NO. 24A1231
CAPITAL CASE

In The Supreme Court of the United States

STEPHEN C. STANKO,

Applicant,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; JOEL E. ANDERSON, Interim Director, SCDC; COLIE RUSHTON, Director of Security & Emergency Operations, SCDC; STEPHEN DUNCAN, Warden, Broad River Correctional Institution; and LYDELL CHESTNUT, Deputy Warden, Broad River Correctional Institution; and HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina,

Respondents.

ON EMERGENCY APPLICATION FOR STAY OF EXECUTION

RESPONSE TO EMERGENCY APPLICATION FOR STAY OF EXECUTION TO PRESERVE JURISDICTION

(Execution scheduled for June 13, 2025, at 6:00 PM)

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INTRODUCTION

"Last-minute stays should be the extreme exception, not the norm." *Bucklew v. Precythe*, 587 U.S. 119, 150 (2019). In the past three days, two federal courts have rejected Stanko's eleventh-hour demand to delay his execution. Nothing about Stanko's case is exceptional, and the family members of Stanko's victims "deserve better" than additional delay of a sentence that was duly imposed and that has been repeatedly upheld. *Id.*

For starters, this Court's precedent forecloses Stanko's claims. Because he has elected a method of execution other than the default method, he has "waived any objection" to his choice of lethal injection. *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999). If Stanko wanted to bring a challenge like this one, he had to do so *before* his election. But he failed to do so. Now that South Carolina will conduct Stanko's execution using his selected method, lethal injection, Stanko lacks standing to challenge the other two options authorized by statute.

Seemingly once he realized what *Stewart* meant for his claims, Stanko "change[d] horses in mid-stream, arguing one theory below and a quite different theory on appeal." *Ahern v. Shinseki*, 629 F.3d 49, 58 (1st Cir. 2010). His complaint challenged the State's methods of execution. *See* ECF No. 1, at 55–56 (claims 1–5). In fact, *Stewart* appeared nowhere in his 57-page complaint—an implausible oversight if his claims were challenging that case.

Now, he's insisting that the State's method-of-execution statute is (facially, it seems) unconstitutional because it effectively forces an inmate to elect a method,

which *Stewart* would then preclude the inmate from challenging. This Court has previously declined to credit a substantially similar eve-of-execution argument from another condemned inmate. *See* Order, *Sigmon v. South Carolina*, No. 24-6709, 145 S. Ct. 1327 (U.S. Mar. 7, 2025). There is nothing wrong with South Carolina adopting a statute that both affords an inmate the option to select an available constitutional method of execution and seeks to put an end to "[t]he seemingly endless proceedings that have characterized capital litigation" in recent decades. *Baze v. Rees*, 553 U.S. 35, 69 (2008) (Alito, J., concurring). Nonetheless, that's not the case Stanko brought, and he cannot change his claim just hours before his scheduled execution.

Stewart is not Stanko's only procedural roadblock. He previously raised the same underlying issue in the S.C. Supreme Court, accompanied by similar inflammatory speculation and unsupported assertions of botched firing squad and lethal injection executions. That court squarely rejected Stanko's botched-execution argument. *See* ECF No. 1-27.[1] Consequently, Stanko cannot relitigate the same factual question here, which he would be required to do to prevail on any of his claims.

Stanko's delay in bringing this case represents another insurmountable hurdle. A stay is an extraordinary equitable remedy that is not available as a matter of right. After all, equity favors the diligent, and Stanko's filing of a last-minute § 1983 action just one week before his scheduled execution neither shows diligence nor, on its own, warrants a stay. *Nelson v. Campbell*, 541 U.S. 637, 649 (2004).

Even if the Court were to reach the merits, the result would be the same.

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[1] Citations to the district court's docket are identified by the corresponding "ECF" designation, and citations to the U.S. Court of Appeals for the Fourth Circuit's docket are reflected as "CA4 Dkt."

Stanko's botched-execution theory is wrong. Mahdi's firing squad execution and the earlier lethal injection executions went as planned, and Stanko cannot support baseless assertions with speculation about those executions. As the district court recognized, all Stanko offered was "surmise and speculation." ECF No. 28, at 9.

Plus, Stanko has failed to offer an alternative that would "significantly reduce a substantial risk of severe pain." *Bucklew*, 587 U.S. at 134. Instead, he demands that the State "do these methods better" and proposes a method that other inmates have recently challenged and in which some inmates have shown signs of struggle—a method, in fact, that his own expert recently called "a pretty ugly way to die." Michael Ramsey, *Execution by Nitrogen Gas "Ugly Way to Die"*, News Nation (Mar. 13, 2025), https://tinyurl.com/nw3bv7m4 (quoting Dr. Groner).

As with the other condemned inmates who were recently executed, "[t]he people of [South Carolina], the surviving victims of Mr. [Stanko]'s crimes, and others like them deserve better" than more delay. *Bucklew*, 587 U.S. at 149. The State has a "significant interest in" finally "enforcing its criminal judgments." *Nelson*, 541 U.S. at 650.

After concluding not only that Stanko's claims "have no legal merit and are factually unsupported," but also that "they are procedurally barred," ECF No. 28, at 10, the district court rightly recognized and rejected this "well known" "tactic" as an "untimely and transparent effort . . . to obtain a stay of the execution," *id.* at 11. Like the lower courts, this Court should deny Stanko's request to halt his execution.

STATEMENT OF THE CASE

A. Stanko is sentenced to death for a gruesome murder.

In the early hours of the morning on April 8, 2005, Stanko called Henry Turner, his 74-year-old friend. Stanko told Turner that Stanko's father had died—a lie. Stanko came to Turner's home shortly after this call. Later that morning, Turner was shaving in front of his bathroom mirror. Stanko, gun in hand, approached Turner from behind. Using a pillow as a silencer, Stanko shot Turner. Stanko then struck Turner in the head and put a fatal shot into Turner's chest. Stanko stole Turner's truck, fled to Columbia and then to Augusta, where he continued lying to people (this time about his identity) before he was eventually apprehended and arrested.[2] *State v. Stanko*, 741 S.E.2d 708, 711 (S.C. 2013).

Stanko was charged with and convicted of murder and armed robbery. *Id.* He was sentenced to death, and the S.C. Supreme Court affirmed. *Id.* The district court rejected his habeas petition. *Stanko v. Stirling*, No. 1:19-cv-3257-RMG, 2022 WL 22859294 (D.S.C. Mar. 24, 2022). The Fourth Circuit then affirmed, *Stanko v. Stirling*, 109 F.4th 681 (4th Cir. 2024), and this Court denied cert, *Stanko v. Stirling*, No. 24-6420, 2025 WL 1285097 (May 5, 2025).

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[2] This, of course, was not the only murder for which Stanko received a death sentence following his multicounty, several-day crime spree. After an earlier trial and conviction in a separate case in Georgetown County, Stanko was sentenced to death for strangling his ex-girlfriend, sexually assaulting her daughter, and slitting the daughter's throat (the daughter thankfully survived). *See State v. Stanko*, 658 S.E.2d 94 (S.C. 2008). The S.C. Supreme Court's execution notice was issued in connection with Stanko's Horry County murder conviction.

B. South Carolina carries out five executions after amending its method-of-execution statute.

For years, South Carolina could not carry out any executions because SCDC, like many other corrections departments around the country, could not obtain lethal injection drugs and lethal injection was the State's default method for executions. *See Glossip v. Gross*, 576 U.S. 863, 869–71 (2015) (discussing States' challenges obtaining these drugs). Eventually, the State amended its method-of-execution statute to make electrocution the default method, while also giving a condemned inmate the opportunity to elect lethal injection or the firing squad, if those methods are available. *See* S.C. Code Ann. § 24-3-530. The State also adopted a shield statute to help facilitate ongoing efforts to obtain lethal injection drugs. *See* S.C. Code Ann. § 24-3-580. The S.C Supreme Court ultimately upheld these methods of execution. *See Owens v. Stirling*, 904 S.E.2d 580 (S.C. 2024).

After the S.C. Supreme Court's decision in *Owens*, the State resumed executions. Freddie Owens was the first inmate executed. He elected lethal injection. According to the witnesses, Owens "appeared to lose consciousness after about a minute," after which "his eyes closed and he took several deep breaths." Jeffrey Collins, *South Carolina Inmate Dies by Lethal Injection in State's First Execution in 13 Years*, Associated Press (Sept. 20, 2024), https://tinyurl.com/3x7662j8. Then, "[h]is breathing got shallower and his face twitched for another four or five minutes before the movements stopped." *Id.*

The second execution was of Richard Moore, who also elected lethal injection. Witnesses to his execution (including one who was also at Owens's execution)

described it consistently with Owens's: "Moore took several deep breaths that sounded like snores over the next minute. Then he took some shallow breaths [for about three minutes], when his breathing stopped. Moore showed no obvious signs of discomfort." Jeffrey Collins, *South Carolina Executes Richard Moore Despite Broadly Supported Plea to Cut Sentence to Life*, Associated Press (Nov. 1, 2024), https://tinyurl.com/2s4tc4vr.

Marion Bowman was the third inmate executed. He likewise chose lethal injection. He stopped breathing "in less than a minute," and there were no reports that he otherwise moved before he was declared dead. Jeffrey Collins, *South Carolina Puts Inmate Marion Bowman Jr. to Death in State's Third Execution Since September*, Associated Press (Jan. 31, 2025), https://tinyurl.com/5a9bmbz4.

Brad Sigmon was the fourth, and he elected the firing squad. "His arms briefly tensed when he was shot, and the target was blasted off his chest." After he "appeared to give another breath or two," witnesses observed nothing further before he was pronounced dead. Jeffrey Collins, *A South Carolina Man Executed by Firing Squad Is the First US Prisoner Killed This Way in 15 Years*, Associated Press (Mar. 7, 2025), https://tinyurl.com/bdzmypra.

The fifth execution was of Mikal Mahdi, who like Sigmon elected the firing squad. Mahdi "cried out as the bullets hit him," and the "target with the red bull's-eye over his heart was pushed into the wound in his chest." He "groaned two more times about 45 seconds after that. His breaths continued for about 80 seconds before he appeared to take one final gasp." Jeffrey Collins, *South Carolina Executes Second*

Man by Firing Squad in 5 Weeks ("*Mahdi Execution*"), Associated Press (Apr. 11, 2025), https://tinyurl.com/29pfv9sy.

C. Stanko files last-minute challenges to his execution.

The S.C. Supreme Court issued Stanko's execution notice on May 16, setting his execution date for June 13. *See* ECF No. 1-22; *see also* S.C. Code Ann. § 17-25-370 (execution is fourth Friday after the notice is issued). The same day the court issued the notice, Stanko moved for oversight of the certification process, based on the theory that previous executions had been botched. *See* ECF No. 1-23. The S.C. Supreme Court unanimously refused to grant Stanko that relief. *See* ECF No. 1-27. The court concluded that Stanko "made no showing that Mahdi's execution was 'botched' or that protocols were not followed," and that Stanko failed to establish "any need for further information on lethal injection." ECF No. 1-27, at 3.

Interim Director Anderson certified, under section 24-3-530(B), that all three methods of execution were available. *See* ECF No. 1-25. Stanko then elected lethal injection by the statutory deadline of 14 days before his execution. *See* ECF No. 1-29.

After making that election, Stanko waited a week before filing this lawsuit. ECF No. 1. More than 24 hours after that, Stanko finally moved to stay his execution. The district court refused to stay his execution, noting the "incorrect factual premises" of Stanko's claims and that his argument was based on "surmise and speculation." ECF No. 28, at 6, 8. That court also recognized that *Stewart*, issue preclusion, and Stanko's delay precluded last-minute relief. *Id.* at 10–12. On appeal, the Fourth Circuit refused to grant Stanko a stay. *See* CA4 Dkt. No. 22.

Stanko now seeks emergency relief from this Court to stay his execution, which is scheduled to occur later today in accordance with South Carolina law and the state supreme court's execution notice. *See* ECF No. 1-22.

STANDARD OF REVIEW

A stay of an execution "should be the extreme exception, not the norm," *Lee*, 591 U.S. at 981 (vacating stay), because a State has a "strong interest in enforcing its criminal judgments without undue interference from the federal courts," *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Whether to grant a stay pending appeal turns on the four *Nken* factors. *See United States v. Texas*, 144 S. Ct. 797, 798 (2024) (Barrett, J., concurring in denial of application to vacate stay); *Nken v. Holder*, 556 U.S. 418, 434 (2009) (four traditional stay factors).

REASONS FOR DENYING THE APPLICATION

I. Stanko is not likely to prevail on the merits.

A. Stanko faces insurmountable procedural hurdles.

1. Stanko has waived any challenge to his chosen method of execution. "By declaring his method of execution" and "picking [it] over the State's default form of execution," a condemned inmate "waive[s] any objection he might have" to the method he picked. *Stewart*, 526 U.S. at 119; *accord, e.g.*, *Miller v. Parker*, 910 F.3d 259, 262 (6th Cir. 2018); *Stanford v. Parker*, 266 F.3d 442, 462 (6th Cir. 2001); *Bell v. True*, 413 F. Supp. 2d 657, 737 (W.D. Va. 2006).

And because Stanko has elected one method, he lacks standing to challenge any others, as it is not "likely" that any "injury will be remedied by the relief" a court

might grant in ruling on another method. *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008); *see also* ECF No. 28, at 12–13. As the Ninth Circuit succinctly put it, "[a] defendant lacks standing to challenge the constitutionality of an execution method that will not be used in the defendant's execution." *Atwood v. Shinn*, 36 F.4th 901, 905 (9th Cir. 2022) (per curiam).

Stanko's attempt to avoid *Stewart*'s waiver rule by saying he wasn't waiving anything when electing lethal injection falls flat. *See* ECF No. 1-29, at 4. Were those couple of sentences sufficient to overcome *Stewart*, that rule would be meaningless, and every inmate would do it. But this Court's pronouncements are not designed to be so easily circumvented.

On top of that concern, allowing such a simple skirt of *Stewart* would exacerbate "[t]he seemingly endless proceedings that have characterized capital litigation" in recent decades. *Baze*, 553 U.S. at 69 (Alito, J., concurring). At some point, a judgment must be carried out. After all, "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew*, 587 U.S. at 149. Too often, those interests are "frustrated" by "delay through lawsuit after lawsuit." *Id.* *Stewart* provides a logical framework to ensure that such frustrations cease.

This isn't to say that a condemned inmate doesn't have a way to bring a challenge like Stanko's. (Not that such a challenge would likely prevail.) He just must do so *before* making an election. This is not some "interpretation" of *Stewart* that requires "authority," as Stanko claimed below. ECF No. 25, at 4. It is, rather, a

straightforward application of that decision: If electing a method results in waiver, then the only way to avoid the waiver is to assert a claim before electing. Stanko did not do that.

So he is wrong that South Carolina has completely closed the door on claims like his. The State has just sought to close the door on those brought at the eleventh-hour. Nothing is wrong with seeking to promote finality and avoid victims' families being put through the emotional rollercoaster of an on-again, off-again execution.

Nor is there anything wrong with the State's method-of-execution statute, which gives inmates like Stanko a choice of execution method. Stanko should not be allowed to transmogrify this act of legislative grace into a reason to delay his execution. And though Stanko now insists that he's challenging "the constitutionality of the [statutory] scheme itself," CA4 Dkt. No. 17, at 7, the claims in his complaint don't say that—they are about the methods, not the statute, *see* ECF No. 1, at 55–56 (claims 1–5). He "cannot," of course, "change horses in mid-stream, arguing one theory below and a quite different theory on appeal." *Ahern*, 629 F.3d at 58.

2. Stanko's claims hinge on the assertion that the State's recent lethal injection and firing squad executions were botched. *E.g.*, ECF No. 1, at 19. This is the same theory on which Stanko sought oversight of the certification process from the S.C. Supreme Court. *See* ECF No. 1-23, at 7–17. The S.C. Supreme Court took up those issues and rejected Stanko's arguments. It explained that Stanko had "made no showing that Mahdi's execution [by firing squad] was 'botched'" and, as for lethal injection, the "reasons for the second dose, and any further doses, of pentobarbital

are specifically set forth in the protocol." ECF No. 1-27, at 3.

Stanko is therefore precluded from bringing his claims here. "Issue preclusion . . . bars successive litigation of an issue of fact . . . actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quotation marks omitted). The doctrine guards against vexatious litigation, protects judicial resources, and promotes uniformity in judicial decisions. *Id.*

All five elements of issue preclusion are met here. One, the factual question of botched execution is raised in both cases. Two, the S.C. Supreme Court ruled on that question. Three, that question was the central focus of the S.C. Supreme Court's order. Four, the S.C. Supreme Court's decision is final. And five, Stanko had every opportunity to raise the issue in the S.C. Supreme Court and offer any evidence he wanted. There's no reason he could not have offered all the expert reports he attached to his complaint here in the state court proceeding. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217 (4th Cir. 2006) (issue-preclusion elements).

Stanko unsurprisingly disagrees with the S.C. Supreme Court's decision. *See, e.g.*, ECF No. 17, at 5, 11. But that doesn't entitle him to relitigate this issue.

3. Stanko's delay in bringing this case is yet another procedural roadblock. A stay is an equitable remedy, and "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Even the "mere fact" of having a "cognizable § 1983 claim" does not require a stay. *Nelson*, 541 U.S. at 649.

Instead, "a party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 585 U.S. 155, 159 (2018).

Far from "[p]ress[ing]" his claim, ECF No. 17, at 4, Stanko has delayed. The statute he now claims to challenge was enacted four years ago. He lost his cert petition in this Court in his habeas case more than a month ago. He sought "oversight" from the S.C. Supreme Court more than three weeks ago. *See* ECF No. 1-22. And he waited nine days after that court ruled against him to bring this case. ECF No. 1-27. These days and weeks might not be noteworthy in the ordinary case, but they are significant here. For example, the delay between the S.C. Supreme Court's order and Stanko filing this case was more than half the time between that order and Stanko's execution date.

Stanko filed this case "late," to use the district court's word. ECF No. 28, at 11. He cannot manufacture urgency and then demand a stay based on arguments he already lost in another court. "[L]ast-minute claims that arise from long-known facts counsel the denial of equitable relief in capital cases." *Mills v. Hamm*, 102 F.4th 1245, 1250 (11th Cir. 2024) (cleaned up).

Ultimately, it's "hard not to see" Stanko's latest case "for what it is": a "contrived game of 'Whac-A-Mole'" that is a "transparent act of gamesmanship that seeks only one thing: Delay for delay's sake." *Middlebrooks v. Parker*, 22 F.4th 621, 624–25 (6th Cir. 2022) (Thapar, J., statement respecting denial of rehearing en banc).

B. Stanko loses on the merits.

Even if the Court were to overlook the procedural bars, Stanko still loses on the merits.

1. None of the previous five executions were botched.

i. Stanko says much about Mahdi's firing squad execution, but three brief points show Stanko's contentions are wrong (even if his arguments about the firing squad were relevant).

First, Mahdi was struck with three bullets. Two points prove that. One, all three rifles fired. Interim Director Anderson (before submitting his certification for Stanko's execution, *see* ECF No. 1-24) confirmed that each of the three rifles fired and then ejected a spent casing after the execution, ECF No. 20-1, ¶¶ 2, 4. Two, no bullet missed Mahdi and hit somewhere else in the execution chamber, *id.* ¶ 3, a point Stanko concedes, ECF No. 1, ¶ 39.

Second, those bullets struck Mahdi's heart. The autopsy describes each track as including "the pericardium" and "the right ventricle." ECF No. 1-19, at 3. Stanko's claim that the bullets "failed to directly strike the heart" is just wrong. ECF No. 17, at 8; CA4 Dkt. No. 17, at 11.

Third, the bullets hit the target. As a media witness reported, the "target with the red bull's-eye over his heart was pushed into the wound in his chest." Collins, *Mahdi Execution*. Stanko's contention that anyone "intended not to hit the target," ECF No. 1, ¶ 61; *see also* ECF No. 17, at 9, is wrong and ignores this eyewitness report. The Court should neither credit nor encourage such inflammatory and

irresponsible speculation.

ii. Stanko's contentions about lethal injection fare no better. Lethal injection executions take more than a couple of minutes before recording a time of death. A condemned inmate may (and typically does) stop breathing before all cardiac electrical activity ceases. As Dr. Antognini explains,[3] a person's body must use up any stored oxygen after breathing stops, which results in "periodic irregular beats" before "the heart stops all together." ECF No. 20-2, ¶ 7; *see also id.* ¶ 26; ECF No. 1-3, ¶ 32 (Stanko's expert recognizing this point). So it is both typical and expected for some period of time to exist between when breathing stops and when death is pronounced. And this brief interval is consistent with the fact that "it would not be unexpected that some heart electrical activity persists after 10 minutes." ECF No. 20-2, ¶ 28; *see also* ECF No. 28, at 8 (district court discussing Dr. Antognini's declaration).

This timeline also explains why a second five grams was administered. It's not because the pentobarbital wasn't working. It's because the protocol calls for it—a point the S.C. Supreme Court quickly recognized when it rejected Stanko's argument. *See* ECF No. 1-27, at 3. Like the state supreme court, the district court acknowledged that the "second dose of pentobarbital is part of South Carolina's protocol for lethal injection and is not administered because the first dose was ineffective." ECF No. 28, at 8.

Also rebutting Stanko's assertions on lethal injection is the fact that no one—not a media witness, not an inmate's lawyer—has cited any evidence of conscious

[3] Dr. Antognini is the same expert the federal government used in *Barr v. Lee*, when this Court quickly vacated a stay of execution.

pain. As Dr. Antognini posited, "If Mr. Moore was conscious and drowning in his own fluids then why didn't he move prior to minute 23 [when he was declared dead]?" ECF No. 20-2, ¶ 27. (The State's one-drug protocol does not, like the three-drug protocol, include a paralytic drug.) "The answer," of course, "is that Mr. Moore was profoundly unconscious from the pentobarbital," so he felt no pain. *Id.*

2. Stanko has not alleged a sufficient alternative method.

A plaintiff challenging his method of execution must "show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew*, 587 U.S. at 134. Stanko has not cleared this "exceedingly high bar." *Grayson v. Hamm*, No. 2:24-cv-00376-RAH, 2024 WL 4701875, at *13 (M.D. Ala. Nov. 6, 2024).

i. Stanko begins by suggesting "competent insertion and monitoring of the IV line and proper storage and testing of compounded pentobarbital." ECF No. 1, ¶ 101. For two reasons, that argument fails. First, it's not an alternative. It's just a slightly rephrased request for more oversight. Second, Stanko has offered nothing to support the claim that SCDC isn't competently inserting or monitoring IVs or is using defective pentobarbital. Stanko discusses executions from Oklahoma, Ohio, and Indiana, *see* ECF No. 1, ¶¶ 70–78, but he mentions nothing so drastic about any of South Carolina's three lethal injection executions—a point the district court aptly recognized. *See* ECF No. 28, at 7–8.

As the district court put it, Stanko did "not offer[] any evidence that any of the

State's recent lethal injection executions failed to meet constitutional standards" or "resulted in any conscious pain and suffering." *Id.* at 9. All he offered was "surmise and speculation." *Id.* That's not enough to stay his execution.

ii. Stanko fares no better when he argues for a "[c]ompetent [f]iring [s]quad." ECF No. 1, at 52 (subheading 2). Again, this isn't an alternative method.

In any event, his three suggestions of ways to change the firing squad fall far short of the bar he must meet. He first suggests—without evidence—that members of the firing squad do not appreciate the solemnity of their duty or would act in bad faith. *See* ECF No. 1, ¶ 107. Nothing supports those claims, and media reports noted that the firing squad hit the target in both executions. He then claims that SCDC must use "a portable ultrasound scanner" to find the heart. *Id.* ¶ 108. But SCDC already does a chest x-ray and has a medical professional place the aim point using a stethoscope. Stanko lastly insists that a "heavier spreading ammunition" should be used. *Id.* ¶ 109. Yet the first two firing squad executions leave no doubt that the ammunition that SCDC uses spreads throughout the chest cavity and causes substantial damage. *See* ECF Nos. 1-17 (Sigmon autopsy); 1-19 (Mahdi autopsy).

iii. Stanko's only true offer of an "alternative" method is nitrogen gas. It's not clear, however, that this method would "significantly reduce a substantial risk of severe pain." *Bucklew*, 587 U.S. at 134. His own expert called it a "pretty ugly way to die." Ramsey, *Execution by Nitrogen Gas "Ugly Way to Die"*, *supra* (quoting Dr. Groner). And a report from Alabama's recent nitrogen gas execution claimed that the condemned inmate "rocked his head," "shook and pulled against the gurney

restraints," "clenched his fists," "appeared to struggle to try to gesture again," and "took a periodic series of more than a dozen gasping breaths for several minutes." Associated Press, *Alabama Carries Out Nation's 3rd Nitrogen Gas Execution*, NPR (Nov. 22, 2024), https://tinyurl.com/mr3revaf.

Not surprisingly, inmates facing nitrogen gas have filed their own lawsuits, insisting that nitrogen gas is unconstitutional. The inmate who Alabama executed in November 2024, for instance, proposed fentanyl as an alternate method. *See Grayson*, 2024 WL 4701875, at *2.

As another tell that Stanko has changed his argument on appeal, this alternative that he pleaded under *Baze*, *Glossip*, and *Bucklew* appears nowhere in his Emergency Stay Application.

iv. Stanko tries to dismiss electrocution as the statutory default, *see* ECF No. 1, ¶¶ 87–92, but that method does not violate the Constitution. To start, the Court has upheld it. *See In re Kemmler*, 136 U.S. 436 (1890); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). That should end the matter. *See Bucklew*, 587 U.S. at 134 ("traditionally accepted methods . . . are not necessarily rendered unconstitutional as soon as an arguably more humane method . . . becomes available").

But if it somehow weren't enough, Stanko's allegations fail anyway. He cites an expert who says it's "possible" that electrocution is painful because an inmate might not be rendered insensate quickly. ECF No. 1, ¶ 91. "Possible." That's the type of speculative testimony that the S.C. Supreme Court held was insufficient to prove

that electrocution is unconstitutionally cruel. *See Owens*, 904 S.E.2d at 595–96. (Notably, for all Stanko has to say about what some courts have held about electrocution, *see, e.g.*, Emergency Stay App. 5, he does not want to acknowledge that the S.C. Supreme Court just rejected his precise argument in *Owens* on a full record after trial.) And it's the type of speculative allegation that cannot make a plaintiff likely to show a "*substantial* risk of severe pain." *Bucklew*, 587 U.S. at 134 (emphasis added).

II. The remaining factors do not support a stay.

Stanko's irreparable harm argument largely assumes that his merits argument will prevail. *See* Emergency Stay App. 19. But his merits argument lacks merit, so Stanko's irreparable harm argument falls flat too.

He gets no further by saying he will lose the right to litigate his claims. *Id.* at 17. If a "cognizable § 1983 claim" does not require a stay, *Nelson*, 541 U.S. at 649, then there cannot be irreparable harm from not getting to litigate that claim—at least not to litigate it on the eve of his execution when the claim would (at least as Stanko frames it now) require this Court to overturn its own precedent.

Taking the last two factors together, *Nken v. Holder*, 556 U.S. 418, 435 (2009), the public interest favors denying injunctive relief. The State has multiple compelling interests here. "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew*, 587 U.S. at 149. Sadly, those interests are often "frustrated" by "delay through lawsuit after lawsuit." *Id.* Stanko is no exception: He's sought to stop his execution in state court and now federal court.

It is hard to credit that Stanko wants only "a pause." Emergency Stay App. 22. Presumably, he'll always have one more challenge if the courts grant him stays. "The people of [South Carolina], the surviving victims of Mr. [Stanko]'s crimes, and others like them deserve better." *Bucklew*, 587 U.S. at 149. There is even a "moral dimension" to this interest in finality. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

Stanko makes no headway with his suggestion that because South Carolina did not carry out an execution for 13 years, more delay is not a big deal. *See* Emergency Stay App. 21–22. For one, he's wrong that the State could have taken the steps at any time to resume executions. There were no death-eligible inmates who had exhausted their federal habeas proceedings for more than half that time. For another, he is incorrect about the State's diligence once condemned inmates did exhaust all their collateral challenges. The State promptly amended its method-of-execution statute, and then it adopted the shield statute in response to the S.C. Supreme Court's first decision in the *Owens* litigation. *See Owens v. Stirling*, 882 S.E.2d 858 (S.C. 2024). It was not the State choosing to delay executions; it followed from legal challenges from inmates like Stanko.

The State also has separate interest in ensuring that federal courts do not interfere with its criminal judgments. To be sure, federal courts "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But in doing so, they "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584. "The

proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously. Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay." *Bucklew*, 587 U.S. at 150. From this role flows the common-sense conclusion that "[l]ast-minute stays should be the extreme exception, not the norm." *Id.* That is why courts must guard against the "Groundhog Day" that is capital litigation so that duly imposed, fully appealed judgments can be carried out. *Glossip*, 576 U.S. at 893 (Scalia, J., concurring).

CONCLUSION

For these reasons, the Court should deny Stanko's Emergency Application for Stay of Execution.

Respectfully Submitted,

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