Nos. 24-6778 & 24A893

Supreme Court of the United States

JESSIE HOFFMAN,

Applicant,

v.

GARY WESTCOTT,
SECRETARY FOR THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY, et al.

Respondents.

To the Honorable Samuel A. Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF ALABAMA AS *AMICUS CURIAE* IN SUPPORT OF LOUISIANA'S OPPOSITION TO STAY APPLICATION

Steve Marshall
Alabama Attorney General

Edmund G. LaCour Jr.
Solicitor General
Counsel of Record

Robert M. Overing
Deputy Solicitor General

Dylan Mauldin
Assistant Solicitor General

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@AlabamaAG.gov

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*

The State of Alabama respectfully submits this brief as *amicus curiae* in support of Louisiana. Alabama adopted nitrogen hypoxia as a method of execution after a dozen inmates demanded it as their alternative to lethal injection. Alabama has since used the method to carry out four death sentences. The district court below deemed those executions unconstitutional. Pretending that Alabama has not been litigating the facts for well over a year, the court said that no "thoughtful" or "well-informed deliberations" had taken place; so too Hoffman claims that prior litigation was "theoretical" and "without evidence regarding real-world application." Wrong. In contrast to the Louisiana court, the federal courts in Alabama not only took expert and scientific evidence; they also heard *live testimony from eyewitnesses*. Their conclusion: Nitrogen hypoxia is rapid, painless, and constitutional. The district court below agreed with the first two attributes, which strongly imply the third. The Fifth Circuit correctly vacated the preliminary injunction.

Because all agree that nitrogen hypoxia is a painless method of execution, the plaintiff is not just unlikely to succeed in showing that the firing squad is substantially more humane—he has an "impossible task" under existing precedent. Pet.App.7. An injunction in such circumstances would be an unwarranted intrusion on sovereignty, essentially requiring States to preclear their criminal justice protocols with federal courts. As the Court did last year in *Smith v. Hamm*, No. 23-6562 (23A688), and *Grayson v. Hamm*, No. 24-5993 (24A498), it should deny the application for stay of execution and the petition for writ of certiorari.

BACKGROUND

Inhaling pure inert gas painlessly renders a person unconscious in seconds. For years, prisoners challenging lethal injection—and the jurists who endorsed their claims—touted this as the decisive virtue of nitrogen hypoxia:

> [N]itrogen hypoxia would be simple and painless. These reports summarized the scientific literature as indicating that there is no reported physical discomfort associated with inhaling pure nitrogen, that the onset of hypoxia is typically so subtle that it is unnoticeable to the subject, and that nitrogen hypoxia would take an estimated seventeen-to-twenty seconds to render a subject unconscious.

Bucklew v. Precythe, 587 U.S. 119, 164 (2019) (Breyer, J., dissenting) (cleaned up; citations omitted). By taking those pleadings seriously, Alabama and Louisiana did not act "so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). Quite the opposite. The States sought a method of execution "less painful and more humane" than even those "uniformly regarded as constitutional for centuries." *Barr v. Lee*, 591 U.S. 979, 980 (2020). They adopted a method that plaintiffs averred would avoid the "flood" of litigation that had "severely constrained" the execution of society's most depraved murderers. *Bucklew*, 587 U.S. at 124; *accord* Pet.32.

"Now, and unsurprisingly" to some, *Smith v. Hamm*, 2:23-cv-656, 2024 WL 116303, at *1 (M.D. Ala. Jan. 10, 2024), "they'[ve] th[ought] of something else," Oral. Arg. Tr. 39, *Bucklew*, No. 17-8151 (Breyer, J.). But because all agree that "nitrogen hypoxia does not cause pain," DE89:16, there is nothing else. The prisoners are left to urge that a "substantial risk of severe pain" is not required, *Baze v. Rees*, 553 U.S. 35, 52 (2008). A *painless* method can superadd so much

"terror" or "disgrace" that it can only be the product of cruelty. *Wilkerson v. Utah*, 99 U.S. 130, 135 (1879). In theory, maybe so, and the Fifth Circuit realized that possibility. Pet.App.7a. But there's never been such a method in American history, none of the English barbarisms described in *Wilkerson* were painless, and under the "standard [that] governs 'all … method[] claims'" today, the superadded terror would have to be at least comparable to "severe pain," *Bucklew*, 587 U.S. at 134.

More importantly, the first question presented is wholly theoretical because nitrogen hypoxia is tried and tested, and it does not superadd "terror and mental anguish." Pet.i. Well before Alabama came to the method, inert-gas asphyxiation had been advocated as a means of peaceful suicide for decades. "Why, one might ask, if the use of [nitrogen gas] is undesirable, would those … interested in practices designed to bring about a humane death, recommend [it]?" *Cf. Baze*, 553 U.S. at 112 (Breyer, J., concurring); *contra* DE89:17 n.106 (dismissing suicide literature).[1] The first expert to testify in the Alabama cases, a right-to-die advocate, had assisted dozens of nitrogen suicides and never once saw any sign of pain or discomfort. Similarly, there are many OSHA-reported cases of workers wearing respirator masks who inhale the wrong gas, pass out, and die without realizing anything is wrong—let alone suffering agony and terror. Hoffman and the district court have no explanation for any of this. *See* Pet. (no mention of suicides or workplace accidents).

Accordingly, the federal courts have resoundingly dismissed claims about anxiety, distress, terror, and the like. This case is nothing new or "unique," Pet.31.

[1] "DE" citations refer to docket entries in the district court proceedings below.

Kenneth Smith, the first prisoner to be executed by nitrogen hypoxia, alleged that he had PTSD, that he would experience "intense psychological distress," and that nitrogen hypoxia would produce a "sensation of suffocation." 2d Am. Compl. ¶¶15, 78-79, 95, *Smith v. Hamm*, 2:23-cv-656 (M.D. Ala. filed Nov. 28, 2023), DE31. The evidence, including the testimony of his own expert, did not bear out his allegations. After an evidentiary hearing, Smith's stay motion was denied, 2024 WL 116303, the Eleventh Circuit affirmed, 2024 WL 266027, and this Court denied certiorari, 144 S. Ct. 414.

Alan Miller, relying on the same expert as the plaintiff here, also alleged that he had anxiety and would feel a "sensation of suffocation." Compl. ¶116, *Miller v. Marshall*, 2:24-cv-197, (M.D. Ala. filed Mar. 29, 2024), DE1. His claim centered on the allegation that "it took much longer than expected for Mr. Smith to reach unconsciousness and death." *Id.* ¶117. But as Alabama proved with eyewitness testimony about Smith's oxygen levels, he was holding his breath. What the Louisiana district court deemed "the most probative evidence"—what she called "violent writhing," DE89:13—occurred *before* Smith had inhaled any nitrogen. If Smith's movements reflected terror, as Hoffman's and Miller's expert surmised, that feeling had nothing to do with nitrogen hypoxia. After taking extensive and unprecedented discovery about the Smith execution, Miller settled his case.

Carey Grayson then sued, also alleging "panic and the sensation of the inability to breathe." Am. Compl. ¶45, *Grayson v. Hamm*, 2:24-cv-376 (M.D. Ala. filed Aug. 30, 2024), DE42. Grayson's expert, who also opined in this case, raised

the specter of "emotional duress" and "psychological pain" but offered "no study or similar support." 2024 WL 4701875, at *20 (M.D. Ala. Nov. 6, 2024). And the court emphatically rejected those allegations because "anxiety and panic[] … [can] be expected regardless of the method of execution. It is not just an issue with nitrogen hypoxia," but "a likely result of being sentenced to death and anticipating the execution." *Id.* During the *Grayson* litigation, Miller was executed, and "for as much as Smith's execution was painted in the violent manner that it was, Miller's execution was not." *Id.* After a two-day evidentiary hearing, the court concluded that the method had "been successfully used twice." *Id.* at 22. Grayson's motion was denied, *id.*, the Eleventh Circuit affirmed, 121 F.4th 894, and this Court denied certiorari, 145 S. Ct. 586.

Demetrius Frazier came to court with largely the same theory of emotional distress. Compl. ¶43, *Frazier v. Hamm*, 2:24-cv-732 (M.D. Ala. filed Nov. 15, 2024), DE1 ("panic and the sensation of the inability to breathe"). But even if those allegations stated a claim, Frazier failed "to establish that the Protocol *does* create a substantial risk of serious psychological pain." 2025 WL 361172, at *10 (M.D. Ala. Jan. 31, 2025). The court appreciated that "inhaling nitrogen materially differs from … suffocation" because the inmate can breathe normally, exhaling carbon dioxide and avoiding the discomfort of hypercapnia. *Id.*; *see also id.* at 11 n.20 (citing Dr. Philip Nitschke); *contra* DE89:17 n.107. After a thorough review, the court concluded that "Smith's, Miller's, and Grayson's movements … do[] not support a finding that any of them experienced severe psychological pain or distress

over and above what is inherent in any execution." 2025 WL 361172, at *12; *contra* Pet.17, 29. Because nitrogen hypoxia does not superadd pain, the court denied relief. Rarely seen in eleventh-hour capital cases: Frazier did not appeal.

Hoffman now brings the same kind of claim that has failed four times. The purported distinction that the Alabama prisoners "affirmatively chose" nitrogen hypoxia (Pet.5) is not material; they each challenged the method. Hoffman also says that before now, the courts "consider[ed] largely theoretical arguments, without evidence regarding real-world application of the method." Pet.34. Absurd. Beyond merely reading hearsay in the news, the *Grayson* and *Frazier* courts heard live testimony from *six eyewitness* to nitrogen executions—the kind of evidence Hoffman argues is "require[d]" to assess pain (Pet.24) yet is *absent* from the record here. Comparatively, *Hoffman's case* is the one built on theory, not "real-world" evidence.

SUMMARY OF ARGUMENT

Hoffman is unlikely to prove that nitrogen hypoxia—a *painless* way to die—is "inhumane and barbarous," akin to "torture," because it allegedly risks some emotional distress in the seconds before unconsciousness. DE89:11. The condemned is not entitled to a "peaceful[] … state of relaxation" when he faces the ultimate punishment, even if the State could provide it. DE4-1:26; *see also* Pet.14. In fact, some perfectly constitutional methods "involve[] a significant risk of pain." DE89:11. Against the backdrop of those "established methods," Hoffman brought "no such evidence of superadded terror," and his "theory would render capital punishment

itself unconstitutional—because surely *every* method of execution necessarily involves some measure of psychological terror." Pet.App.7a-8a.

So how did the district court rule for Hoffman? Mainly by misapplying *Bucklew*. To distinguish permissible from impermissible pains, the court must conduct a "comparative exercise." *Bucklew*, 587 U.S. at 136. It cannot analyze a State's method "in a vacuum." *Id.* But the district court here did something worse by constructing its own near-vacuum, isolating the prisoner's preferred comparator (time to unconsciousness) and ignoring the rest.

The district court's entire analysis was three sentences, observing that bullets to the heart would produce unconsciousness in "4 seconds" while nitrogen hypoxia may take "30 to 40 seconds" to render the inmate unconscious. DE89:20. But that can't be the end of it, or only the fastest method would be constitutional. Dying can be quick but excruciating; it can be prolonged but peaceful. The district court erred by utterly failing to compare the risks of *physical* pain, focusing only on the condemned's mental state. And it erred again by failing to compare *all* the risks of emotional distress, focusing only on the time it takes gas or bullets to produce unconsciousness. It erred finally by dismissing the State's penological objections to death by firing squad on the ground that *other States* have authorized it.

Any one of these errors is enough to affirm denial of Hoffman's eleventh-hour request because he did not prove a substantial likelihood that his claim would satisfy the Eighth Amendment's "exceedingly high bar." *Lee*, 591 U.S. at 980. He seeks to relitigate the Alabama cases, which this Court declined to review. The

district court did not rest its order on some new theory or new evidence unknown to the Alabama courts; rather, it just ignored the evidence, the Alabama decisions, and the law. In the end, it appears the court was "convinced" by its own "common sense," DE89:17, but "[t]he job of a federal district court is to apply the law to the facts presented by the parties," Pet.App.8a. Because the district court "overstep[ped] [its] bounds," it was "incumbent" and entirely proper for the Fifth Circuit "to right the ship" and vacate the preliminary injunction. *Id.*

ARGUMENT

I. Nitrogen Hypoxia is a Painless Method of Execution.

A. The experts agree and the courts have found that nitrogen hypoxia is painless.

Since Alabama moved to execute Kenneth Smith in 2023, every expert to testify on the question has agreed that execution by nitrogen hypoxia is painless. Smith's primary expert, Dr. Philip Nitschke, quibbled only with Alabama's implementation, and he perplexingly advocated a loose bag or hood on the ground that a full-face mask with an adjustable five-point harness might produce an inadequate seal. *Smith v. Hamm*, 2024 WL 116303, at *5, *18 (M.D. Ala. Jan. 10, 2024); *cf. id.* at *4 n.3. Carey Grayson hired Dr. Brian McAlary, who also testified as a fact witness in *Frazier* and was involved in this case until Hoffman abandoned him. Dr. McAlary agreed that the method causes "no[] physical pain" and proposed only a sedative to avoid feelings of panic or anxiety. *Grayson v. Hamm*, 2:24-cv-376, 2024 WL 4701875, at *5 (M.D. Ala. Nov. 6, 2024). In both *Smith* and *Grayson*, the district courts relied on these opinions, and the Eleventh Circuit found no clear

error in the resulting findings of fact. By the time Demetrius Frazier sued Alabama, the method's bona fides had been so firmly proven that he did not bother alleging a physical pain. *Frazier v. Hamm*, 2:24-cv-732, 2025 WL 361172, at *9 (M.D. Ala. Jan. 31, 2025).

In this case, Hoffman's expert Dr. Philip Bickler and Louisiana's expert Dr. Joseph Antognini "agree[d] that nitrogen hypoxia does not produce physical pain." DE89:16. The district court made the same finding of fact, and the Fifth Circuit's review of the record resulted in this emphatic endorsement of the method:

> Breathing 100% pure nitrogen causes unconsciousness in less than a minute, with death following rapidly within ten to fifteen minutes. And it does not produce physical pain. Nitrogen hypoxia has been used successfully four times by the State of Alabama.

Pet.App.3a. There is no basis in this record—or in any of the Alabama litigation—for anyone to conclude otherwise. The matter is settled.

Despite the unambiguous expert testimony, challengers have played fast and loose with their verbiage. Hoffman, for instance, argued to the Fifth Circuit that "the extreme terror [he] is very likely to suffer will cause *physical agony* for minutes." CA5.Sur-Reply.5 (emphasis added). But there's no evidence of that in the record or the district court's findings. Dr. Bickler offered no hypoxia experiments resulting in "physical agony"; his studies couldn't pass an institutional review board if they did. Not only is there no such evidence in the record; Hoffman points to no reported case of terror-induced physical agony suffered by *any* inmate in *any* execution using *any* method authorized by the Constitution. That's precisely

because the Founders proscribed those torturous practices designed to cause gruesome physical pain and terror. *Cf. Bucklew*, 587 U.S. at 130.

B. Because it is painless, nitrogen hypoxia is highly unlikely to be unconstitutionally cruel.

Hoffman is left to argue that nitrogen hypoxia may be cruel despite being painless. This Court has already rejected a stay application and certiorari petition raising similar questions. *See* Pet. for Writ of Certiorari at i, *Grayson v. Hamm*, No. 24-5993 (Nov. 19, 2024) ("The questions presented are: 1. Does the Eighth Amendment's prohibition on cruel and unusual punishment bar a method of execution that includes conscious suffocation? 2. Does the Eighth Amendment prohibit a method of execution that involves superadded terror?"). Such questions are academic on this posture, however, because it is highly unlikely that nitrogen hypoxia—a painless method of execution—is so terrifying that it violates the Eighth Amendment. Hoffman has no likelihood of success on the merits.

For starters, a court must determine whether the alleged emotional distress is severe. This Court needs no reminder than an inmate is not promised a painless execution. *Bucklew*, 587 U.S. at 132. If this Court compares Hoffman's alleged risks to those posed by other lawful methods, *see In re Ohio Exec. Protocol Litig.*, 946 F.3d 287, 290 (6th Cir. 2019),[2] it will find that some pain is not only possible but *probable* with those methods, *see, e.g.*, *Baze*, 553 U.S. at 53; *Bucklew*, 587 U.S. at 132;

[2] *See also Baze*, 553 U.S. at 105 (Thomas, J., concurring in judgment) ("To the extent that there is any comparative element to the inquiry, it should be limited to whether the challenged method inherently inflicts significantly more pain than traditional modes of execution such as hanging and the firing squad.") (citing *Gray v. Lucas,* 463 U.S. 1237, 1239-1240 (1983) (Burger, C.J., concurring in denial of certiorari) and *Hernandez v. State,* 43 Ariz. 424, 441 (1934)).

Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947). These pains have not rendered those traditional modes of execution unconstitutional. *Cf. Bucklew*, 587 U.S. at 132-33 (citing STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 170 (2002)); *Bucklew*, 587 U.S. at 154, 157-58 (Breyer, J., dissenting); *In re Kemmler*, 136 U.S. 436, 446 (1890); *Wilkerson*, 99 U.S. at 134-36.

Comparing Hoffman's alleged risks to those posed by *unlawful* methods—*i.e.*, those "inhuman and barbarous" and "horrid modes of torture" known to English history—it is clear that nitrogen hypoxia does not belong in the category. *Bucklew*, 587 U.S. at 130-31, 134. Whatever "[d]ifficulty would attend the effort to define with exactness" the line between pains permitted and proscribed, *Wilkerson*, 99 U.S. at 136, this case is not close to the line. History and tradition should have special purchase here, where Hoffman (like prisoners in Alabama) has relied heavily on *Wilkerson*'s description of English cruelty—those punishments where "circumstances of terror, pain, or disgrace were sometimes superadded." *Id.* at 135. Importantly, the "terror" involved in those sentences was accompanied by severe physical pain. Also worth noting, the Court meant the "terror" superadded "to terrorize the criminal, and thereby more effectively deter the crime," *Baze*, 553 U.S. at 96 (Thomas, J., concurring in judgment); *id.* at 97 (citing BANNER, *supra* at 70), as evidenced by the fact that the cruel "parts of those judgments … were seldom strictly carried into effect" and often "remitted," *Wilkerson*, 99 U.S. at 135.

Thus, the Court did not have in mind an inmate's alleged minute of emotional distress when it used the word "terror" in *Wilkerson*. Hoffman cannot

prove a *kind* or *degree* of "terror" that would violate the Eighth Amendment, and that is why the Fifth Circuit vacated the injunction, *see* Pet.App.7a-8a—not because it thought *any amount* of psychological terror can be superadded to a death sentence. *Contra* Pet.3. There is no circuit split, *contra* Pet.21-23, because every court agrees that the possibility of mental distress "associated with being under a sentence of death is not material." *In re Ohio Exec. Litig. Protocol*, 881 F.3d 447, 450 (6th Cir. 2018). Every expert to opine on Hoffman's likely mental state relied on "*that experience*"—the experience of being executed—which cannot violate the Eighth Amendment, *id.* (emphasis added), without rendering "*every* method" unconstitutional, Pet.App.8a.

To overcome clear precedent, the district court relied on its "common sense" about the "primal urge to breathe." DE89:17. The "inability to quiet" that urge, it said, "*is* severe emotional suffering." DE89:16 (emphasis added). But the court's other findings contradict its key premise: "[S]ubstituting nitrogen for atmospheric air *does not substantially burden Hoffman's ability to breathe*." DE89:6-7 (emphasis added). And that's exactly right: The mask permits unobstructed inhalation and exhalation of gases; the inmate breathes normally. He can even take "deep breaths" (1 Tr. 33) "rhythmically" as part of a Buddhist "ritual … to achieve a meditative state." DE89:7. "Nothing in the evidence" suggests otherwise. *Id.* Thus, there can be no severe pain and no constitutional problem owing to the "urge to breathe," *contra* DE89:16-17 & n.107. (In contrast, being struck in the chest with multiple high-

caliber bullets is clearly not conducive to a "calm state," "meditation" or "meditative breathing at the time of death," Pet.8, 14, 28. *See infra* §III.A.)

Hoffman's expert and the district court also relied on the hearsay accounts of journalists describing bodily movements during nitrogen-hypoxia executions. The district court was willing to accept that an inmate's "violent writhing" (the court's words) does not connote any pain, DE89:13, yet she took it to be decisive evidence of psychological terror. As described *supra*, these exaggerated accounts have not been credited by the Alabama courts. For good reason: the journalists could not attest to "conscious terror for several minutes," DE89:13, as they had no idea when the nitrogen began to flow or when the inmates lost consciousness. They also had no way to attribute the movements to "terror" as opposed to combativeness, performance, or involuntary spasms and agonal breathing that followed the loss of consciousness. *See Baze*, 553 U.S. at 57 (noting that "convulsions or seizures [can] be misperceived as signs of consciousness or distress"). Dr. Bickler admitted as much—before he started testifying for plaintiffs. *Evidence Against Nitrogen's Use for the Death Penalty*, AMA ED HUB (May 29, 2024), edhub.ama-assn.org/jn-learning/audio-player/18883262 ("We don't know anything about [Smith's] level of consciousness during this period of time."). And even on their own terms, the media accounts were "conflicting and inconsistent … and in some respects wrong." *Grayson,* 2024 WL 4701875, at *20. Thus, the *Grayson* court found their colorful reporting to have "highly questionable value." *Id.* at *22; *accord Grayson v. Comm'r*, 121 F.4th 894, 899 (11th Cir. 2024) (no clear error in discounting media reports).

Alabama rebutted those misleading narratives with ample eyewitness testimony of its own, *Grayson*, 2024 WL 4701875, at *4, and "what that evidence did show was that the nitrogen hypoxia protocol was successful and resulted in death in less than 10 minutes and loss of consciousness in even less time," *id.* at *20.[3]

In any event, this Court need not flip through the pages of the *Montgomery Advertiser* to know that the record here cannot support the legal conclusion that "barbarous" "torture" (DE89:11) is "sure or very likely" to occur. *Baze*, 553 U.S. at 50. When asked about OSHA reports of nitrogen deaths that happen "quickly, without warning," Dr. Bickler agreed, "That may happen in some instances." 2 Tr. 275. When asked about inert-gas asphyxiation as a means of suicide, Dr. Bickler agreed that it may be a wholly "gentle" way to die. *Id.* at 298. Though Dr. Bickler was not "aware of a single anecdote" of self-rescue, *id.* at 276; *see also id.* at 406, he still thought the gas could "produce a very strong reaction," *id.* at 275. But even assuming the possibility, Dr. Bickler never explained why Hoffman is sure to suffer "intense terror" (DE89:17) or "drowning" (DE82:16) or a sense of suffocation (DE89:18), while many people die from inert-gas inhalation without feeling a thing. As Dr. Antognini explained, there is a world of difference between prolonged exposure to low oxygen levels and a sudden drop to near-zero oxygen, which produces unconsciousness in seconds. *See, e.g.*, 2 Tr. 364 (at most, nitrogen hypoxia risks seconds of "shortness of breath" that is not "even close to the amount … that

[3] As U.S. Attorney General Bill Smith once said, "Everything you read in the newspapers is absolutely true except for the rare story of which you happen to have firsthand knowledge." *Required Reading: Smith on Lawyers*, N.Y. TIMES (Feb. 27, 1982), www.nytimes.com/1982/02/27/us/required-reading-smith-on-lawyers.html.

people have from exercise" "on a treadmill"); *accord, e.g.*, *Frazier*, 2025 WL 361172 at *9 n.18 (no "symptoms akin to the breathlessness associated with smothering"); *id.* at *11 (crediting testimony that "Frazier will not experience the same 'pain and suffering as might occur with … smothering [or] choking' because the Protocol does not prevent [him] from taking normal breaths and exhaling carbon dioxide"').

To the extent the district court relied on the possibility that "an unwilling inmate holds his breath" "for 3 to 5 minutes," DE89:18, that's irrelevant on this record. Hoffman *wants* to breathe, he *plans* to breathe, and he *can* breathe throughout his execution. The attorney argument that "[w]hat[] [he] expects to do can change" is too little, too late. CA5.Resp.Br. 31. Second, the possibility of breath-holding for "3 to 5 minutes" is contradicted, on this record, by Dr. Bickler's expert opinion that most people can hold their breath for only 45 seconds. 2 Tr. 286. And finally, even if an inmate could hurt himself by holding his breath for longer, that off-chance is not the kind of "sure or likely" risk of severe pain that makes for a cognizable Eighth Amendment violation.

II. Emotional Distress is Not Unique to Nitrogen Hypoxia.

A. The district court ignored the emotional distress "inherent in any execution," so there was no basis to find superadded pain.

The district court ignored that emotional distress is an inherent risk with *any* method of execution. It should have accounted for that obvious fact, which may have played a large role in Dr. Bickler's feeling that nitrogen hypoxia somehow works differently in executions. *See, e.g.*, 2 Tr. 235-36 (Dr. Bickler) ("[W]hen faced with being strapped to a bed, having a mask strapped to the face, and the inevitability of

coming death … terror [takes] over."). Hoffman even presented an expert on emotional distress, who testified that the inmate could be expected to fear death. 1 Tr. 71 (Dr. Sautter) ("[I]f anybody in this room started having the fear of death, you would find you would start to lose your breath a little bit"—a "sort of psychological distress"); *id.* ("[T]hat's a natural response to high levels of fear and having your life threatened."); *id.* at 69-70 ("[C]ertainly if he thinks he is going to die, he is going to become susceptible to having … powerful negative emotions … like, you know, being terrified."). Indeed, an inmate's distress upon facing execution is unsurprising and perhaps inevitable for some. *Accord* JOHN LAURENCE, A HISTORY OF CAPITAL PUNISHMENT 68 (1960) ("The behaviour of those who suffer death by law is much the same the world over. Some enter the execution chamber with a calmness which is almost unbelievable, others in a state of collapse[.]").

Hoffman is unlikely to prove that Louisiana superadded severe pain to his sentence because the only pain he alleged is indistinguishable from that which any inmate might feel in the execution chamber. The fear attendant one's imminent death may be "an inescapable consequence" of the punishment, which cannot count against any particular method. *Baze*, 553 U.S. at 50; *In re Ohio Exec. Protocol Litig.*, 881 F.3d at 450 ("Psychological pain or mental suffering is a likely result of being sentenced to death and anticipating the execution, but that experience of psychological suffering could not by itself make a method of execution unconstitutional"). Unlike the physical risks posed by other methods that might be reduced with further tinkering, *see, e.g.*, *Glossip v. Gross*, 576 U.S. 863, 949 (2015)

(Sotomayor, J., dissenting); *Baze*, 553 U.S. at 114 (Ginsburg, J., dissenting), no method of execution can eliminate an inmate's fear of death. For that reason, the Eighth Amendment is not concerned with "the necessary suffering involved in any method employed to extinguish life humanely," and even experiencing twice the "psychological strain of preparation for electrocution" does not violate the Constitution. *Resweber*, 329 U.S. at 464.

Because the district court made no finding about a prisoner's baseline emotional state during execution generally, it could not reach any conclusion about how much distress is allegedly superadded by nitrogen hypoxia specifically. If the inmate is already "certain[]" (1 Tr. 69) to experience terror, the answer may be none—no pain is superadded. So the Fifth Circuit rightly observed, CA5.6-7 ("[The] theory would render capital punishment itself unconstitutional—because surely *every* method of execution necessarily involves some measure of psychological terror."), as did the Middle District of Alabama twice, *Frazier*, 2025 WL 361172, at *10 ("Frazier may experience psychological pain 'either by accident or as an *inescapable* consequence of death.' … This psychological pain likely grows as execution day draws near."); *id.* at *11-12 (no pain "over and above what is inherent in any execution"); *Grayson*, 2024 WL 4701875, at *20 ("Dr. McAlary conceded that the protocol only inflicts psychological pain, a type of pain that would exist regardless of the method of execution" and "is to be expected." (citing *In re Ohio Exec. Protocol Litig.*, 881 F.3d at 450)). Without such findings, the district court

here could not conclude that Hoffman made a clear showing of superadded pain, and the Fifth Circuit properly vacated the preliminary injunction.

B. The district court failed to compare the alleged emotional distress with that of an inmate facing a firing squad.

Even if the alleged emotional distress could rise to the level of an Eighth Amendment violation, the district court did not properly compare the risk of emotional distress during nitrogen hypoxia to that of an execution by firing squad. All it did was measure "the time between nitrogen onset and unconsciousness," DE89:16; *id.* at 21 ("30 to 40 seconds"), against the time to the time it takes for bullets to "tear the heart to pieces," DE89:21 ("3 to 4 seconds").

But the time to unconsciousness *after* shots are fired is obviously not the only time when an inmate might be distressed. By limiting the inquiry, the district court arbitrarily excluded the likelihood, severity, and duration of "psychological terror" *before* shots are fired. Perhaps having a bullseye fixed to one's chest and a hood placed over one's head produces great and certain "terror" for longer than a minute. Perhaps waiting in silence for an undefined period before a "violent" and "sudden" shooting does that. DE89:21 n.131. Or perhaps just knowing that the method involves "unleashing tremendous destructive energy upon the heart" "equivalent" to the force of "a 3-quarter-ton fully loaded truck," DE89:20-21, is enough to cause the kind of emotional distress the district court deemed cognizable. For Hoffman, who alleges he has PTSD and has been twice robbed at gunpoint, facing a firing squad could be "one of maybe a hundred different kinds of stimuli" that trigger "powerful negative emotions." 1 Tr. 70, 83 (Dr. Sautter). We do not know because Hoffman did

not bring any evidence. *Cf.* DE81:54; 1 Tr. 128 (Hoffman's expert Dr. James Williams conceding, "I offered no psychological evidence").

Thus, the district court erred when it counted only the distress an inmate might feel for "3 to 4 seconds" between the bullets penetrating his heart and unconsciousness. DE89:21. If the firing squad produces more mental pain overall, including the time before the shots, then it is not an alternative that "in fact significantly reduce[s]" the alleged risk. *Glossip*, 576 U.S. at 877; *see also Bucklew*, 587 U.S. at 143 (requiring not a "minor reduction in risk" but a "clear and considerable" one). The district court needed to find "documented advantages" favoring Hoffman's alternative, *Baze*, 553 U.S. at 52, but it rested after noting only one documented difference—time to unconsciousness—which is not the Eighth Amendment inquiry.

Indeed, unconsciousness during the dying process is not even required for constitutionality; not all lawful methods are designed to produce unconsciousness prior to the time of death. Some lethal-injection methods do, but some do not. With a one-drug protocol, for instance, the conscious inmate may well know that he is receiving a lethal dose when he is receiving it; he may know that he is dying for quite some time. Even with methods that use a sedative, the inmate may experience fear, knowing that he is about to die, before and "during the process of death," Pet.31. Either way, these methods do not violate the Constitution; the Court has not

demanded that States try to minimize the length of consciousness before death. Nitrogen hypoxia should not be held to a different standard.[4]

III. Death By Firing Squad Is Not Clearly Better.

A. The district court did not weigh the physical pain of being shot to death against the alleged emotional distress.

The district court did not come close to completing the "comparative exercise." *Bucklew*, 587 U.S. at 136. Even if it had compared *all* the distress allegedly caused by both methods, it should have then weighed the *physical* suffering of death by firing squad. Without a comparison between the alleged emotional distress and the physical pain of being shot to death, there was no basis to conclude that Hoffman had made a clear showing that his claim would succeed.

Hoffman defended the district court's focus on time to unconsciousness, asserting below that it is the analysis "contemplated by *Bucklew*." CA5.Br. 43. Not so. (And even Mr. Bucklew recognized that time to unconsciousness is not dispositive. *See, e.g.*, Oral Arg. Tr. 29 ("[T]he issue is not that there would be a shorter twilight period.")) The ultimate issue is whether the method of execution superadds so much suffering that state officials cannot claim they were "subjectively blameless." *Glossip*, 576 U.S. at 877. Yet it seems that under the district court's myopic unconsciousness metric, any method that causes death or unconsciousness in under 30-to-40 seconds must be favored over nitrogen hypoxia.

[4] This brief does not address the equities except to note that the sole argument for irreparable harm is psychological harm. As such, Hoffman's delay, prolonging possibly "agonizing … uncertainty" about his execution, should weigh heavily against him. *Cf. Lackey v. Texas*, 514 U.S. 1045, 1421 n.* (1995) (Stevens, J., respecting denial of certiorari).

Even if the alternative is one of those historical, "atrocious" methods; even if it was "designed" to inflict pain or terror. *Bucklew*, 587 U.S. at 127, 131. That cannot be right. When a State selects a method that causes no physical pain and, as a whole, less suffering, the method does not "suggest cruelty." *Baze*, 553 U.S. at 50. It instead reflects the decades-long trend of States "developing new methods … thought to be less painful and more humane." *Lee*, 591 U.S. at 980. The district court's approach thus finds no home in the Eighth Amendment.

If the district court had fully compared the methods, it would have noted that a firing squad would leave the prisoner alive for at least three to four seconds while his bones and organs have been shot to pieces. Even with perfect accuracy, these seconds would be painful—as experts on both sides testified, DE81:21-22; 2 Tr. 369-71. Only the State's expert specifically compared the two methods, and he concluded that a shooting death would be "more" painful. DE81:53. (Relatedly, it does not take an expert to see that the Hoffman's alternative, striking "the torso" with the "destructive power" of a "truck," DE89:20-21, does not permit "unfettered breath at the time of … death," Pet.3.)

Perhaps the firing squad is a "relatively painless" method, *Glossip*, 576 U.S. at 977 (Sotomayor, J., dissenting), but in comparison to nitrogen hypoxia, it sure seems like splitting hairs. Permitting the case to proceed based on even a "slightly or marginally safer alternative," which Hoffman has not shown, "would threaten to transform courts into boards of inquiry charged with determining 'best practices' for executions." *Baze*, 553 U.S. at 51.

It's also a recipe for endless litigation. Assume Louisiana were to adopt a firing-squad method of execution. Under the district court's "backwards" logic, Pet.App.2a, if the inmate's concern is *physical* pain, he may well succeed in a challenge to that method with nitrogen hypoxia as his alternative. It would not matter that the district court reached the exact opposite conclusion here because physical pain, on Hoffman's theory, is an entirely different "metric by which to gauge the cruelty." CA5.Br.43. But the Eighth Amendment does not mandate "best practices" or the inmate's preferred method. *Bucklew*, 587 U.S. at 134. *Contra* Pet.5-6. The district court should have considered the complete picture—whether a firing squad, on the whole, significantly reduces the risk of severe harm. Failure to do so was error, and the Fifth Circuit properly corrected course.

B. The district court erred when it held that one State's use of a method trumps another State's penological reasons to reject it.

The district court erred once more when it discarded Louisiana's legitimate penological reasons for refusing to adopt firing squad as its method. Louisiana's reasons include reducing physical pain, preserving dignity, limiting the emotional costs of its employees, and avoiding other logistical complications. *Cf. Bucklew*, 587 U.S. at 165 (Breyer, J., dissenting) (citing penological virtues of nitrogen hypoxia as a method of execution); *Frazier*, 2025 WL 361172, at *13-14 (describing some of Alabama's "legitimate penological reason[s]"). The district court set those weighty considerations aside because other States have adopted the firing squad and Louisiana has the resources to do it. DE89:21-22. That was error.

A method's "track record of successful use" and the availability of resources are important considerations, but far from dispositive of whether "the State has refused to adopt [an alternative] without a legitimate penological reason." *Bucklew*, 587 U.S. at 134, 142. That one State uses a method does not diminish another State's "legitimate reasons" for rejecting it if, for instance, it calls for medical professionals participating or results in a less dignified death. *Id.* at 134-35. States might have different resources or priorities, and the Eighth Amendment's "deference" allows States to strike a different balance between competing interests. *Id.* at 134. Precisely because States might have legitimate reasons to disagree, this Court has explained that nothing in "*Baze* and *Glossip* suggest[s] that traditionally accepted methods of execution—such as hanging, the firing squad, electrocution, and lethal injection—are necessarily rendered unconstitutional as soon as an arguably more humane method like lethal injection becomes available." *Id.* The district court's holding that there is no legitimate reason not to adopt another State's available and "well-established protocol" cannot be squared with that understanding of *Baze* and *Glossip*. DE89:22.

CONCLUSION

Nitrogen hypoxia is a swift and humane way to die. There is no substantial risk of severe pain; there is no risk of any pain that an alternative would significantly reduce. Because the district court made multiple errors in its application of contemporary Eighth Amendment jurisprudence, the Fifth Circuit rightly reversed. Hoffman has no likelihood of success on the merits, and Louisiana

should be permitted to carry out his sentence by nitrogen hypoxia. The Court should deny the stay application and the petition for writ of certiorari.

Respectfully submitted,

Steve Marshall
Alabama Attorney General
s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Solicitor General
Counsel of Record
Robert M. Overing
Deputy Solicitor General
Dylan Mauldin
Assistant Solicitor General
STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@AlabamaAG.gov

MARCH 17, 2025