* at 2 (emphasis added); *see also* Ivana Hrynkiw, *Alabama's Autopsy of Joe Nathan James Jr. Finds No Signs of Abuse, Cutting into Arms for Vein*, AL.COM, https://www.al.com/news/2022/11/alabamas-autopsy-of-joe-nathan-james-jr-finds-no-signs-of-abuse-cutting-of-veins.html. Similarly, Dr. Datnow's findings, including the toxicology screen he ordered, provide *no support* for Smith's claim that ADOC personnel administered an intramuscular sedative to Mr. James. *Id.*

Smith's theory relies on the assertion that the State of Alabama cannot be trusted to follow the district court's order to "strictly adhere" to the protocol because "there are independent autopsy results consistent with the use of cutdowns and intramuscular sedation on Mr. James, of which Defendant curtly denies and refuses to explain." DE24:6. But, as Dr. Datnow's declaration and his autopsy make clear, Smith's statements are misrepresentations. The "independent autopsy results" are, according to the pathologist who conducted the autopsy, in no way "consistent with the use of cutdowns and intramuscular sedation." *Id.* Just the opposite: "Dr. Zivot's

speculations about torture, cutdown procedures, intramuscular sedation, and struggling by Mr. James are *not supported by the autopsy I performed*." DE31-1:4 (emphasis added). The autopsy on which Smith's claim relies unequivocally undermines the merits of his argument, dooming his ability to "ma[k]e a strong showing that he is likely to succeed on the merits." *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1370 (11th Cir. 2022) (quoting *Nken*, 556 U.S. at 425-26).

And the evidence against Smith continues to pile up. Following Smith's notice of appeal, the Alabama Department of Forensic Sciences has released the official autopsy of Joe Nathan James conducted by Dr. Shante Hill (DE45-1), which is on all fours with the autopsy performed by Dr. Datnow. Like Dr. Datnow's, the ADFS autopsy addressed the cuts opposite James's elbow. Contrary to Smith's claim, ADFS *confirmed there was no cut-down*; rather, the ADFS autopsy describes the injuries that Smith supposes represent a "cutdown" as "superficial abrasions [] less than 1/16 inch in depth." DE45-1:2. Nor did the ADFS toxicology report note the presence of any intramuscular sedative. DE45-2. In the end, only two qualified pathologists examined Joe Nathan James: Dr. Datnow and Dr. Shante Hill. Neither found any evidence to back up the speculations advanced by Dr. Zivot—who is, after all, an anesthesiologist with no Alabama medical license and, thus, could not legally conduct James's autopsy.[4] The findings of Drs. Datnow and Hill cripple whatever remained of Dr. Zivot's credibility. *See Bucklew*, 139 S. Ct. at 1132.

[4] Under Alabama law, the practice of medicine without a license is a class C felony. *See* Ala. Code §34-24-51. While Dr. Datnow maintains an active and unrestricted medical license, Dr. Zivot has no Alabama license. *See* Doc. 24-1, Exh. A, para. 3.

In much the same way that Dr. Zivot "crossed up the numbers" when relying on a "horse study" to support a prisoner's Eighth Amendment argument, *Bucklew*, 139 S. Ct. at 1132, he appears to have yet again rendered medically unsound testimony in an effort to delay a lawful execution. The conclusion is inevitable: When the known evidence is considered, Smith can show *no* likelihood (much less a substantial one) that he will succeed on the merits of his claims.

C. Smith's Eighth Amendment Claim Cannot Succeed.

Following "the original and historical understanding of the Eighth Amendment on which *Baze* and *Glossip* rest," *Bucklew*, 139 S. Ct. at 1126, to succeed on his method-of-execution claim Smith must meet two requirements: *First*, he must prove "substantial risk of serious harm," *Glossip v. Gross*, 576 U.S. 877 (2015); and *second*, he must show "some other feasible and readily available method to carry out its lawful sentence that would have significantly reduced a substantial risk of pain," *Bucklew*, 139 S. Ct. at 1128; *see also Nance*, 142 S. Ct. at 2222-23 ("[The prisoner] must, we have said, present a 'proposal' that is 'sufficiently detailed' to show that an alternative method is both 'feasible" and 'readily implemented.' … [H]e is providing the State with a veritable blueprint for carrying the death sentence out.").

Smith faces no prospect whatsoever—and certainly not a "substantial likelihood"—of meeting each of these necessary conditions. As explained below, nothing in his pleadings suggests that ADOC's standard IV-access protocol subjects Smith to a "substantial risk of serious harm." *Glossip*, 576 U.S. at 877. But most galling is Smith's treatment of the *Baze-Glossip* test's second prong. Smith asserts that

nitrogen hypoxia is available *"[a]s a matter of law*," DE24-1:19 (emphasis added), while at the same time adducing expert testimony that whether the State can execute a prisoner by nitrogen hypoxia "remains unknown." DE24-1:34. That is, Smith readily concedes that nitrogen hypoxia is unavailable as a matter of *fact*, *id.*, but nevertheless insists he can prevail on his Eighth Amendment claim because nitrogen hypoxia is theoretically available "[a]s a matter of law," *id.* at 19.

Smith's argument is self-refuting. Not only does Smith misunderstand Alabama's nitrogen-hypoxia-election law (which expressly contemplates the unavailability of nitrogen hypoxia as a method of execution, *see* Ala. Code §15-18-82.1(i)), but his metaphysical acrobatics contravene precedent from this Court's decisions in *Baze*, *Glossip*, *Bucklew*, and *Nance*, among others. His Eighth Amendment claim faces no prospect of success.

1. Smith cannot show that Alabama's IV protocol is a "punishment" that "'superadds' pain well beyond what's needed to effectuate a death sentence."

Smith alleged that ADOC violated its internal protocol "when ADOC executed Joe Nathan James on July 28, 2022 and when it attempted to execute Alan Eugene Miller on September 22, 2022," *id.* at 3, because ADOC allegedly implemented "an unauthorized 'cutdown' procedure" and "an unauthorized intramuscular injection" on James, "strapped [Miller] to a gurney in a stress position," and "slapp[ed]" Miller "on his neck." *Id.* at 4. Smith also homes in on the duration of time it has taken ADOC to establish intravenous access. He claims that taking "three hours" to establish IV

access for James (DE24-1:9) and "nearly two hours" for Miller (*id.* at 14), for example, was cruel and unusual.[5]

None of these procedures "cruelly superadds pain to the death sentence." *Bucklew*, 139 S. Ct. at 1125; *accord, e.g.*, *Nooner v. Norris*, 594 F.3d 592, 604 (8th Cir. 2010) (holding prisoners "failed to establish a genuine issue of material fact about whether they face a substantial risk of serious harm from a cut-down procedure"). Rather, even according to Smith and his own expert's explanations, each appears to constitute a medical decision designed to carry out the lethal injection. *See, e.g.*, DE24-1:11, 31; DE12:12 ("Mr. Smith alleges that ADOC staff performed a surgical procedure on Mr. James."); *accord, e.g.*, *Stimmler v. Chestnut Hill Hosp.*, 602 Pa. 539, 545 (2009) ("A 'cutdown' is the 'dissection of a vein or artery for insertion of a cannula or needle for the administration of intravenous fluids or medication or for measurement of pressure.'") (quoting *Stedman's Medical Dictionary* 474 (28th ed. 2006)).

And because "the Constitution does not demand the avoidance of all risk of pain in carrying out executions," *Baze v. Bowling*, 553 U.S. 47 (2008), Smith fails to demonstrate why cutdowns or intramuscular injections—alleged risks of pain and discomfort notwithstanding—violate the Constitution. Nor does he explain how a "stress position" or a "slap[]" on the neck amount to "long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) superadd[ition] of terror, pain, or disgrace." *Bucklew*, 139 S. Ct. at 1124 (internal quotation marks

[5] Again, Smith's reliance on the length of time available to ADOC for an execution merely highlights the statute-of-limitations problems that arise out of the fact that the protocol has long been public and Smith's own pleadings about the failed preparations for Doyle Hamm's execution on February 22, 2018. *See supra* §I; DE1:5.

omitted). No amount of discovery will change that. Medical procedures and alleged "slap[s]" just don't come close to those "[d]isgusting" practices traditionally considered cruel and unusual—like "dragging the prisoner to the place of execution, disemboweling, quartering, public dissection, and burning alive, all of which Blackstone observed 'savor[ed] of torture or cruelty.'" *Id.* at 1123.

Even further afield are Smith's claims that taking "three hours" or "nearly two hours" (DE24-1:9, 14) to establish IV access violates the federal Constitution. Smith bases his claim on Dr. Zivot's assertion that "in a medical setting and in the hands of skilled medical professionals, it would be highly unusual to take three hours to start 2 IVs." DE24-1:28-29. But comparison to ideal "medical setting[s]" in "Emory [University] hospitals" (*id.* at 31) is simply irrelevant in the context of prisoner executions.

Indeed, Smith's own experts' testimony explains precisely why establishing an IV line in an execution setting will take more time than doing the same in a standard medical setting. In the words of Dr. Zivot: "Establishing IV access in an execution setting with a condemned person strapped to a gurney is subject to inherent risks above and beyond any that might exist in establishing IV access with a willing patient in a medical setting." *Id.* at 33. This is because "[w]hen a person is nervous or frightened, the sympathetic nervous system is activated, and this leads to the release of certain hormones and chemical mediators. This stress response causes the blood vessels to constrict, and it becomes much harder to locate suitable veins for intravenous canulation." *Id.*

And Dr. Robert Yong, another of Smith's experts, explained that even in optimal conditions "[f]ailure rates for peripheral intravenous catheters range from 35-50%." *Id.* at 120. But "[i]n settings where the patient is not optimized, such as extreme distress or anxiety, shock, or trauma, failure rates are higher and can go longer without being recognized." *Id.* at 121-22. So "[i]n circumstances where the patient is not optimized or with increased anxiety"—in other words, circumstances exactly like those facing condemned inmates—"*the challenges of obtaining intravenous access increase greatly*." *Id.* at 123 (emphasis added).

Smith's own exhibits directly contravene his claim that "[i]t should not take three hours, as it did in Mr. James's case, or nearly two hours, as it did in Mr. Miller's case to establish intravenous access." *Id.* at 8. And Smith never even attempts to explain how long establishing IV access should take, offering no baseline against which one could possibly measure whether the discomfort he alleges is "unnecessary." Instead, he baldly asserts that establishing IV access took *too long*, and that ADOC made *too many* attempts to establish IV access. Smith's refusal to explain how much time ADOC should have spent to establish an IV is telling; indeed, by his own experts' testimony, ADOC faced substantial headwinds not present in a standard "medical setting" at Emory University, and Smith provides no basis to conclude that the time they took to establish IV lines for James and Miller "'superadd[ed]' pain well beyond what's needed to effectuate a death sentence." *Bucklew*, 139 S. Ct. at 1126. And again, no amount of discovery will convert ADOC's attempt to establish IV access for a lawful execution into "barbarous and cruel punishments" like "[b]reaking on the wheel,

flaying alive, rending asunder with horses, ... maiming, mutilating and scourging to death." *Id.* at 1123.

"[T]he Constitution affords a 'measure of deference to a State's choice of execution procedures' and does not authorize courts to serve as 'boards of inquiry charged with determining 'best practices' for executions.'" *Id.* at 1125 (quoting *Baze*, 553 U.S. at 51-52). By failing to show that any of ADOC's alleged deviations from internal protocol violates the Constitution, Smith fails to provide any constitutional salience to his claim that ADOC might use "other procedures in its discretion." DE24-1:23.

2. Contravening *Baze*, *Glossip*, *Bucklew*, *Nance*, and other precedents of this Court, Smith declared that he does not need to show a "feasible and readily implemented alternative method of execution."

Even assuming Smith could show that the State's protocol for establishing IV access amounted to "a substantial risk of severe pain," *Glossip*, 576 U.S. at 877, to state a viable Eighth Amendment claim he still "*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 (emphasis added). He "*must*, as [this Court] ha[s] said, present a 'proposal' that is 'sufficiently detailed' to show that an alternative method is both 'feasible' and 'readily implemented.'" *Nance*, 142 S. Ct. at 2222 (emphasis added). This Court's repeated admonitions make clear that showing a feasible, readily implemented alternative is not optional. To succeed,

Smith *must* "provid[e] the State with a veritable blueprint for carrying the death sentence out." *Id.*

But Smith and the Eleventh Circuit disregarded all of this. Rather than "provid[e] the State with a veritable blueprint for carrying the death sentence out," *Nance*, 142 S. Ct. at 2222, Smith summarily asserted that, "[a]s a matter of law, nitrogen hypoxia is an available and feasible alternative method of execution," DE24-1:19. Offering a blanket assertion that nitrogen hypoxia is available "[a]s a matter of law" is no substitute for adequately "present[ing]"—as a matter of *fact*—"a 'proposal'" for nitrogen hypoxia as a method of execution "that is 'sufficiently detailed' to show that [nitrogen hypoxia] is both 'feasible' and 'readily implemented.'" *Nance*, 142 S. Ct. at 2222 (quoting *Bucklew*, 139 S. Ct. at 1129); *see also, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level."). Worse still, Smith not only failed to show nitrogen hypoxia is "feasible and readily implemented," *Bucklew*, 139 S. Ct. at 1125; he affirmatively asserted that "[h]ow it will be done remains unknown," DE24-1:34. So much for "a veritable blueprint." *Nance*, 142 S. Ct. at 2223.

What could lead Smith and the Circuit Court so astray? Reliance on dicta from the Court of Appeals's decision in *Price v. Dunn*, 920 F.3d 1317 (11th Cir. 2019), where the court concluded 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." *Id.* at 1327-28. "[D]ictum is usually a bad idea." *United States v. Burris*, 912 F.3d 386, 410 (6th Cir. 2019) (en banc) (Kethledge, J.,

concurring in the judgment); *see also, e.g.*, *Wright v. Spaulding*, 939 F.3d 695, 701 (6th Cir. 2019) (Thapar, J.) ("[D]ictum is less likely to reflect a court's deliberate judgment."); *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1315 (11th Cir. 1998) (Carnes, C.J., concurring) (noting that dicta is "less reliable" because "it is effectively insulated from *en banc* or Supreme Court review[,] [n]o matter how strongly other members of the Court are convinced that a panel's dicta is wrong"). Just so here, where "[t]he facts of this case cast serious doubt on the Eleventh Circuit's suggestion that the State bears a heavy burden of showing that a method of execution is unavailable as soon as its legislature authorizes it to employ a new method." *Price v. Dunn*, 139 S. Ct. 1533, 1539 (2019) (Thomas, J., concurring in denial of certiorari).

a. Smith's position and the dicta on which it rests unequivocally contravene this Court's decisions in *Baze*, *Glossip*, *Bucklew*, and *Nance*, among others. The *Baze* plurality made clear that to prove an Eighth Amendment violation a prisoner must provide an "alternative procedure" that is "feasible, readily implemented, and *in fact* significantly reduce[s] a substantial risk of severe pain." *Baze*, 553 U.S. at 52 (2008) (emphasis added). An alternative method that is feasible only *in theory* does not demonstrate that method's feasibility "in fact." *Id.* And the *Glossip* Court confirmed that "the Eighth Amendment requires a prisoner to *plead and prove* a known and available alternative." *Glossip*, 576 U.S. at 880. "Plead[ing] and prov[ing]" the existence of an alternative without providing evidence of its actual existence is, of course, incoherent; to "prove" is "[t]o establish or make certain; to establish the truth of (a

fact or hypothesis) *by satisfactory evidence*." *Prove*, Black's Law Dictionary (11th ed. 2019) (emphasis added).

This Court reaffirmed all this just a few years ago in *Bucklew*, explaining that its "precedents and history require asking whether the State had some other feasible and readily available method to carry out its lawful sentence." 139 S. Ct. at 1127. And not even five months ago, the Court emphatically reiterated that to prevail on an Eighth Amendment claim under §1983 (as Smith attempts to do here) a prisoner

> *must* … present a proposal that is sufficiently detailed to show that an alternative method is both feasible and readily implemented. In other words, he *must* make the case that *the State really can put him to death*, though in a different way than it plans. …. [H]e is *providing the State with a veritable blueprint* for carrying the death sentence out. If the inmate obtains his requested relief, it is because he has persuaded a court that the State could *readily use his proposal* to execute him.

Nance, 142 S. Ct. at 2222-23 (internal quotation marks omitted; emphasis added).

Smith's error is as simple as it is glaring: He reasoned that dicta from an Eleventh Circuit decision permits him to ignore this Court's unequivocal "precedents and history." *Bucklew*, 139 S. Ct. at 1127. Worse, he makes a hash of those "precedents and history" by pushing an Eighth Amendment claim while simultaneously declaring that the feasibility of his purported alternative (nitrogen hypoxia) "remains unknown." DE24-1:34. A litigation strategy that recalcitrantly refuses to engage the merits of a claim is not remotely "likely to succeed on the merits," *Glossip*, 576 U.S. at 876, and on that independent basis this Court should vacate the Eleventh Circuit's stay.

b. What's more, Alabama's nitrogen-hypoxia law did not "adopt" a particular method of execution so as to irrevocably guarantee its "availab[ility] to … inmates." *Price*, 920 F.3d 1317 at 1328. To the contrary, the law *explicitly states* that "[a]n election for a choice of a method of execution made by a convict *shall at no time supersede the means of execution available* to the Department of Corrections." Ala. Code §15-18-82.1(i) (emphasis added). That is, far from "conced[ing] that the method of execution [*i.e.*, nitrogen hypoxia] is available to its inmates," *Price*, 920 F.3d at 1328, Alabama's nitrogen-hypoxia-election law explicitly contemplated the possibility that this method of execution might not fall within "the means of execution available to the Department of Corrections," Ala. Code §15-18-82.1(i), and explained that in such instances an inmate's election would not "supersede" the State's physical capacities, *id.*

Simply put, nothing about the State's nitrogen-hypoxia law obviates an Eighth Amendment claimant's obligation to show "an alternative method [of execution] [that] is both 'feasible' and 'readily implemented.'" *Nance*, 142 S. Ct. at 2223.

III. The Other Equitable Factors Warrant Vacating The Stay.

Smith's execution is set to take place *more than two hours ago*, at 6 p.m. CT on November 17, 2022. But Smith never properly sought a preliminary injunction or stay of execution in the district court, even though his case has been pending there for three months. Why? Because waiting until the last minute to seek injunctive relief—in the Court of Appeals no less—forced an emergency that timely filing would not, thus increasing the chances that his execution would be delayed through sheer

judicial maneuvering. Unfortunately, the gambit worked below. It should not be rewarded here.

In fact, delay has been baked into this action since the beginning. Despite many opportunities to do so, including an instruction three years ago by the federal habeas court that his challenge to Alabama's lethal-injection protocol must be brought in a §1983 lawsuit, *see Smith v. Dunn*, 2:15-cv-0384, 2019 WL 4338349, at 51 (N.D. Ala. Sep. 12, 2019), Smith declined to bring this action until nearly two months after the State moved to set his execution date. **Yet at no point until today did he move for injunctive relief in the district court.** If ever there was one, this was a "last-minute attempt[] to manipulate the judicial process." *Nelson*, 541 U.S. at 649.

The Eleventh Circuit's decision to reward such gamesmanship thus abdicated its duty to "police carefully against attempts to use such challenges as tools to interpose unjustified delay." *Bucklew*, 139 S. Ct. at 1134. As this Court just recently explained, "[w]hen a party seeking equitable relief 'has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him. These well-worn principles of equity apply in capital cases just as in all others." *Ramirez*, 142 S. Ct. at 1282 (internal quotation marks, citations omitted).

Not only that, but the Court has also repeatedly recognized that "equity must be sensitive to the State's strong interest in enforcing its criminal judgement without undue interference from the federal courts." *Hill*, 574 U.S. at 584. That is because

both the State and victims of Smith's heinous crime have an "interest in the finality and timely enforcement of valid criminal judgments." *Bowles v. DeSantis*, 934 F.3d 1230, 1247 (11th Cir. 2019) (citation omitted). And courts have specifically "rejected the argument that 'the equities favor a stay because [the defendant] will suffer irreparable harm if he is executed, whereas the state will only suffer [a] minimal inconvenience,' because 'the state, the victim, and the victim's family also have an important interest in the timely enforcement of [the defendant's] sentence.'" *Id.* at 1247-48 (alterations in original) (quoting *Brooks v. Warden*, 810 F.3d 812, 825-26 (11th Cir. 2016)).

In sum, "[t]he people of [Alabama], the surviving victims of Mr. [Smith's] crimes, and others like them deserve better" than last-minute attempts to abuse the judicial process to force the State to delay a lawful execution. *Bucklew*, 139 S. Ct. at 1134. This Court should thus vacate the Eleventh Circuit's stay order, and it should do so quickly so the execution can take place as scheduled.

CONCLUSION

This Court should swiftly vacate the stay so the scheduled execution may take before the death warrant expires at midnight.

Dated: November 17, 2022

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