Nos. 23-6562 & 23A688

In the Supreme Court of the United States

KENNETH EUGENE SMITH,
APPLICANT
v.
COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,
RESPONDENTS

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

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INTRODUCTION

Kenneth Smith was convicted and sentenced to death for the murder-for-hire slaying of an innocent woman, Elizabeth Dorlene Sennett, in 1988. When Alabama scheduled Smith to be executed in 2022, he challenged the State's lethal injection protocol. Nitrogen hypoxia would be preferable, Smith said, because he would "lose consciousness within seconds, and experience no pain or discomfort while dying within minutes." DE39-1:¶86.[1] On August 25, 2023, the State agreed to execute Smith by nitrogen hypoxia, not lethal injection, and moved to set a new execution date. Smith's execution by nitrogen hypoxia is set for **today, January 25, 2024.**

"Now, and unsurprisingly, Smith objects to that method too," DE69:1, alleging that nitrogen hypoxia—the method *he defended* for over a year—is cruel and unusual. Extensive discovery, depositions, and a robust hearing on Smith's claims followed. The district court received over one hundred exhibits, including videos of the State's nitrogen system. The court heard live fact and expert witnesses and *physically inspected* the State's mask apparatus. The district court found that Smith failed to carry his burden, and the Eleventh Circuit identified no clear error in that ruling.

Among many problems for Smith was his star witness, Dr. Philip Nitschke, who might as well have testified for the State. Tellingly, Dr. Nitschke is not even *mentioned* in Smith's petition. Before joining Smith's cause, Dr. Nitschke said that critics of Alabama's method were "misrepresenting the science." R.App.354a.

[1] "DE" citations refer to the district court docket entry and ECF pagination where available. Citations to witness declarations and Smith's Stay Application (Stay.App.) here will use their native pagination.

"Nitrogen hypoxia is not cruel and unusual. Rather, [it is] fast and effective and with no risk to others." *Id.* Dr. Nitschke has witnessed "dozens" of suicides by nitrogen and "never observed physical pain," R.App.351a, let alone "injuries short of death, including a persistent vegetative state, stroke, or the painful sensation of suffocation." DE31:¶10 (Smith's Complaint). By design, nitrogen hypoxia is "peaceful" and "reliable," R.App.349a, 354a, Dr. Nitschke insisted, because it "ensure[s] an almost-immediate loss of consciousness with death following soon after," R.App.367a (§14.1. Smith's expert is a renowned activist and advocate in the "right-to-die" movement; having studied suicide for decades, he advocates nitrogen hypoxia "as harm reduction," R.App.354a; *see also id.* ("[I]f the U.S. insists on executing people, then harm minimizing strongly points to nitrogen."). Add to Dr. Nitschke's testimony that of the State's expert, Dr. Antognini, and the plethora of evidence about workplace fatalities and suicides by inert gas. The case for nitrogen hypoxia was open and shut.

Grasping at straws, Smith quibbled with *the way* nitrogen will be delivered. First, he said the mask is too loose and will let air inside it. But the State dispelled that concern when it produced the mask,

> a NIOSH-approved, industrial grade, continuous flow supplied-air respirator mask with an adjustable five point harness system and a pliable, double flange rubber seal that would tightly fit and hold the mask over the entirety of the wearer's face—including eyes, nose, mouth, and chin—that also contained a one-way valve near the mouth and nose allowing for the exit of exhaled gases.

DE69:9 n.3. Second, Smith said that in the precise few seconds between when gas enters the mask and he loses consciousness, he will vomit and choke to death. But the district court found (twice over) that Smith's fear was "speculative", "theoretical,"

and "unlikely." DE88:3. And the Eleventh Circuit agreed "there is no evidence that Smith is likely to vomit at the moment in which nitrogen is introduced into the mask." CA11 Op.19.

Even if Smith had proven a real risk of severe pain, he offered no alternative "that would significantly reduce [it]." *Nance v. Ward*, 597 U.S. 159, 169 (2022). Smith needed to plead and prove "a proposal that is sufficiently detailed to show that an alternative method is both feasible and readily implemented." *Id.* (cleaned up). Then, only if the State refused his alternative despite its "documented advantages" and "without a legitimate penological justification," could Smith hope to prevail. *Baze v. Rees*, 553 U.S. 35, 52 (2008). Smith failed to make this showing. The entirety of his proposal was "a custom fit mask …, a closed space or a hood." DE31:¶102. To his credit, Smith did identify a particular mask, but it was leaky and secured with magnets, so Smith abandoned it on appeal. As for the "hood," Smith never amended his pleadings, and the evidence revealed that a "hood" would exacerbate Smith's primary fear about oxygen infiltration: The "hood" used for suicide is "not a tight fit," R.App.353a, has no valve to expel excess gas, R.App.225a, and would take longer to work, *id.* at 258a. The State had good reasons to reject it.

In 2022, Smith predicted that nitrogen hypoxia would "relieve the State of the possibility of cruel and unusual punishment." DE39-6:22. The proceedings below proved him right—the new method will be swift, painless, and humane.

Smith's Equal Protection Claim similarly fails many times over and arises from a nonappealable order, the district court's decision to dismiss that claim at the

pleadings stage. The issue presented is not cert-worthy, the vehicle for presenting it is terrible, and the claim lacks any merit, as it is premised on the absurd and debunked notion that the State does not execute any condemned inmate so long as he files a second, third, or thirtieth state habeas petition before execution day. Finally, this claim is moot because Smith's requested relief for the claim was a stay to complete his pending state appeal, and this Court denied certiorari in that appeal yesterday. *See Smith v. Alabama*, No. 23-6517.

Despite all this, Smith seeks the extraordinary relief of a stay pending the disposition of his petition for a writ of certiorari. But his petition is based solely on assertions of "erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10, so certiorari is unlikely. And even if the Court were to review the case, the district court's ruling is based on extensive, careful fact findings and was affirmed by the Eleventh Circuit after its own "painstaking review of the underlying record." CA11 Op.20. This Court is unlikely to reverse. Finally, the equities tilt in favor of the State. Smith sought nitrogen hypoxia, delayed in challenging it once he got it, and then engaged in time-wasting sandbagging before the Eleventh Circuit by introducing after oral argument evidence that predated the district court's decision. Smith's petition and his emergency stay application should be promptly denied.

STATEMENT

A. Smith Murders Liz Sennett for $1,000 and Receives a Death Sentence.

On April 7, 1988, Kenneth Smith was indicted for capital murder by a Colbert County, Alabama, grand jury for murdering Elizabeth 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. *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. *Smith*, 908 So. 2d at 280. Smith was convicted of a capital offense—"Murder for pecuniary gain, pursuant to a contract, or for hire." ALA. CODE §13A-5-40(a)(7).

Smith then pursued "conventional post-trial and post-conviction relief in state court" and later brought federal habeas proceedings, which ended in 2022. DE69:3.

B. Smith Brings a §1983 Action, Demanding Nitrogen Hypoxia.

On June 24, 2022, the State of Alabama moved for the Alabama Supreme Court to set an execution date for Smith, and that court did so, setting Smith's execution for November 17, 2022. On August 18, 2022, Smith sued Commissioner Hamm and the Alabama Department of Corrections (ADOC). Smith alleged "that execution by lethal injection violated his Eighth Amendment rights, and … that nitrogen hypoxia was his preferred method of execution because it was an available and feasible alternative method." DE69:3. Following last-minute litigation that delayed Smith's execution, ADOC could not establish intravenous access in time and ultimately called off the execution. CA11 Op.4-5; DE69:4.

Smith continued pressing his §1983 suit to obtain nitrogen hypoxia as his method of execution. Commissioner Hamm ended the lethal-injection litigation by agreeing Smith would not be executed by lethal injection. *See* Final Judgment and Order, *Smith v. Hamm, et al.*, No. 2:22-cv-00497-RAH (M.D. Ala. Sept. 20, 2023), ECF

No. 112 at 1 (noting that "[i]n no fewer than two hearings before this Court, [Smith] has confirmed that nitrogen hypoxia is his chosen and preferred method"); DE69:16 (describing how "Smith vehemently argued for execution by nitrogen hypoxia in his previous litigation only several months ago").

C. Smith Brings This Suit, Demanding Execution by Firing Squad.

Smith "unsurprisingly" sued again (DE69:1), seeking to enjoin Respondents from carrying out his sentence. First, though Smith "did not elect to be executed by nitrogen hypoxia," DE31¶61, he alleged that it would violate the Fourteenth Amendment to execute him because there are condemned inmates who elected nitrogen hypoxia and exhausted their appeals, while Smith was still appealing the state court's denial of his second state postconviction petition. DE31¶¶104-16. He requested a stay until completion of his appeals. DE31:34.[2] Second, Smith alleged that the Protocol would violate the Eighth Amendment by subjecting him to the "risk of a persistent vegetative state, a stroke, or … suffocation," DE31¶122, and the risk that he "may experience nausea, … vomit[] inside the mask, … [and] choke," DE31¶95. He alleged that such risks could be reduced by using "a closed space or a hood" instead of a mask, DE31¶¶102, or a firing squad, *id.* at ¶103. Smith's remaining claims alleged that the Protocol would violate his freedom of speech and of religion under the First Amendment, the Religious Land Use and Institutionalized Persons Act (RLUIPA), and the Alabama Religious Freedom Amendment (ARFA). *See* DE31¶¶125-45. He alleged

[2] Since then, this Court has denied certiorari in Smith's collateral case, *Smith v. Alabama*, No. 23-6517 (U.S. cert. denied Jan. 24, 2024).

that praying could dislodge the mask, forcing him to choose between "dangerous consequences" and religious exercise. DE31¶¶129, 136, 142-43.[3]

On November 20, 2023, Smith filed a motion for preliminary injunctive relief seeking to block his execution. *See* DE19. Smith argued that he was likely to succeed on his Fourteenth Amendment claim, his Eighth Amendment claim, and his RLUIPA and ARFA claims. DE19:11-27.

D. Smith Receives Expedited Discovery and a Robust Hearing.

Smith received expedited discovery (DE28:3), including requests for production, interrogatories, depositions, an unredacted copy of the Protocol, and physical inspections of certain components of ADOC's system. According to the district court, discovery "appear[ed] to have allayed some of [Smith's] concerns." DE69:36.

On December 20, 2023, the district court held a hearing on Smith's motion for a preliminary injunction. The court received over one hundred exhibits, including:

> declarations from expert witnesses, Smith, and other party and non-party witnesses; case reports and articles discussing hypoxia in the context of industrial accidents and assisted suicides; medical articles concerning the respiratory system and anesthesiology; and several videos of individuals donning the mask the Defendants intend to use.

DE69:9. The court heard live testimony from four expert witnesses and seven fact witnesses, including three who were videoed breathing and speaking while wearing the mask. The court also "examined in detail" the mask itself. DE69:9 n.3.

[3] Smith's complaint included numerous other allegations and claims that were disproven and/or abandoned. Smith is no longer pursuing, *e.g.*, his Due Process claim, his First Amendment claims, his ARFA claim, his "right of access" claim (DE19), or his "corporal punishment" claim (Doc. 55:11 (11th Cir.)).

E. The District Court Dismisses Smith's Equal Protection Claim and Rejects Smith's Motion for Injunctive Relief.

On January 10, 2024, the district court granted in part the State's motion to dismiss and rejected Smith's motion for a preliminary injunction. *See* DE69. Smith "failed to show a substantial likelihood of success" on any of his claims, so the court denied the motion without reaching the other factors. DE69:35.

Equal Protection. The district court dismissed Smith's Fourteenth Amendment claim. DE69:22-26. Smith's claim is premised on the timing of the State's motion in the Alabama Supreme Court to set an execution date. But neither Respondent made that decision—the Alabama Attorney General did—so Smith lacks standing and his claim fails on the merits for the same reason. *Id.*

Eighth Amendment. The district court applied this Court's well-established method-of-execution framework, which it described as a "heavy burden" for Smith. *See* DE69:18-20, 35. In view of the record, the district court found "no[] dispute" that nitrogen hypoxia … will result in death." DE69:35; *see also* DE69:38. Smith failed to carry his burden because "there is simply not enough evidence to find with any degree of certainty or likelihood that execution by nitrogen hypoxia under the Protocol is substantially likely to cause Smith superadded pain short of death or a prolonged death." DE69:41-42. Smith would suffer "only if a cascade of unlikely events occurs." *Id.* But "[p]roof of *some* theoretical risk"—the "risk of pain if many other events occur"—"does not clear Smith's high hurdle." DE69:43. Smith had no more than "speculation." *Id.*

The district court found that Smith had reduced his concerns to two: (1) the risk that ADOC's mask and Protocol will permit too much room air (including oxygen) to infiltrate the mask, prolonging death, and (2) the risk that Smith will vomit and choke to death before he becomes unconscious. *See* DE69:36.

1. Findings about the risks of oxygen. Smith claims that if enough oxygen enters the mask, he will suffer a prolonged death or other complications. At the hearing, the district court "examined in detail" the State's mask, which is the kind "often used in industrial settings" where "air conditions are or can be dangerous." DE69:9 n.3. Given "the harness system, the contours and size of the face shield, and the rubber seal," the court found "it highly unlikely that the mask would dislodge or that the seal would be broken." DE69:41. The mask's "design and fit" enable it to be "tightly secured … in a positive pressure environment." *Id.* Thus, it would be "highly unlikely" to dislodge from "speaking or moving [the] mouth or head." *Id.*

Smith's expert Dr. Philip Nitschke, an advocate for nitrogen hypoxia as a means of peaceful suicide, had also examined the mask. But he did not "identify to a scientific certainty or likelihood that the ADOC's choice of this particular mask when combined with Smith's physical characteristics or with speaking or praying will in fact cause complications from air leakage or a dislodged seal." DE69:38. The court credited the testimony of Cynthia Stewart-Riley, the ADOC Regional Director, that the mask is "designed to fit and does fit a broad range of wearers" and "allows for a secure fit" and "tight seal." DE69:40-41, 46. Based on her experience, she stated that "Smith will be able to speak audibly without dislodging the mask." DE69:40.

Dr. Joseph Antognini, who examined the mask, testified that the Protocol will "result in rapid unconsciousness, followed by cardiac arrest and death," and that Smith "would experience no pain." DE69:41.[4]

Smith's expert Dr. Robert Jason Yong did not examine the mask and "could not give an opinion with any certainty" about the timing of unconsciousness or death. DE69:41; DE69:10 n.4 (discounting Dr. Yong's "theoretical" testimony).

2. Findings about the risks of vomit. Smith alleged that he might vomit during the execution because he suffers from nausea. DE69:39. On cross-examination, however, Smith's expert Katherine Porterfield admitted that Smith had not reported any vomiting. *Id.* The district court found that vomiting was only a "theoretical possibility" because "no one could state with any certainty the likelihood that Smith will vomit," "when, where, or how much he might vomit," or any "foundation upon which any such likelihood of vomiting would be based." *Id.*

If Smith were to vomit before nitrogen is introduced, "the execution team would remove and clean the mask and check and clean Smith's airway." DE69:38-39. But once nitrogen floods the mask, ADOC will not intervene. Thus, Smith could, "in a highly theoretical sense," suffer pain if he vomits *exactly* before he becomes unconscious and insensate. DE69:42 & n.13. Because that scenario relies on a "cascade of

[4] Dr. Antognini explained that the physics of pumping gas at a high flow rate into a 1.4-liter mask are "very, very straight-forward." R.App.249a-250a. And he corroborated those physics by testing the mask and observing oxygen levels deplete to 2% in 42.5 seconds. R.App.305a (¶24). Accordingly, Dr. Antognini estimated that Smith would be unconscious "within 30-40 seconds." R.App.296a (¶9).

unlikely events," the court found Smith's claim speculative and unlikely to succeed. *Id*.

3. Findings about Smith's proposed alternatives. "Smith did not draft a … protocol" but "submitted a bullet-point list" of ten ideas. DE69:35-36 & n.12. He also proposed a firing squad based on Utah's redacted protocol and the short declaration of a pediatric surgeon. *See* DE69:37-38. The district court easily dispatched these proposals for Smith's failure to develop supporting evidence. Smith was "far from providing a feasible, readily implemented alternative nitrogen hypoxia protocol," and the firing squad was backed by only "cursory allegations and evidence." DE69:43-44.

In sum, Smith's evidence came up "well short." DE69:42. "Smith's own experts effectively conceded that they lacked evidence to prove Smith's case beyond dispute." DE69:43. True, nitrogen hypoxia "ha[s] never been tested" in a judicial execution, Pet.3, but novel methods "are not new to the federal courts," which "presume" that States do not seek to superadd pain, DE69:42-43.

RLUIPA. Smith had "little-to-no actual evidence, let alone compelling evidence" that prayer would "dislodge" his mask. DE69:46. That possibility was "speculative," DE69:45, especially in light of the court's inspection, DE69:41, and Smith's failure to present evidence about ADOC's mask. DE69:45-46. Plus, the State "provided substantial evidence" to the contrary. *Id.*

F. At Oral Argument on Appeal, Smith Asserts New Vomiting.

Smith appealed the district court's order the day it issued, January 10, 2024, and on January 15 sought a stay of execution from the Eleventh Circuit. At oral argument on January 19, Smith's counsel asserted in rebuttal that Smith "has been

vomiting for about a week." Oral Arg. at 1:17:25, *Smith v. Comm'r*, No. 24-10095 (11th Cir. Jan. 19, 2024). By email to trial counsel that day, Smith's counsel also stated that Smith has been vomiting "over the past two weeks"—*i.e.*, as far back as January 5. Ex. B. to DE77-2. Smith later introduced evidence he had reported vomiting as early as December 24, 2023. *See* DE87-5:2. Smith made no excuse for his delay.

After a series of motions, the Eleventh Circuit remanded for Smith to supplement the record and for the State to respond. *See* Doc.51-1 at 1-3. Smith added attorney declarations, medical records from prison, and declarations from Drs. Yong and Porterfield opining on the likelihood that Smith will vomit. DE88:1-2. The State presented a declaration from Warden Raybon, who had altered Smith's final meal schedule. DE88:1. Smith will be served his last meal at least eight hours before the execution, and he will not be permitted to consume liquids for the final two hours. DE88:2.

The district court considered this new evidence and found that none of it changed its factual findings or legal conclusions. DE88:1, 4. Smith's new evidence was "based entirely on his own personal reports" that had "not been corroborated by anyone." DE88:2. Even so, Smith reported only "intermittent" vomiting over a period of weeks. *Id.* "[N]o evidence" showed "when exactly, the number of times, and how close in time to Smith eating solid food or drinking liquids the vomiting occurred." DE88:2. "As before," Smith's claim relies on "a cascade of unlikely events" in which:

> Smith in fact vomits during the execution, precisely between the time nitrogen begins to flow and before he reaches unconsciousness, vomit remains in his mouth and throat in a sufficient volume to block his airway such that he chokes or otherwise experiences severe pain prior to his loss of consciousness or death by nitrogen hypoxia.

DE88:3. Even with Smith's new evidence, the court found that Smith's scenario is not "sure or very likely" to happen; his evidence remained "broad and non-specific." *Id.* The experts' views were "undermined by Raybon's declaration," which showed that the State will "implement just what Smith previously argued the Protocol lacked: a nothing-by-mouth order." *Id.*

Separately, Smith's claim still failed for lack of a better alternative. The new evidence did nothing to disturb the court's finding that any vomiting risk could not be significantly reduced by Smith's alternatives. DE88:3.

G. The Eleventh Circuit Affirms "After a Painstaking Review of the Underlying Record."

The Eleventh Circuit affirmed dismissal of Smith's equal protection claim, affirmed denial of his preliminary-injunction motion, and denied a stay of execution.

Eighth Amendment. The Eleventh Circuit held that the district court did not abuse its discretion when it rejected the Eighth Amendment ground for injunctive relief. "After a thorough review of the underlying record, and in light of our highly deferential standard of review, we are bound to agree with the district court's factual findings." CA11 Op.19. First, Smith "is not substantially likely to vomit during the execution." *Id.* And there was certainly "no evidence that Smith is likely to vomit *at the moment* in which nitrogen is introduced." *Id.* (emphasis added). Especially after the State moved Smith's last meal to be at least eight hours before the execution—a precaution "similar to one of Smith's suggested remedies"—the district court did not clearly err in "finding that Smith would not be at substantial risk of harm from choking on his vomit." *Id.* at 20.

Nor did the district court clearly err in its "factual findings surrounding a substantial risk of oxygen infiltration." *Id.* The Eleventh Circuit engaged in a "painstaking review of the underlying record." *Id.* In view of evidence about the mask's fit and the volume of incoming nitrogen, "it is not clearly erroneous to conclude that the mask will be adequately sealed to create sufficiently severe hypoxic conditions that, according to expert testimony, will lead to unconsciousness within seconds." *Id.* at 20-21. The court could not "say the mask is 'sure or very likely to' dislodge or permit enough oxygen to infiltrate to create a substantial risk of severe pain." *Id.* at 21.

RLUIPA. Because there was no error in finding Smith's claim "speculative" based on the facts about the mask, the court could not "conclude that Smith will be substantially burdened in his ability to audibly pray." *Id.* at 23.

Equal Protection. The Eleventh Circuit agreed that Smith's equal protection claim "fails on traceability grounds." CA11 Op.14. Smith had sued Commissioner Hamm and Warden Raybon, but neither one can carry out an execution absent "the Attorney General's primary role in selecting condemned inmates and serving as the final confirmation for an execution to proceed during the course of Alabama's execution process." *Id.* at 13-14. Smith's "execution selection injury is directly traceable to the Attorney General," not the defendants in this case. *Id.*

Judge Wilson concurred, expressing concerns about Smith's vomiting, but concluded it was not clear error to find that possibility highly unlikely. Conc.Op.1, 5.

Judge Jill Pryor dissented. In her view, the district court clearly erred in finding Smith unlikely to vomit at the critical time. Diss.Op.2-3. Her opinion mistakenly

stated that "no one contests" Smith is "persistently" vomiting. *Id.* at 1; *contra* Doc. 56:2, 7, 10 (11th Cir.); DE88:2 (finding that Smith reported only "intermittent" vomiting). Citing only Smith's health and the "effects of oxygen deprivation," the opinion concluded that Smith *is* likely to vomit and asphyxiate. Diss.Op.2-3. According to the dissenter, Smith did not need to show a "veritable blueprint," and he met his burden by naming "firing squad" as an alternative. *Id.* Judge Pryor did not address evidence showing that an inmate flawlessly executed by firing squad still remains conscious for at least "a few seconds" after "bullets … tear open [his] heart," DE69:37, or explain whether that method would significantly reduce the substantial risk of severe pain she thought that Smith had established from nitrogen hypoxia.

REASONS TO DENY THE APPLICATION

For Smith "[t]o obtain a stay pending the filing and disposition of a petition for a writ of certiorari," he "must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). He is unlikely to make any of those showings.

First, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Thus, "when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally … be denied," a "policy … applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles v.*

Whitley, 514 U.S. 419, 456-57 (1995) (Scalia, J., dissenting) (citing *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949)). Yet Smith's application and his forthcoming petition merely ask this Court to conduct the same "painstaking review of the underlying record" that the district court and Eleventh Circuit already conducted, CA11 Op.20, and conclude that the district court clearly erred on a series of fact findings. There is no reasonable probability the Court will grant certiorari.

Second, as explained in Parts I-II, there is not a fair prospect that this Court will reverse the Eleventh Circuit's decision. Smith bore the "heavy burden" (DE69:35) to show (1) that the State's method poses "a substantial risk of severe pain" that was "cruelly 'superadded' to the punishment," *Bucklew v. Precythe,* 139 S. Ct. 1112, 1126 (2019), and (2) that there is a "feasible, readily implemented [alternative that] in fact significantly reduces the risk of harm involved," *Nance v. Ward*, 597 U.S. 159, 164 (2022) (cleaned up). The district court did not clearly err when it found that Smith failed to show that the State's method "is sure or very likely to cause substantial risk of serious harm or superadded pain when compared to either of his alleged alternatives, nor that either of his alternative methods would in fact significantly reduce that risk if used instead." DE69:44. And Smith's equal protection claim fails based on standing, mootness, *Rooker-Feldman*, preclusion, and the merits. Plus, the district court's decision to dismiss the claim is not a final appealable order, and it would be improper for this Court to grant, in essence, a preliminary injunction on a claim that is before the Court based not on evidence, but on the pleadings.

Finally, as explained in Part III, the equities favor the State. Smith has said since 2022 that nitrogen hypoxia is feasible and readily implemented, yet after the State agreed with him in August 2023, Smith waited until November to challenge his once-preferred method. He waited to say how he wanted nitrogen hypoxia to be carried out until he knew how the State would do it, and even then he didn't provide specifics. Then after he failed to prove his case to the district court, he waited until the close of his Eleventh Circuit oral argument to announce that he had new proof, which led to a nearly weeklong delay, as the case ping-ponged between the district and appellate courts, with Smith continually proposing additional evidence—much of which predated the district court's order—without explaining why this was raised only after appeal. Now, he has waited until the day of his execution to seek extraordinary relief from this Court. This all contributed to "the last-minute nature of [his] application that could have been brought earlier" and suggests an "attempt at manipulation." *Bucklew*, 139 S. Ct. at 1134. That alone is reason enough to deny Smith's request for a stay.

I. Smith's Eighth Amendment Claim Is Based Solely On Claims Of Clear Error And Has No Chance of Success.

First and foremost, Smith did not prove that ADOC's Protocol will employ nitrogen hypoxia in a manner that "presents a 'substantial risk of serious harm'—severe pain over and above death itself." *Nance*, 597 U.S. at 164 (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)). For Smith to win, he needed to show a harm "sure or very likely" to occur. *Glossip*, 576 U.S. at 877. He did not come close. Second, Smith did not show "an alternative that is 'feasible, readily implemented, and in fact

significantly reduce[s] a substantial risk of severe pain.'" *Id.* (quoting *Baze v. Rees,* 553 U.S. 35, 52 (2008)). He needed to give "the State a pathway forward," such as "a veritable blueprint for carrying the death sentence out." *Nance*, 597 U.S. at 169. But all he came up with was "a hood." DE31:¶102. The State had "legitimate penological reason[s]" to refuse Smith's vague suggestion. *Bucklew*, 139 S. Ct. at 1125.

Smith had ample opportunity to develop evidence but did not come close to satisfying his burden. Indeed, his petition appears to admit that under "this Court's precedents … it was 'impossible' to reverse" the district court, Pet.3-4 (citing CA11 Op.21 n.6), because "there is a 'dearth of evidence'" to support his claim, Pet.16.

A. Smith's Fears of Vomit and Oxygen Do Not Amount to Substantial Risks of Severe Pain.

1. Vomit. Smith argues that there is a "real risk of vomiting during his execution." Pet.12. But the scenario that could theoretically cause him harm relies on all of the following speculative predictions: (1) due to his anxiety, he will develop nausea, (2) his nausea will cause him to vomit, (3) he will vomit precisely after the nitrogen begins flowing but before he becomes unconscious, (4) he will vomit enough to choke on his vomit, and (5) he will die from choking on his own vomit. The district court found twice over that this "cascade of unlikely events" is not a real possibility. DE69:42; DE88:3. Even if one or more steps in the chain were probable, the conjunction of all of them is not "sure or very likely" to happen, *Glossip*, 576 U.S. at 877, so the Eleventh Circuit agreed that Smith has not carried his burden.

First, Smith will not have eaten anything for eight hours prior to his execution. The courts below did not clearly err in finding that this schedule for Smith's final

meal ameliorates Smith's fears of vomiting. Smith assigns error on the ground that "Respondents first raised the issue of a nothing-by-mouth order" at the preliminary-injunction hearing, Pet.15. Wrong. It was Smith who developed expert deposition testimony that surgeons use "nothing-by-mouth" orders to mitigate vomiting, R.App.283a. And it was Smith who used that testimony to criticize the Protocol—before he knew the schedule for his final meal. DE65:46-47 (complaining that if the State used its prior schedule, Smith would eat "two hours before" the execution). Smith should not be permitted to backtrack on appeal from his reliance on the same expert testimony just weeks ago. Even so, correcting this alleged error (about who raised nothing-by-mouth orders first) would not affect the reasoning below that Smith is very unlikely to choke to death on vomit.

In any event, two experts agreed that vomiting risks are reduced by not eating. R.App.283a (deposition testimony of Dr. Antognini); R.App.78a-79a (hearing testimony of Dr. Yong). And Smith will not have stomach contents of sufficient volume at the time of execution to vomit enough to choke to death. If his (unsupported) appellate allegation that he is vomiting "consistently" is credited, Pet.10, then he will have vomited many times before the execution, and there will be little to nothing left to vomit. The State has reduced the risk; it is not required to "eliminate" it. Pet.16.[5]

[5] Smith now argues that the State "subjects [him] to new harm—he will be unable to eat or drink anything for hours." Pet.16. This is not a constitutional violation, and Smith did not plead such a claim nor develop evidence to support it. Until yesterday, Smith argued that a nothing-by-mouth order would be effective.

Second, the likelihood that Smith vomits at any particular time is low. True, Smith has reported feeling nauseous.[6] But his uncorroborated eleventh-hour self-reports disclose only "intermittent" vomiting, as the district court found, DE88:2. And Smith's petition cites *three instances of vomiting over a period of one month*, Pet.13. Clothing Smith's three episodes in language like "clinical certainty" (*id.*) does not make it any more likely that he vomits exactly at the wrong time. Smith also undermines his specific scenario when he claims that exposure to "the same environment where he was traumatized" will trigger his symptoms. Pet.14. That makes it more likely that Smith vomits well before nitrogen gas is introduced. In that case, the execution team would (as practiced) remove the mask (if necessary), remove the vomit (using a finger sweep and bite guard if necessary), and continue the Protocol. R.App.461a, 463a.

Even if Smith vomits during the execution, his cascade relies on the implausible assumption that he would vomit after nitrogen is introduced but before unconsciousness. But Smith will be unconscious in under a minute, *see infra* §II.A.2, so he needed to show that he would vomit, choke, and experience unconstitutional levels of pain—all within seconds. He did not make that showing. Nor did he present any evidence about the duration between exposure to a stimulus (whether a PTSD trigger or nitrogen) and the onset of nausea or about the frequency of vomiting (as opposed to nausea) when experiencing hypoxia. None of the workplace fatality reports in the

[6] The record does not contain evidence, however, that "vomiting is a documented symptom of PTSD," as Smith alleges without citation, Pet.12.

record, *see infra*, listed vomiting as a complication. Because the timing of nausea and possible vomiting would vary from person to person, R.App.69a, 73a (Dr. Yong), Smith did not show a substantial risk.

Third, even if the entire cascade of unlikely events materializes, Smith must show that he will choke to death or otherwise suffer *unconstitutional* pain. But he has not shown that choking on vomit is the type of pain that an inmate sentenced to death is entitled to avoid. Other permissible methods of execution involve some amount of pain. *See Bucklew*, 139 S. Ct. at 1124 (describing hanging). Smith's own proposed alternative—*the firing squad*—involves tearing his organs apart with bullets while he's still conscious. This Court should not grant a stay on the fact-bound determination, unsupported by anything in the record, that the negligible risk of some pain from vomiting outweighs the pain of being shot to death.

2. Oxygen. Breathing 100% nitrogen gas will ultimately cause death. And the experts agree that nitrogen hypoxia is painless because it causes unconsciousness in seconds, R.App.296a¶9, or as Smith's expert put it, "an almost-immediate loss of unconsciousness with death following soon after," R.App.367a §14.1. Having elected nitrogen hypoxia, Smith now objects to the State's mask. The mask, he says, creates a substantial risk that oxygen will infiltrate, which, in turn, creates a substantial risk that Smith will "transition[] into a persistent vegetative state, hav[e] a stroke, or suffocat[e]." Pet.17. The courts below "painstaking[ly]" weighed all the evidence and correctly determined that Smith's concerns are not serious. CA11 Op.20; DE69:42.

Smith's entire claim relies on the alleged need for "an airtight seal," Pet.17, a proposition Smith never proved and was belied by his own suggestion of a loose "hood." As Dr. Antognini testified, no method—a mask, a hood, or even a hyperbaric chamber—will be 100% airtight. R.App.221a-222a. Dr. Yong, who did not inspect the mask, testified that doctors "create a tight seal" simply by *holding* a mask to the patient's face. Pet.App.190a. The question, then, is not whether there may be some oxygen, but how much oxygen is too much. Smith's evidence did not answer that question, and his expert admitted that "there is a lack of data." *Id.* at 5. Thus, Smith has no basis to claim that the mask will let in too much oxygen.

The evidence showed that ADOC's mask is tight enough to prevent substantial risk. Based on its inspection of the mask, the district court found that it "highly unlikely" "that the seal would be broken and outside air introduced" to a problematic degree. DE69:41. Dr. Antognini called it "a virtually air-tight mask," R.App.296a¶9, which would produce "minimal" entrainment and result in "very low oxygen concentrations," R.App236a. Given that "the flow rate is so high" and the "volume of the mask" so low, the system will "flush out [any] oxygen pretty quickly." R.App247a-48a. After wearing the mask, Dr. Nitschke admitted that it was "tight[]," not "loose," and he could not notice any entrainment of room air. R.App.355a-56a.

The State's method *will* rapidly lower the oxygen level in the mask, ensuring unconsciousness in seconds. Alabama's mask will reduce oxygen levels to 2% in under 45 seconds. *See* R.App273a; R.App.304a-305a (¶24). The Eleventh Circuit reviewed footage that shows the mask "creat[ing] a rapidly hypoxic environment over the

course of 45 seconds." CA11 Op.21. Based on diagrams of the mask, fact and expert testimony, and video footage, the court of appeals found no clear error in the district court's fact-bound rejection of this claim. *Id.* All Smith can say is that tests of the mask "were not subject to peer review," Pet.18, but neither does Smith present peer-reviewed evidence that the State's industrial-grade, regulator-approved mask will not work. And it was his burden to support his claim with evidence.

Smith says the mask's user manual states that the mask must be fitted and sealed to prevent leakage. Pet.17-18. The courts below considered this evidence and found it wanting; plus, Smith's loose hood alternative would not be fitted and sealed and has no manual (because he has not produced a specific hood). The mask's manual does not contemplate the mask's use in executions, including the presence of an execution team to ensure the mask remains in place or the high rate of gas flow that ADOC will use, R.App.297a¶10; R.App247a. The "negative pressure test" or any test for an "airtight" seal, Pet.17-18, is unnecessary because, like the "hood" method, the mask mechanism *also* relies on positive pressure (*i.e.*, enough gas entering to push out other gases), *see* R.App.272a-273a. In light of these basic physics, Dr. Antognini testified to "a reasonable degree of certainty, medical certainty," that "a visual inspection would be sufficient to prevent … enough entrainment of room air that would cause the inmate to survive" and suffer. R.App238a. In any event, the "negative pressure test" was performed by one of the State's witnesses, who obtained an effective seal on camera, R.App.492a.

Smith argues that the mask is not designed for executions, Pet.18, but emphasizing the mask's purpose—to protect against exposure to outside gases—aids the State. DE69:9 n.3. ADOC's mask is a NIOSH-approved Type-C full facepiece supplied air respirator. To receive NIOSH approval, such masks must "fit persons with various facial shapes and sizes." 42 C.F.R. §84.135(a). And the record contains numerous OSHA reports where workers unfortunately died because they mistakenly supplied inert gas to a respirator. *See, e.g.*, R.App.301a¶16 (Dr. Antognini describing reports). None of Smith's experts found *a single case* where someone survived exposure to inert gas while wearing a supplied air respirator without immediate rescue. Smith did not show that a mask designed to keep out dangerous gas will fail to keep out oxygen.

Smith's petition wholly ignores the other evidence that disproves his claims. Videos in the record showed people of different genders, sizes, weights, ages, and degrees of facial hair wearing the mask. There is no evidence that a single person had problems with the fit or seal of the mask. Smith's own expert agreed the "design … would fit most people effectively." R.App.355a. Dr. Nitschke wore the mask, *id.* at 42:16-17, 44:1-3, Dr. Antognini wore the mask, R.App.303a, and no evidence surfaced to help Smith's case. ADOC's execution team has practiced fitting the mask to people of varying face and body types during their bi-weekly rehearsals. R.App.447a, 481a. Smith did not prove a substantial risk associated with the mask.

B. Smith Failed to Show a Feasible and Readily Available Alternative That Would Significantly Reduce the Alleged Risks.

Smith's claim requires proof of another "feasible and readily available method … that would have significantly reduced a substantial risk of pain." *Bucklew*,

139 S. Ct. at 1128. Smith's proposal must be "sufficiently detailed," such as "a veritable blueprint for carrying the death sentence out." *Nance*, 142 S. Ct. at 2222-23. In the court below, Smith pleaded various proposals but has now abandoned all but the "hood," "chamber," and firing squad alternatives. None came with sufficient "evidence to meet his heavy burden." DE69:35. Smith's two-sentence argument (Pet.19) does not show likely success on this crucial element of his Eighth Amendment claim.

1. Smith's alternative nitrogen systems are non-starters. The entirety of Smith's allegation is that the State could "use a closed space or a hood." DE31¶102. He does not defend these alternatives here, and as the district court found, they fell "far from providing a feasible, readily implemented alternative." DE69:43.[7]

As to the "hood" method, Smith never specified the characteristics of his "hood," leaving unanswered questions about its design, its material, how it could be secured, whether it's readily available, etc. There is no blueprint. Dr. Nitschke's suicide method requires the wearer to pull the bag around the top of his head, wait for it to inflate, exhale deeply, pull the bag down over his head, cinch the elastic collar, and inhale deeply. R.App.353a. Neither Smith nor Dr. Nitschke proved how that procedure could be adapted for an execution or how it would work if Smith resists.

[7] The Eleventh Circuit and Smith fault the district court for too rigidly applying the language in *Nance* about the inmate's need to show a "veritable blueprint." Pet.19. But even under a more relaxed standard, Smith's alternatives fail and the district court's findings about them remain reasonable in light of the record.

Respondents introduced substantial evidence showing that inhaling inert gas with a "hood" (or "bag") would less reliably result in death.[8] Further, the "hood" method would not eliminate and might exacerbate the risk of breathing oxygen. At the hearing, Dr. Nitschke explained that his hood method works primarily by positive pressure, R.App.126a-27a, which Smith now says is inadequate, Pet.18. Dr. Nitschke also admitted that his hood—which he has personally watched kill dozens of people—is "not a tight fit" and allows a "flow of gas exiting around the neck." R.App.353a; *accord* R.App.221a-22a. Further, Dr. Nitschke uses a 15-liter-per-minute flow rate, R.App.353a, which is far below ADOC's flow rate into a much smaller container (a mask) with a one-way exit valve. *See* R.App.297a¶10; R.App247a. Additionally, the risks of vomiting remain "even in a hood system." DE69:38 (citing Dr. Nitschke). Respondents introduced an article reflecting that the cause of death in a suicide by inert gas "was suffocation due to a plastic bag over the head *and aspiration of gastric contents*." R.App.519a:2 (emphasis added).

As to the "chamber" or "closed space" method, Smith did not prove that it would be feasible and readily available to ADOC. There are many unanswered questions, including how large a chamber would be needed to be to conduct a nitrogen hypoxia execution, how it would be sealed, how it would permit a final statement and prayer,

[8] For example, a case report (among many in the record) details how a thirty-year-old man attempted suicide "by inhaling nitrogen gas through a plastic bag" and "lost consciousness for a while," but a "few hours later, he recovered." R.App.511a-15a. In contrast, the only example presented in this litigation where anyone survived inert-gas exposure while wearing a supplied air respirator was rescued by outside actors. R.App.516a-18a.

how it would permit witnesses, how it would permit ADOC's intervention if necessary, and how it would operate safely. Given that chambers are not used for anesthesia, Dr. Yong had no idea what such a chamber would be like and refused to hypothesize. R.App.70a-71a. But these are material and critical penological concerns.

Smith also failed to show that a "closed space" would significantly reduce the alleged risks. Smith did not detail what flow rate or volume of nitrogen would be required to displace breathing air quickly enough that it would not prolong life or cause the "dire consequences" he fears. Pet.17. As to the risks of vomiting, Smith presented no evidence explaining how restraining him and placing him inside a sealed enclosure would make it *easier* for ADOC officials to respond and render aid if he were to vomit (or suffer any other complication),

2. Smith's firing squad proposal should be barred, and it fails on the merits. Judicial estoppel and claim preclusion should bar the firing-squad proposal because Smith *repeatedly* demanded nitrogen hypoxia and alleged that it was constitutional, feasible, and readily available. DE39-1:¶¶54, 85, 87, 95; DE39-2:17-18; DE39-3:15; DE39-4:¶¶24, 26, 95; DE39-5:¶¶14, 74; DE39-6:21; DE39-7:¶¶250, 251, 264; DE39-8:8. Smith now complains that nitrogen hypoxia is "novel" and "experimental." But if he had genuine concerns, he should have given the State a "pathway forward," rather than sandbagging until now. *Nance*, 597 U.S. at 174.

Judicial estoppel is one "useful tool for identifying inmates who are more interested in delaying their executions than in avoiding unnecessary pain." *Middlebrooks v. Parker*, 22 F.4th 621, 628 (6th Cir. 2022) (Thapar, J., statement respecting

denial of rehearing en banc). To accept that firing squad is *really* Smith's preferred method would create "the perception that either the first or second court was misled." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001).

On the merits, execution by firing squad would not significantly reduce a substantial risk of severe pain compared to nitrogen hypoxia. Smith offered little-to-no supporting evidence, including no live testimony about firing squads. The pertinent part of his expert's declaration is quoted in full at DE69:37-38. For "a few seconds," Dr. Groner described, Smith would feel the pain of "bullets [] tear[ing] open the heart causing immediate loss of the pumping function" and ultimately stopping "blood flow to the brain." *Id*. But nitrogen hypoxia is painless by design. If the Court considers the remote possibilities of pain under the Protocol, it must compare apples-to-apples and consider, for example, the pain of being shot if the firing squad misses or the inmate moves. Smith did not show "documented advantages" over nitrogen hypoxia, *Baze*, 553 U.S. at 52.

3. For each of his proposals, Smith can succeed only if he shows the State lacks "a legitimate penological reason" for refusing them—in other words, if the State chooses pain for the sake of pain. *Bucklew*, 139 S. Ct. at 1125. In addition to the evidence discussed above, the State has penological reasons to seek "more humane methods," *Glossip*, 576 U.S. at 892, and methods that "preserv[e] the dignity of the procedure," *Baze*, 553 U.S. at 57. Smith may disagree with the State's reasons or believe they should be outweighed by other concerns, but they are nonetheless legitimate penological reasons.

C. Smith Failed to Show That the State's Method is Deliberately Designed to Inflict Pain.

Because the prisoners in *Bucklew*, *Glossip*, and *Baze* failed to satisfy the standards set forth above, this Court has not had reason to consider whether "establishing cruelty consistent with the Eighth Amendment's original meaning demands slightly more." *Bucklew*, 139 S. Ct. at 1125. If the Court determines that Smith is likely to succeed under the *Bucklew-Glossip-Baze* test, the Court is likely to apply the original meaning of the Eighth Amendment and ask whether Smith also showed that the Protocol was *deliberately designed* to inflict pain. As originally understood, the Eighth Amendment's "primary concern … was to proscribe tortures and other barbarous methods of punishment," *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (cleaned up). Smith is thus unlikely to succeed for the additional reason that the Protocol is not deliberately designed to inflict unnecessary pain.[9]

II. Smith's Equal Protection Claim Is Moot, Barred, And Meritless, And He Sued The Wrong Defendants.

Smith's equal protection claim does not warrant certiorari review or justify a stay because it relies solely on a purported "erroneous factual findings or the misapplication of a properly stated rule of law," Sup. Ct. R. 10, is jurisdictionally barred on standing, mootness, and *Rooker-Feldman* grounds, and is unlikely to succeed on the merits. *See Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground[.]"). Moreover, because the issue

[9] In fact, Smith argued in prior litigation that the State's purpose in adopting nitrogen hypoxia is to find an even "more humane" method than lethal injection. *See* DE39-1 ¶ 56 (citing an article stating that "[a]ccording to sponsors of the 2018 legislation, nitrogen is a 'more humane' method of execution").

was decided against Smith on a motion to dismiss, the order is not appealable and there are no facts to support granting Smith a stay of on his mere allegations. The petition and stay application should be denied.

Smith asserts that he was denied equal protection when the Attorney General requested and the Alabama Supreme Court granted the State permission to execute Smith, though he had pending an appeal "from the dismissal of a non-frivolous state postconviction petition," while "other[s] … who elected to be executed by nitrogen hypoxia when that option was made available to them in 2018 have exhausted their appeals." DE31¶6. He requested a "permanent injunction … until he has exhausted his pending appeals or, alternatively, a stay of execution pending completion of Mr. Smith's appeals." DE31:34. The claim fails six ways from Sunday.

A. Smith's Claim is Now Moot Because This Court Denied Certiorari in His Habeas Case.

Smith's claim rested on the premise that he was treated differently because he was set to be executed despite a pending appeal from the dismissal of a "non-frivolous state postconviction petition." *Id.* at ¶6. But Smith's appeal has now ended. Yesterday, in *Smith v. Alabama*, No. 23-6517, this Court denied Smith's application for a stay in that case and denied his petition for a writ of certiorari. There is no need to grant him "a stay of execution pending completion of Mr. Smith's appeals" (DE31:34) because they are completed. No controversy exists, and it would be an improper advisory opinion for this Court to answer whether his equal protection rights *would have been violated* by executing him while his state court appeal was pending.

B. Smith Lacks Standing Against These Defendants.

At the pleadings stage, Smith needed to allege an injury "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up). He failed to do so for his equal protection claim, which alleges that "ADOC selected" Smith for execution. DE31¶6. But his claim is not against "ADOC," it is against Defendants Hamm and Raybon; and as the district court noted, Smith never alleges "how either Defendant played a role in his selection over other inmates." DE69:24. The reason for his failure is clear. "Alabama law tasks the Attorney General"—not the Commissioner or Warden—"with seeking and moving for an execution date with the Alabama Supreme Court." DE69:23 (citing Ala. R. App. P. 8(d)(1); Ala. Code §36-15-1(2)). Indeed, "testimony in the record confirms the Attorney General's primary role in selecting condemned inmates." CA11 Op.13.

Smith's reliance on *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), is misplaced. There, environmental groups and individuals who lived closed to planned nuclear facilities sued the builders of those plants alleging that operation of the plants would cause radiation to invade their air and water, damage lakes and rivers they used, and reduce their property values, among other harms. *Id.* at 67, 73. These are actionable harms traditionally remedied by tort suits, and plaintiffs alleged that a federal statute, by preempting their claims, would violate their constitutional rights. Here, there is no actionable harm to Smith from the Commissioner and Warden carrying out an execution authorized by Alabama law. "[T]he challenged action" was requesting the Alabama Supreme Court authorize the

execution of Smith's sentence and receiving an order from that Court. *Id.* at 74. That action cannot be traced to Defendants. There is no "injury as a result of the putatively illegal conduct of *the defendant*." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, Inc., 454 U.S. 464, 472 (1982) (emphasis added).

Under Smith's view, any inmate who thinks he is detained based on a selective prosecution or *Batson* violation could sue his jailer under 42 U.S.C. §1983, years after the biased conduct. But such claims sound in habeas or need to be raised in the criminal proceeding brought by the prosecutor (here, the Alabama Supreme Court proceeding), *see infra* Part II.C-D, not in a §1983 action against other state officials.

C. Smith's Claim Sounds in Habeas and is Jurisdictionally Barred.

Smith was sentenced to death for murder, and a critical element of that sentence is *when* it can be executed. In 2023, the Alabama Supreme Court determined that it was an "appropriate time" to "authoriz[e] the Commissioner" to carry out Smith's sentence. Ala. R. App. P. 8(d)(1). Smith's claim seeks to undermine that order by enjoining the execution of his sentence. He is seeking to "prevent[] the State from executing him," and prevailing on his claim would "necessarily imply the invalidity of" the court order authorizing the execution of his sentence. *Nance*, 597 U.S. at 167. His claim thus "must proceed in habeas," *id.*, but he brought it under §1983.

Unlike the inmate in *Nance*, Smith's equal protection claim does not challenge "the State's mode of carrying … out" his death sentence, but rather "challenges … the validity of [his] death sentence," because he claims it cannot constitutionally be carried out for now. *Id.* at 172. His claim is like the habeas petitioner seeking "immediate or speedier release from prison." *Id.* at 167 (quotation marks omitted). Instead of

seeking to end a term of imprisonment early, he seeks a "delay" that, "for its span, is a commutation of a death sentence to one of imprisonment." *Bowles v. DeSantis*, 934 F.3d 1230, 1248 (11th Cir. 2019). That is a challenge to the sentence.[10]

That means Smith's claim fails because he already brought an initial federal habeas petition. *See Smith v. Comm'r*, 850 F. App'x 726 (11th Cir. 2021). "Section 2244(b)(3)(A) requires a district court to dismiss for lack of jurisdiction a second or successive petition for a writ of habeas corpus unless the petitioner has obtained an order authorizing the district court to consider it." *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1259 (11th Cir. 2009). Smith never obtained such an order. Nor could he. His claim is not based "on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or" new facts undermining confidence in Smith's guilt. 28 U.S.C. §2244(b)(2).

D. Smith's Claim Is Barred By Claim Preclusion, Issue Preclusion, And/Or The *Rooker–Feldman* Doctrine.

Smith's claim also fails because it has already been rejected by the Alabama Supreme Court when that court determined it was an "appropriate time" to authorize Smith's execution. After the Attorney General moved to authorize Smith's execution, Smith responded with the same equal protection argument he raises here. *See* Smith ASC Oppo. at 2, 8-9, *Smith v. State*, No. 1000976 (Ala. filed Sept. 22, 2023). Smith admitted as much to this Court in his Tuesday filing: "[I]t is undisputed that [Smith] separately opposed the setting of an execution date in the Alabama Supreme Court

[10] Separately, "establishing the basis for" Smith's "claim necessarily demonstrates the invalidity of the" the Alabama Supreme Court's decision to authorize Smith's execution. *Wilkinson v. Dotson*, 544 U.S. 74, 80 (2005).

on the ground that setting a date would be premature while this post-conviction proceeding was pending." Reply at 4, *Smith v. Hamm*, No. 23A664. Attempting to excuse his failure to seek a stay, Smith claimed he had already "litigated the issues" in the Alabama Supreme Court. *Id.* But if he already litigated and lost on the substance of his equal protection claim, he is precluded from raising it again.

First, *res judicata* bars the claim because the Alabama Supreme Court case of *Smith v. Alabama*, No. 1000976, ended with a final order authorizing Smith's execution; the court had jurisdiction; the parties to that case and this one are in privity; and the causes of action in the two suits are the same—whether the Equal Protection Clause permits an execution to proceed before state habeas proceedings conclude.

Second, issue preclusion bars Smith's claim because Smith raised his equal protection claim against the State in the Alabama Supreme Court, it was litigated when that court determined that now is an appropriate time to authorize Smith's execution, and Smith had a full and fair opportunity to press his argument.

Third, *Rooker–Feldman* bars Smith's claim. Smith's assertion that executing his sentence now would violate the Equal Protection Clause cannot be squared with the Alabama Supreme Court's judgment that now is an "appropriate time" to execute his sentence. Ala. R. App. P. 8(d). Smith is a "state-court loser[] complaining of injuries caused by [a] state-court judgment[] rendered before the district court proceedings commenced and inviting district court review and rejection of" that judgment. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). If he wanted

a federal court to review that judgment, he needed to seek certiorari review, not take his complaint to federal district court. *See* 28 U.S.C. §1257.

E. Smith's Claim Fails on the Merits.

Smith failed to allege facts that would support a class-of-one equal protection claim. To prevail on such a claim, a plaintiff "must demonstrate that [he was] treated differently than someone who is *prima facie identical in all relevant respects*." *Griffin Indus. v. Irvin*, 496 F.3d 1189, 1205 (11th Cir. 2007). Smith's class of supposedly identical comparators is "other condemned people in Alabama whose appeals have exhausted and who elected to be executed by nitrogen hypoxia." DE31¶59. He claims that it is unfair that he is set for execution even though he (at the time) had "an appeal pending … and other condemned people who elected to be executed by nitrogen hypoxia five years ago have exhausted their appeals." *Id.* ¶64; *see also id.* ¶¶111-12. But Smith showed he is *not* identical to his comparator class because he "did not elect to be executed by nitrogen hypoxia." *Id.* ¶61. "Because [Smith] did not timely elect the new protocol, he is not similarly situated in all material respects to the inmates who did." *Price v. Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1325 (11th Cir. 2019).

Smith claimed that once Commissioner Hamm determined that Smith would not be executed by lethal injection, Smith was similarly situated in all material respects to all other condemned people subject to execution by nitrogen hypoxia. But it *is* relevant whether an inmate elected nitrogen hypoxia. Because Smith did not, his execution was scheduled for 2022. And though he successfully secured an order enjoining Defendants from conducting his execution by lethal injection, that order did not make him identical to inmates who elected. Rather, the State has good reason to

treat inmates who bring method-of-execution challenges to lethal injection differently from inmates who elected nitrogen hypoxia. Doing otherwise would incentivize more litigation from inmates who did not elect because bringing a suit that ends in an order to use nitrogen hypoxia might further delay their executions.

Smith's claim also fails because Alabama has executed or sought to execute other inmates even when they have had second or successive postconviction petitions pending. *See, e.g.*, *In re Hutcherson*, 468 F.3d 747 (11th Cir. 2006); *Hubbard v. Campbell*, 379 F.3d 1245 (11th Cir. 2004); *Arthur v. State*, 71 So. 3d 733, 738 (Ala. Crim. App. 2010). In *Arthur*, the State sought execution through a renewed motion to set an execution date with full knowledge of the pendency of Arthur's successive petition. Smith has consistently ignored these facts below. He cannot show that the State always delays until all successive habeas challenges have ended. If that were the rule, inmates could delay execution of their sentences forever with a new habeas petition each time its predecessor was denied.[11]

To the extent Smith expects Defendants to determine whether an inmate's second Rule 32 petition is "non-frivolous," DE31¶6, that inquiry by its "nature involve[s] discretionary decisionmaking based on a vast array of subjective, individualized assessments." *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 603 (2008). Allowing a

[11] Smith contended that his latest Rule 32 petition is not successive because it was filed "*before* the State moved for authority to execute him based on facts that did not exist when his previous postconviction petition was pending in state and federal court." CA11 Blue.Br.28. But the State doesn't view it that way. *See* Ala. R. App. P. 32.2(b) (defining "successive petitions").

challenge in that context "would undermine the very discretion that such state officials are entrusted to exercise." *Id.*

F. This Court is Unlikely to Grant Certiorari on this Issue.

Because this claim lacks merits for so many reasons, this Court is unlikely to grant certiorari and reverse the Eleventh Circuit's holding on Smith's Equal Protection claim. But two more reasons make this claim unfit for review and thus a stay to consider it.

First, the Eleventh Circuit reviewed this claim as part of its pendent jurisdiction because it was already reviewing the denial of Smith's preliminary injunction. But because this Court is unlikely to grant review on the Eighth Amendment claim, this Court should not grant certiorari on the Equal Protection Issue either. *See Whole Woman's Health v. Jackson*, 595 U.S. 30, 38 (2021) ("As with any interlocutory appeal, our review is limited to the particular orders under review and any other ruling 'inextricably intertwined with' or 'necessary to ensure meaningful review of' them.").

Second, both courts to review this claim have dismissed it for lack of standing, so neither has addressed its merit. It would be improper to grant and stay and consider this claim for this first time in this posture; this is "a court of review, not first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005).

III. The Equitable Factors Favor the State.

A. Irreparability is a meaningful prerequisite for injunctive relief—even in capital cases. *See, e.g.*, *Ramirez v. Collier*, 595 U.S. 411, 433 (2022) (citing spiritual harm, not merely the fact of execution). But Smith argues primarily that death is "final." Stay.App.5. That cannot be a cognizable harm in this method-of-execution case for

two reasons. First, Smith does not contest that the State may execute him at some time and with some method. His citation to an *Atkins* case (at 5) does not help him because there, the inmate had a claim that would have relieved him of his death sentence. *See In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003). Second, Smith is guilty, and his death sentence is lawful and just. Punishing him for his senseless murder of an innocent woman, Liz Sennett, is the fulfillment of the public's "moral judgment." *Calderon v. Thompson,* 523 U.S. 538, 556 (1998).

Next Smith argues that he will suffer "needless[]" pain. Stay.App.5. But if that were enough, the allegations of every stay applicant in every Eighth Amendment case would automatically satisfy irreparability. Instead, even if Smith has shown a risk of some pain, the Court should deny the application because injunctive relief is reserved for "actual and imminent" threats, not speculative fears. *Siegel v. LePore*, 234 F.3d 1163, 1178 (11th Cir. 2000). Smith's reference to his "human dignity" rests on the same speculation, Stay.App.5, and is belied Smith's repeated demands that the federal judiciary force the State to give him *this* method of execution.

B. If there is any case in which a prisoner has forfeited the prospect of equitable relief, it should be this one. Smith challenges the very method of execution that he doggedly asked for—right up to the moment that he finally got it.

Smith should not be excused for launching eleventh-hour litigation because the State's method is new. He had every opportunity in his prior suit to specify the method he wanted. Indeed, it was his burden to plead and prove an alternative to lethal injection. But instead of giving the State a path forward, he waited until his

execution date was set (over a month after he had notice) and then brought this baseless lawsuit, claiming that every way to do nitrogen hypoxia is permissible—except the one chosen by the State. The State is here defending its method on an expedited basis not because it adopted its Protocol in August 2023; the State is here because there is no way to carry out Smith's execution that he would not challenge. Indeed, the claims presented in his petition are ones he had already lodged before he had the unredacted Protocol. No doubt if the State had adopted "a hood" instead of a mask, Smith would be telling the Court that "a hood" threatens him and his dignity too.

Nonetheless, Smith had a full opportunity to litigate his claims about nitrogen hypoxia in the district court. Smith is wrong that there was "little research" available to the district court, Stay.App.6, which considered a plethora of studies and reports on workplace fatalities and suicide by inert-gas hypoxia.[12] The courts below even reopened the record to permit Smith to add "new evidence" on the week of his execution, despite that the "new evidence" had been available to him for weeks. Following his assertions of vomiting, the State adopted Smith's expert's recommendation (which Smith previously relied upon) to impose a nothing-by-mouth order after Smith's final meal. Now he complains about that too. Pet.i; Doc. 55:11 (11th Cir.). Smith has acted manipulatively, but he was treated fairly, and he lost twice. He has no chance of

[12] Smith attempts to excuse his evidentiary failures with the unsupported assertion that the State should have the burden to prove the efficacy of any new method of execution. Stay.App.6-7. The State has no such burden.

success, yet he brings this "last-minute" bid "to forestall [his] execution" anyway. *Nance*, 597 U.S. at 174. The Court should not countenance it. *Id.*[13]

C. Smith murdered Mrs. Sennett over three decades ago. Any court-ordered "delay" of Smith's sentence is, "for its span, … a commutation of a death sentence to one of imprisonment." *Thompson*, 714 F.2d at 1506. The public, "the State and the victims of crime have an important interest in the timely enforcement" of Smith's sentence. *Bucklew*, 139 S. Ct. at 1133.

CONCLUSION

The Court should deny Smith's petition and application for stay.

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[13] Smith also seeks a stay on the ground that he "has not been able to fully exhaust his claims" arising out of *another* suit. Stay.App.6. But he has not shown a likelihood of success on those claims, and yesterday this Court denied certiorari review to the Alabama Supreme Court. *See Smith v. Alabama*, No. 23-6517.