No. 23A688 & No. 23-6562

IN THE

Supreme Court of the United States

KENNETH EUGENE SMITH

Petitioner,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS;
WARDEN, HOLMAN CORRECTIONAL FACILITY,

Respondents.

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

EXECUTION SCHEDULED FOR JANUARY 25, 2024

REPLY IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION AND REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The premise and primary theme of Respondents' opposition is false. Mr. Smith has not walked away from his allegation that nitrogen hypoxia is a feasible and available alternative method of execution to lethal injection. When he made the argument he had not seen ADOC's Protocol for executing condemned people by nitrogen hypoxia. He was only provided with a heavily redacted copy of the Protocol in late August, at the same time that the State informed him that he would be the first person subject to it and moved in the Alabama Supreme Court for authority to execute him under its procedures. Mr. Smith did not receive an unredacted copy of the Protocol until late November when the district court ordered Respondents to produce it.

Mr. Smith did not endorse (and could not have endorsed) the procedures in the Protocol before he had seen them. And, of course, the "devil is in the details" of the Protocol, so his current challenge is to the procedures in the Protocol—specifically to the use of a mask to deliver nitrogen instead of other feasible and available alternatives, including a hood or a closed chamber—not to nitrogen hypoxia per se. When the State permitted condemned people in Alabama to elect nitrogen hypoxia as the method of their execution, ADOC adopted an election form that expressly provided that those condemned people so electing did not "waive [their] right to challenge the constitutionality of any protocol adopted for carrying out execution by nitrogen hypoxia." *Woods v. Comm'r, Ala. Dep't of Corr.*, 951 F.3d 1288, 1291 (11th Cir. 2020); *see also Smith v. Comm'r, Ala. Dep't of Corr.*, No. 21-13298, 2021 WL 4817748, at *1 (11th Cir. Oct. 15, 2021). Neither did Mr. Smith when he alleged that nitrogen hypoxia was a feasible and available alternative method of execution in the Lethal Injection Action.

That misimpression aside, Mr. Smith turns to Respondents' other contentions, which are meritless as explained below.

ARGUMENT

I. Mr. Smith is Likely to Succeed on the Merits of His Eighth Amendment Claim.

A. Respondents Misapprehend the Alternative, Feasible, and Readily Available Standard Required by the Eighth Amendment.

Respondents commit the same error as the district court by misapprehending the "veritable blueprint" language from in *Nance v. Ward*, 597 U.S. 15 (2022). Pet. App. 22a n.7. Mr. Smith has adequately identified alternatives to the current nitrogen protocol that are feasible and readily available to reduce the risks posed by the current Protocol.

Firing Squad. Respondents' contention that the firing squad would subject Mr. Smith to more pain than the nitrogen protocol is speculative, unsubstantiated, and directly contradicted by Dr. Groner's declaration which Respondents *did not* challenge in the lower court. As Dr. Groner explained, following the Utah firing squad protocol, a condemned person will lose consciousness in just a few seconds, "meaning the individual cannot experience pain." Pet. App. 376a ¶¶ 5-10. Respondents put forth no experts or other evidence to the contrary. As the Eleventh Circuit has previously recognized, Utah's firing squad protocol "is 'sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly.'" *Nance v. Comm'r, Ga. Dep't of Corr.*, 59 F.4th 1149, 1155 (11th Cir. 2023) (quoting *Bucklew v. Precythe*, 139 S. Ct. 1112, 1129 (2019)).

In recognition of this oversight, Respondents contend that Mr. Smith should be barred by judicial estoppel and collateral estoppel from showing that the firing squad is

another alternative and feasible method of execution. The district court correctly rejected this argument. *See* DE 69 at 17. And for good reason. Mr. Smith pleaded nitrogen hypoxia as an alternative but he by no means agreed to be bound by a Protocol he had never seen, especially when that Protocol was finalized mere months after the State had just represented to multiple courts that it was not ready. To hold Mr. Smith to a never-before-seen Protocol of an undisputedly novel and untested method contradicts the ADOC's own nitrogen hypoxia election form which explicitly states that the condemned person does not "waive [their] right to challenge the constitutionality of any protocol adopted for carrying out execution by nitrogen hypoxia." *Woods v. Comm'r, Alabama Dep't of Corr.*, 951 F.3d 1288, 1291 (11th Cir. 2020); *see also* R. App. 434a at 61:14–62:10 (Ms. Stewart-Riley). Indeed, Respondents have so little faith in their Protocol that they resistant discovery in the district court regarding what they considered in developing it, and they have made changes to it just hours before Mr. Smith's scheduled execution.

Hood/Chamber. Respondents attempt to portray Mr. Smith's proposal of a hood as overly complicated, unworkable, and engineered by Mr. Smith as nothing more than a litigation tactic. But a document on which ADOC relied in developing the Protocol and produced in this litigation belies their argument. What Respondents dub "the Oklahoma White Paper" explicitly contemplates the use of a hood, not a mask, and explains how easy it would be for states to implement in executions. *See* DE 62-34 at 10 ("The process itself, as demonstrated by those who seek euthanasia, requires *little more than a hood sufficiently attached to the subject's head and a tank of inert gas* to create hypoxic atmosphere." (emphasis added)). In doing so, the Oklahoma White Paper acknowledged the same

problems with masks that Mr. Smith has argued all along: entrapment of oxygen from non-air tight seal. *See id.* at 7 ("When masks were placed over the face (instead of using bags of helium over the head) it has been reported some problems have occurred. This is typically a result of the mask not sealing tightly to the face, resulting in a small amount of oxygen being inhaled by the individual. This extends the time to become unconscious and extends the time to death.").

Under this alternative, Mr. Smith is simply arguing for a change to the face covering. Although simple, this alternative will substantially reduce the risk posed by masks which have long been abandoned by individuals willingly using nitrogen or other inert gases to engage in assisted suicide. DE 62-53 at ¶ 5.1; *see also* DE 62-57 ¶ 16. Mr. Smith similarly established that a closed chamber was a feasible, reasonable, alternative. *See* DE 67 at 72:6–7. ("[E]ven with completely closed chambers, there's typically an inflow. The same thing as a mask.").

B. Respondents' Intended Use of the Mask Contradicts User Manual and Federal Regulations Requiring an Airtight Seal and Fit Testing.

Respondents point to the masks NIOSH approval to support their claims that the mask will fit persons of all shapes and sizes and remain sealed. Specifically, Respondents cite 42 C.F.R § 84.135(a) which requires the mask to "fit persons with various facial shapes and size" to receive NIOSH approval. But Respondents ignore other federal regulations that specifically require fit testing before such a mask is used to ensure an airtight seal. These federal regulations require fit testing to be conducted prior "to use [of] any respirator with a negative or positive pressure tight-fitting facepiece" and explain in great detail the "kinds of fit tests allowed." 29 C.F.R. § 1910.134(f).

These regulations are consistent with the User Manual that warns users not to use the mask in a manner inconsistent with the manual and applicable federal regulations. *See* DE 62-28 at 3, 5. Specifically, the manual explicitly instructs the user to perform a negative pressure test, warns about the possibility of an improper fit for people with facial hair, and cautions that an unsatisfactory face seal can result in leakage. DE 62-28 at 5, 8, 17. Importantly, the instructions inform users that the type of positive pressure ADOC is relying on to prevent leaks will not replace the need for a negative pressure test (which ADOC will not perform). *Id.* at 4, 5, 7, 8. Respondents' reliance on one federal regulation is taken out of context and contradicted by the User's Manual warnings which Respondents undisputedly intend to ignore.

II. Respondents' Contentions Concerning Mr. Smith's Fourteenth Amendment Claim are Meritless.

Respondents raise a number of procedural objections to Mr. Smith's Fourteenth Amendment, which were never decided in any court because Respondents never raised them or were decided adversely to Respondents.

A. The Court of Appeals Had Jurisdiction to Consider Mr. Smith's Appeal from the District Court Order Dismissing the Claim.

Without citation, Respondents contend that "because the [Fourteenth Amendment] issue was decided against Smith on a motion to dismiss, the order is not appealable." Opp. 29–30. Mr. Smith explained in his opening brief in the Court of Appeals that the Court had pendent appellate jurisdiction to consider the dismissal of his Fourteenth Amendment claim because it was "[a]n integral part of the District Court's denial of the preliminary injunction." *Speer v. Miller*, 15 F.3d 1007, 1008 (11th Cir. 1994); *see also Sierra Club v. Van*

Antwerp, 526 F.3d 1353, 1359 (11th Cir. 2008). *See Smith v. Comm'r, Ala. Dep't of Corr.*. No. 24-10095-P, Plaintiff-Appellant Kenneth Smith's Opening Brief at 1–2 (11th Cir., filed on Jan. 15, 2024). Respondents were silent and the Court of Appeals exercised its pendent appellate jurisdiction. Respondents remain mute in this Court as to why that was improper.

B. Mr. Smith's Claim is Not Moot.

Respondents contend that Mr. Smith's Fourteenth claim is moot because the appeals from the dismissal of his state postconviction claim "ended" when this Court denied his petition for certiorari yesterday. Opp. 30. That is incorrect. Mr. Smith is entitled to pursue his claim in a federal habeas petition, which right will be lost if his execution proceeds tomorrow. *See* 28 U.S.C. § 2254(a). And this Court's denial of certiorari is not precedential.

C. Mr. Smith Has Standing.

Mr. Smith has standing to assert his Fourteenth Amendment claim for prospective injunctive relief against Respondents who are the only State officials with authority to execute him and deny him an opportunity to exhaust his appeals. *See* Pet. 19–24. Respondents distinguish this Court's decision in *Duke Power* by recharacterizing Mr. Smith's claim and contending that the challenged action here is "requesting the Alabama Supreme Court authorize execution of [his] sentence." Opp. 31–32. But moving in the Alabama Supreme Court to authorize his execution did Mr. Smith no harm; it is the carrying out of his execution that moots his pending appeals. In any event, Respondents have no answer for Mr. Smith's showing that *Respondents* did participate in the decision to move in the Alabama Supreme Court for authority to execute him. *See* Pet. 22–23. Nor do

Respondents dispute that Mr. Smith would lack standing to assert his Fourteenth Amendment claim against the Attorney General. *See* Pet. 22.

Respondents' argument concerning the prospect of inmates suing their jailers for *Batson* or other violations in their criminal trials years after the fact of those violations contradicts their position and the Eleventh Circuit's holding *See* Opp. 32. Inmates do just that in habeas actions. The reason inmates assert those claims in habeas—not § 1983—actions is because those claims "challenge[] the validity of the [inmate's] conviction or sentence." *Nance v. Ward*, 597 U.S. 159, 167 (2022). It has nothing to do with Article III standing, which is a requirement in federal habeas actions just as it is in § 1983 actions. *See*, *e.g.*, *Moody v. Holman*, 887 F.3d 1281, 1286–87 (11th Cir. 2018). And Respondents never explain why those inmates have standing to assert their habeas claims against their jailers even though their jailers had nothing to do with the underlying constitutional violation that allegedly renders their detention illegal.

D. Mr. Smith Properly Asserted His Claim Under § 1983.

Misconstruing *Nance*—and raising one of the many claims that they failed to raise in the district court—Respondents contend that Mr. Smith's Fourteenth Amendment claim must proceed as a habeas claim—not under § 1983. Opp. 32. In *Nance*, the Supreme Court held that an inmate "must proceed in habeas [rather than under § 1983] when the relief he seeks would 'necessarily imply the invalidity of his conviction or sentence.'" *Nance*, 597 U.S. at 167 (citation omitted). Mr. Smith's claim does neither. He seeks an "injunction prohibiting Defendants from executing [him] *until* he has exhausted his pending appeals

or, alternatively, a stay of execution *pending completion* of Mr. Smith's appeals." Pet. App. 180a, Prayer for Relief, ¶ 1.b (emphasis added).

Respondents nevertheless contend that Mr. Smith's claim must be brought in habeas "because he claims [his sentence] cannot constitutionally be carried out for now." Opp. 32. But a sentence that cannot be carried out *for now* is not invalid. And despite the language that Defendants take out of context from *Bowles v. DeSantis*, 934 F.3d 1230 (11th Cir. 2019), nothing in that case supports their position. To the contrary, there a condemned person asserted a § 1983 claim that Florida's clemency procedures violated his federal right to representation of counsel in such proceedings and sought a stay of his execution. *See id.* at 1237–38. In other words, the condemned person claimed that his sentence could not be carried out f*or now*. But nothing in this Court's opinion in *DeSantis* holds or even hints that the plaintiff was required to bring his claim in habeas, rather than under § 1983.

E. Mr. Smith's Claim is Not Precluded.

Next, Respondents contend that Mr. Smith's claim is barred by claim preclusion, issue preclusion, and/or the *Rooker-Feldman* doctrine. *See* Opp. 33–34. Respondents raised only the *Rooker-Feldman* doctrine in the district court, which correctly rejected their argument. *See* Pet. App. 60a n.9. In any event, none of those preclusion doctrines apply.

Defendants contention that all three doctrines apply is based on the false premise that Mr. Smith "presented the same equal protection argument he raises here" to the Alabama Supreme Court when he opposed the State's motion for authority to execute him. Opp. 33. They claim incorrectly that Mr. Smith admitted this by quoting misleadingly from

Mr. Smith's stay application in this Court to suggest that Mr. Smith received a merits determination in the Alabama Supreme Court on his Fourteenth Amendment equal protection claim. *See id.*

In his stay application, Mr. Smith argued that there was no need to seek a stay of his execution in the Alabama Supreme Court pending his petition for certiorari in the U.S. Supreme Court because the Alabama Supreme Court already had granted the State's motion to authorize Mr. Smith's execution despite his then pending appeal in the Alabama Court of Criminal Appeals from the dismissal of his state postconviction petition. *See Smith v. Hamm*, No. 23A634, Reply at 4 (U.S., filed Jan. 23, 2024). It says nothing about Mr. Smith's Fourteenth Amendment equal protection claim at issue on this appeal.

Mr. Smith's opposition to the State's motion for authority to execute him in the Alabama Supreme Court demonstrates that his claim is not precluded. There is a single mention of the equal protection clause in Mr. Smith's Alabama Supreme Court opposition. Near the end of a three-page section arguing that issuing a death warrant would be premature because Mr. Smith then had an appeal pending in the Alabama Court of Criminal Appeals, Mr. Smith wrote the following:

> Indeed, another attempt to execute Mr. Smith while his appeal was pending would violate his Fourteenth Amendment right to equal protection because the State does not move to execute any other similarly situated condemned person until he has exhausted his appeals, including state postconviction remedies. *See Smith* [*v. Hamm*], 2023 WL 4353143, at *8 [(M.D. Ala. July 5, 2023)] ("A plaintiff may successfully allege a violation of his equal protection rights as a class of one by showing that [he] has intentionally been treated differently from others similarly situated and that there is no rational basis for the difference in treatment." ((citation and internal quotation marks omitted).

Ex parte Kenneth Eugene Smith, No. 1000976, Kenneth Eugene Smith's Opposition to the State's Motion to Set an Execution Date at 8–9 (Ala., filed Sept. 22, 2023).

Nothing in the State's order granting Defendants authority to execute Mr. Smith can be construed as a final decision on the merits of Mr. Smith's Fourteenth Amendment claim based on that slender reed. Nor would anything in the Alabama Supreme Court's order or Mr. Smith's opposition to the State's motion have supported an appeal to this Court from an imagined final judgment on the merits of Mr. Smith's Fourteenth Amendment claim.

F. Mr. Smith is Likely to Succeed on the Merits of His Claim.

To succeed on his equal protection claim, Mr. Smith is required to establish that Defendants "will treat him differently from other similarly situated persons" and "that the disparate treatment is not rationally related to a legitimate government interest." *Arthur v. Thomas*, 674 F.3d 1257, 1262 (11th Cir. 2012) (per curiam). Further, "an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that [he] has been irrationally singled out as a so-called 'class of one.'" *Engquist v. Oregon Dep't of Agri.*, 553 U.S. 591, 601 (2007); *see also Vill. of Westbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."). The undisputed facts establish those elements.

Since Respondent Hamm determined that Mr. Smith will be executed by nitrogen hypoxia, he is similarly situated to all other condemned people subject to execution by the same method. *See* DE 62-33 at 61:21–62:10; *see also* DE 67 at 118:12–15. By planning to execute Mr. Smith by nitrogen hypoxia tonight *before* he has exhausted his appeals, Respondents are treating Mr. Smith disparately from all other similarly situated condemned people who would not be executed under those circumstances, including 21 who have exhausted their appeals—some more than a decade ago. *See* DE 62-31; *see also* DE 62-32 at 119:3–10; DE 67 at 116:10–21.)[1] *See* As Respondent Hamm testified, based on his experience, "an inmate wouldn't be up for execution until their appeals had been exhausted." DE 62-32 at 114:2–8; *see also* DE 67 at 119:3–12. And Respondents did not dispute below that their purpose for planning to execute Mr. Smith while his appeal is pending was to moot the Lethal Injection Action and spare ADOC from disclosing information it wants to shield from public scrutiny.

Respondents contend that Mr. Smith "is *not* identical to his comparator class because 'he did not elect to be executed by nitrogen hypoxia.'" Opp. 35 (emphasis in original, citation omitted). But Respondents do not explain why the timing of when a condemned person became subject to nitrogen hypoxia is material to the decision whether to execute them *before* they have exhausted their appeals. *Price v. Comm'r, Ala. Dep't of Corr.*, 920 F.3d 1317, 1325 (11th Cir. 2019) (per curiam) (equal protection claim requires

[1] And even if, contrary to fact, Mr. Smith had exhausted his appeals on February 22, 2022 when this Court denied his petition for certiorari in his federal habeas proceeding, *see Smith v. Hamm*, 142 S. Ct. 1108 (2022), there are still 18 condemned people who elected to be executed by nitrogen hypoxia and whose appeals exhausted before then, and a 19th whose appeals exhausted on the same day. *See* DE 62-31; DE 67 at 116:22–25.

showing that plaintiff is "similarly situated in all *material* respects to" the comparator class).[2]

Respondents fare no better when they contend that "Alabama has executed or sought to execute other inmates even when they have had second or successive postconviction petitions pending." Opp. 36. Each of Respondents' examples involves a successive postconviction petition filed days or weeks before an already scheduled execution based on facts in existence, but allegedly undiscoverable, when a previous postconviction proceeding was pending. *See In re Hutcherson*, 468 F.3d 747, 749 (11th Cir. 2006); *Hubbard v. Campbell*, 379 F.3d 1245, 1246 (11th Cir. 2004); *Arthur v. State*, 71 So.3d 733, 738–39 (Ala. Crim. App. 2010).

Defendants do not dispute that Mr. Smith filed his state postconviction petition *before* the State moved for authority to execute him and when Defendants were representing that "[w]e don't have any immediate plans to do so." (*Smith v. Hamm*, No. 2:22-cv-497, DE 93 at 7:1.) And Mr. Smith's postconviction claim arises from facts that were not in existence when any previous postconviction claim was pending and is not considered "second" or "successive" under federal law. That is a key distinction because Mr. Smith's postconviction claim is not considered "second or successive" under federal law. Thus, "'claims based on a *factual* predicate not previously discoverable are successive,' but '[i]f . . . the purported defect did not arise, or the claim did not ripen, until after the conclusion

[2] *Price* does not help Respondents. There, a condemned person who was scheduled for execution by lethal injection and had not elected to be executed by nitrogen hypoxia brought an equal protection claim on the ground that he was being treated disparately from those condemned people who had elected nitrogen hypoxia and were not subject to execution because ADOC had no nitrogen hypoxia protocol at that time. The materiality of the plaintiff's failure to have elected nitrogen hypoxia in that circumstance is plain.

of the previous petition, the later petition based on that defect may be non-successive.'" *Stewart v. United States*, 646 F.3d 856, 863 (11th Cir. 2011) (citation omitted, emphasis in original)); *see also Boyd v. United States*, 754 F.3d 1298 (11th Cir. 2014) (holding that habeas petition was not "successive" even though filed successively where the petitioner's "vacatur-based claim did not exist until after the proceedings on his initial § 2255 motion concluded").

Those undisputed and objective facts distinguish Mr. Smith's postconviction claim from Defendants' examples and show that there is no basis for Defendants' professed concern for inviting meritless "second, third, or thirtieth habeas petitions" or for its having to make subjective determinations about whether claims are "non-frivolous." Opp. 4, 36.

III. The Equities Favor a Stay.

Having no meaningful response to Mr. Smith's showing that it was Respondents' conduct, and not his own, that created the emergency nature of this litigation, Respondents resort to misrepresentations of Mr. Smith's contentions in this litigation. Respondents assert that the equities weigh in their favor because Mr. Smith previously alleged that nitrogen hypoxia was an available and feasible method of execution that would reduce the intolerable risk posed by the State's then-plan to attempt to execute him for a second time by lethal injection. Opp. at 17. Respondents also contend that Mr. Smith has now changed his position to assert "last-minute" claims to delay his execution, *id.*, and insist that he received a "full opportunity to litigate his claims." *Id.* at 39. None of that is true.

First, the State criticizes Mr. Smith for opposing a second execution attempt by nitrogen hypoxia because, the State says, he "challenges the very method of execution that

he doggedly asked for," Opp'n at 38, but that argument is too clever by half. There is no dispute that no state nor the federal government has *ever* executed anyone by nitrogen hypoxia. The State therefore had to write a nitrogen hypoxia protocol essentially on a blank slate, and at the time Mr. Smith raised the option of nitrogen hypoxia, the State had not yet released its Protocol to the public. That Protocol was not disclosed to Mr. Smith—or anyone outside the Alabama Attorney General's Office, ADOC, and their advisors—until the Attorney General moved on August 25, 2023 to set Mr. Smith's execution date. *See Smith v. Hamm*, No. 2:22-cv-497, DE 104, 104-1, 108 at 11-12, 108-3 (M.D. Ala.). Respondents' suggestion that Mr. Smith needed to raise his concerns about the Protocol in his earlier method-of-execution challenge when that Protocol *had not even been released yet* is absurd. *See Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 873 (11th Cir. 2017) (method-of-execution claim does not accrue until "the later of the date on which the state review [of a conviction and sentence] is complete, or the date on which the capital litigation becomes subject to a new or substantially changed execution protocol").[3]

Second, Respondents misleadingly suggest that Mr. Smith has changed his position because, according to Respondents, his suit "demand[s] execution by firing squad." Opp. at 6. Mr. Smith has not changed his position that nitrogen hypoxia is an available and feasible method of execution. His challenge is to ADOC's protocol for nitrogen hypoxia,

[3] Respondents' assertion that Mr. Smith "had every opportunity in his prior suit to specify the method he wanted" is false. Opp. 38. Respondents delayed discovery in the lethal injection litigation for nearly one year through filing a meritless motion to dismiss, only to suddenly announce their intent to proceed with nitrogen hypoxia on the eve of finally being required to disclose information about their failed attempt to moot the litigation. *See* Pet. App. 29a-30a. Because of Respondents' delay tactics, the prior litigation never proceeded past the pleading stage, and Mr. Smith never had an opportunity to present evidence regarding any aspect of that case. *See* Pet. App. 160a, 163a–166a.

and he provided detailed proposed amendments to that Protocol that would remedy its serious defects. That he also offered firing squad as an additional feasible and readily available alternative should ADOC decline his proposed changes to their nitrogen hypoxia Protocol does not amount to a change in position. Accordingly, judicial estoppel does not apply here because it "requires a party's later position to be contradictory or 'clearly inconsistent' from an earlier one." *Hoefling v. City of Miami*, 811 F.3d 1271, 1278 (11th Cir. 2016) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)).

Third, Mr. Smith's petition does not arise from a "last-minute" claim to delay his execution. It is undisputed that Mr. Smith did not learn of ADOC's plans to execute him by its nitrogen hypoxia Protocol until August 25, 2023. It is also undisputed that on that same day, ADOC released a heavily-redacted version of its Protocol, and it refused to provide an unredacted version until forced to do so by a federal court just two months ago. Respondents cannot reasonably dispute that the exigent nature of this appeal is a result of the State's own decision to release its novel and highly-redacted Protocol on the same day it moved to set Mr. Smith's execution and its subsequent months-long refusal to provide Mr. Smith an unredacted version of that Protocol so that he could make a complete assessment of how the State intends to carry out his execution.

Fourth, Respondents' assertion that Mr. Smith "had a full opportunity to litigate his claims" is also wrong. Mr. Smith faced constant stonewalling from Respondents. The Eleventh Circuit's majority opinion refers to one of the more egregious examples in which Mr. Smith did not receive the opinion of ADOC's expert witness until late into the night before that expert's deposition. The Eleventh Circuit "appreciate[d] the expedited nature

of this case and the balance of confidential information," but nonetheless explained that it was "concerned and disheartened that Alabama's Office of the Attorney General would wait until late the night before a deposition to provide an expert opinion report, especially one that was hired before the start of this litigation." Pet. App. 25a n.8. Similarly, Respondents opposed discovery and withheld information predating its adoption of the current protocol in August 2023, and the district court refused to rule on Mr. Smith's motion to compel production of that information. Pet. App. 24a.

Fifth, Respondents accuse Mr. Smith of "sandbagging" in the Eleventh Circuit with new evidence about his deteriorating health, Opp. at 4, but that new information about vomiting from PTSD was not known to his counsel until January 18, 2024, after briefing was complete in the Eleventh Circuit. To the extent Respondents are suggesting Mr. Smith should have relayed that information to someone sooner, it is Respondents who have custody over him; it is respondents who placed him on "single walk" status severely restricting him from his counsel, family, and friends; and it was Respondents' own medical staff who treated him for vomiting. Despite all that information, Respondents failed to disclose anything about Mr. Smith's vomiting until he was finally able to speak with his counsel; they suggest that he should have proven how often, how much, when and where he was vomiting, but that information is impossible to obtain when Mr. Smith remains on "single walk."

Finally, Respondents' conclusory assertion that there is a need for timely enforcement of sentences is belied by ADOC's own years-long delay in developing the nitrogen hypoxia Protocol outlining procedures that it now vehemently asserts are mostly

"common sense." *See, e.g.*, R. App. 439a–440a at 81:2–14; 84:20–85:5; R. App. 455a at 147:23–148:8; R. App. 462a at 175:4–12; R. App. 473a at 217:2–10 (Ms. Stewart-Riley). The length of delay required to fully and fairly adjudicate the serious issues raised by the Protocol pales in comparison to ADOC's own delay in formulating its Protocol after the Alabama legislature approved nitrogen hypoxia as a method of execution in 2018. Defendants' insistence that they now be able to employ that Protocol as quickly as possible to moot further discovery or scrutiny of it should not be countenanced.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioner's application for stay pending petition for writ of certiorari.

Respectfully submitted,

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