No. _____

IN THE

Supreme Court of the United States

KENNETH EUGENE SMITH,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

APPLICATION FOR STAY OF EXECUTION

Mr. Smith's execution is scheduled for a "time frame" that begins at 12:00 a.m. CST on January 25, 2024, and runs until 6:00 a.m. CST on January 26, 2024.

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 respectfully requests that this Court stay his execution pending the disposition of his petition for writ of certiorari that he is filing contemporaneously with this application.

BACKGROUND

The Alabama Department of Corrections (ADOC) intends to execute Kenneth Eugene Smith during a time frame that begins at 12:00 a.m. on January 25, 2024. It intends to do so using nitrogen hypoxia—a method that has never been attempted by any State or the federal government—using procedures set forth in a protocol that has never been tested. It will be the second time ADOC has attempted to execute Mr. Smith, having already subjected him to cruelty and pain when it tried and failed to execute him by lethal injection in November 2022. Indeed, Mr. Smith was selected for execution even though he has not been able to fully exhaust claims raised in a separate proceeding arising from that failed attempt, which is a deviation from the State's custom, and treats Mr. Smith differently than other similarly situated inmates. And the State is proceeding ahead despite the mounting evidence of Mr. Smith's escalating posttraumatic stress disorder (PTSD) symptoms, which create a substantial risk that he will vomit during the execution and asphyxiate, causing prolonged or superadded pain and suffering.

Mr. Smith first learned that he would be executed by nitrogen hypoxia on August 25, 2023, when the State moved in the Alabama Supreme Court for authority to execute him by that method. That motion was filed just days before Defendants would have been required to respond to discovery requests in Mr. Smith's then-pending litigation about ADOC's failed execution attempt. Also on August 25, 2023, ADOC released to the public and Mr. Smith a heavily-redacted version of the Nitrogen Hypoxia Protocol it intends to use during the execution. Five days later, Mr. Smith's counsel requested an unredacted version of the Protocol so that he could make a complete assessment of how ADOC planned

to carry out his execution. ADOC refused. Mr. Smith nevertheless investigated what was readable and filed the instant action on November 8, 2023. On November 20, 2023, he filed a preliminary injunction motion supported by expert declarations and other evidence. He did not receive an unredacted version of the Protocol until November 22, 2023, after the district court ordered that it be produced.

Given ADOC's decision to release its novel and highly-redacted Protocol on the same day it moved to set Mr. Smith's execution, as well as its months-long refusal to provide an unredacted version, Mr. Smith was forced to complete discovery and present his evidence about ADOC's novel Protocol in an extremely condensed time frame. Thus, the exigent nature of the instant Petition for a Writ of Certiorari is of ADOC's own making. Mr. Smith nevertheless presented evidence in support of his preliminary injunction motion showing that he is likely to succeed on his claims that ADOC's planned execution by nitrogen hypoxia will violate his constitutional rights. Moreover, the equities weigh strongly in favor of a stay because of the compelling need to ensure that ADOC gets it right this time.

ARGUMENT

To receive a stay, Mr. Smith must make a strong showing that he is likely to succeed on the merits of his claim. *Nken v. Holder*, 556 U.S. 418, 426 (2009). This Court also balances the harm to the parties and the public interest. *Id.* As set forth below, Mr. Smith satisfies those factors.

First, Mr. Smith is likely to succeed. *See Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (to warrant a stay pending disposition of a petition for a writ of certiorari, a party must demonstrate "a reasonable probability that this Court will

grant certiorari" and "a fair prospect that the Court will then reverse the decision below") (quotation marks omitted).

Regarding his Eighth Amendment claim, Mr. Smith is likely to succeed because he has demonstrated that ADOC's planned use of a one-size-fits-all mask creates a substantial risk that he will be left in a persistent vegetative state, experience a stroke, or asphyxiate on his own vomit. Feasible and readily available alternatives—including a hood or closed chamber system for nitrogen hypoxia, or, in the alternative, the firing squad—would significantly reduce those risks.

Regarding his Fourteenth Amendment claim, Mr. Smith is likely to show that it was improperly dismissed for lack of standing. Mr. Smith alleged that the execution will violate his Fourteenth Amendment Equal Protection rights because he has not fully exhausted claims first presented in a postconviction petition arising out of the State's previous, failed attempt to execute him because he has not yet been able to purse federal habeas relief. Similarly situated condemned people are not subject to execution under those circumstances. The State's plan to execute Mr. Smith thus violates the State's custom to wait until a person's conventional appeals are exhausted before an execution date is set, moves him to the front of the execution line well before others who long ago exhausted their appeals, and was a transparent effort to moot Mr. Smith's then-pending litigation and discovery requests related to the previous failed execution attempt. Mr. Smith sought prospective relief for an imminent future injury—his planned execution and the loss of his right to exhaust his postconviction appeals. That imminent injury is fairly traceable to the conduct of the Defendants—the Commissioner of ADOC and the warden of the facility

where Mr. Smith is incarcerated—who have the responsibility under state law for carrying out Mr. Smith's execution. *See Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 78 (1978) (holding that plaintiffs alleging environmental injury from a neighboring nuclear power plant had standing to sue the plant owner to assert a claim challenging the constitutionality of the Price-Anderson Act without which the power plants could not be completed, and rejecting the contention that plaintiffs "must demonstrate a connection between the injuries they claim and the constitutional rights being asserted").

Second, Mr. Smith will be irreparably harmed absent a stay. *See Nken*, 556 U.S. at 426. There is nothing more final than death. *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) ("We consider the irreparability of the injury that petitioner will suffer in the absence of a stay [of execution] to be self-evident."). What Mr. Smith stands to suffer, however, would compound that. Under ADOC's Protocol, Mr. Smith will suffer a needlessly painful execution attempt in violation of his constitutional rights. This injury is irreparable as it "cannot be undone through monetary remedies." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990). *See also* Pet. App. 33a (J. Pryor, J., dissenting) ("The cost, I fear, will be Mr. Smith's human dignity, and ours.").

Third, the balance of equities weighs heavily in favor of a stay. For starters, a stay best serves the public interest, which "is served when constitutional rights are protected." *Melendez v. Sec'y, Fla. Dep't of Corrs.*, No. 21-13455, 2022 WL 1124753, at *17 (11th Cir. Apr. 15, 2022) (internal quotation marks and citation omitted); *see also Dahl v. Bd. of*

Trustees of W. Michigan Univ., 15 F.4th 728, 736 (6th Cir. 2021) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (internal quotation marks and citation omitted)); *Ray v. Comm'r, Ala. Dep't of Corrs.*, 915 F.3d 689, 701 (11th Cir. 2019) ("[T]he public has a serious interest in the proper application and enforcement of the Establishment Clause . . . ."); *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) (same). This case involves serious constitutional violations. The State has scheduled Mr. Smith for execution by nitrogen hypoxia despite the facts that (1) Mr. Smith has not been able to fully exhaust his claims arising out of the failed execution attempt; (2) the Protocol subjects Mr. Smith to a heightened risk of superadded pain including the painful sensation of suffocation, stroke, or a transition to a persistent vegetative state; and (3) the State has sought to change its Protocol at the eleventh-hour by putting in place a "nothing by mouth" order in the hours before the execution, including an order to deny Mr. Smith water as of 4 PM tomorrow.

There is little research regarding death by nitrogen hypoxia. When the State is considering using a novel form of execution that has never been attempted anywhere, the public has an interest in ensuring the State has researched the method adequately and established procedures to minimize the pain and suffering of the condemned person. It is therefore in the public's interest to ensure Defendants comply with the Constitutional protections afforded to Mr. Smith. The Eleventh Circuit ruled that the "lack of evidence here on the effects nitrogen hypoxia will have on Smith makes it impossible for us to reverse" because this Court's ruling in *Glossip v. Gross*, 576 U.S. 863, 881–84 (2015), "tied [its] hands." Pet. App. 21a n.6. But it cannot be that this Court's reasoning in *Glossip*, which involved an established execution method—*i.e.*, that a petitioner bears "the burden

of persuasion," even when there is a "dearth of evidence," *id.*—applies to an *entirely new* method of execution that has never been tried before anywhere, or even tested. The State must bear some initial burden of production that the method it will use will not cause superadded pain, lest it be permitted to unilaterally select a new mode of execution without any scientific support or the need to produce the documents explaining how and why that method was accepted. Otherwise, the State could select even highly experimental methods of execution simply because they had been untested.

There is also the fact that the irreparable harm that denying a stay would cause Mr. Smith far outweighs the harm that granting a stay would cause ADOC. To be sure, the State and victims have an interest in carrying out timely executions. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006). But a delayed execution is a temporary harm that is ultimately redressable; a premature execution is permanent and irreparable. *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) (considering the "irreparability of the injury" of a premature execution to be "self-evident").

CONCLUSION AND PRAYER FOR RELIEF

Mr. Smith respectfully requests that this Court grant this application and stay his execution.

DATED: January 25, 2024

Respectfully submitted,

/s/ Robert M. Grass

Robert M. Grass
Counsel of Record
Jeffrey H. Horowitz
David Kerschner
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, New York 10019-9710
(212) 836-8000
robert.grass@arnoldporter.com
jeffrey.horowitz@arnoldporter.com

Andrew B. Johnson
BRADLEY ARANT BOULT CUMMINGS, LLP
1819 Fifth Avenue North
Birmingham, Alabama 35203
(205) 521-8000
ajohnson@bradley.com

david.kerschner@arnoldporter.com

Ashley Burkett
Angelique A. Ciliberti
Lindsey Staubach
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
(202) 942-5000
ashley.burkett@arnoldporter.com
angelique.ciliberti@arnoldporter.com
lindsey.staubach@arnoldporter.com

Counsel for Petitioner