NO. _____

In the
Supreme Court of the United States

JOHN Q. HAMM,
COMMISSIONER, ALABAMA DEPARTMENT
OF CORRECTIONS,
Petitioner,

v.

KENNETH EUGENE SMITH,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

STEVE MARSHALL
Attorney General

STATE OF ALABAMA
Office of the Attorney General
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@
AlabamaAG.gov

EDMUND G. LACOUR JR.
Solicitor General
Counsel of Record

THOMAS A. WILSON
Deputy Solicitor General

RICHARD ANDERSON
Assistant Attorney General

CAPITAL CASE
QUESTION PRESENTED

This Court has repeatedly held that one of "the substantive elements of an Eighth Amendment method-of-execution claim" is the requirement that "a prisoner … plead and prove a known and available alternative" method of execution. *Glossip v. Gross*, 576 U.S. 863, 880 (2015). To satisfy this element, "an inmate must show that his proposed alternative method is not just theoretically 'feasible' but also 'readily implemented.'" *Bucklew v. Precythe*, 139 S. Ct. 1112, 1129 (2019). He must "provid[e] the State with a veritable blueprint for carrying the death sentence out." *Nance v. Ward*, 142 S. Ct. 2214, 2223 (2022).

In the Eleventh Circuit, however, inmates need "not come forward with sufficient detail about how the State could implement" an alternative method if they can just "point[] to the executing state's official adoption of that method of execution" instead. *Price v. Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1328 (11th Cir. 2019). That is all Kenneth Smith has done here. He alleges that nitrogen hypoxia is a feasible and a readily implemented alternative method because it is statutorily approved while also alleging that how the method will be carried out is unknown. The Eleventh Circuit held that even if "no mechanism to implement the procedure has been finalized," it is "available" because it has been adopted by Alabama. App.14.

The question presented is:

In an Eighth Amendment method-of-execution case, is an alternative method of execution feasible and readily implemented merely because the executing State has statutorily authorized the method?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner (Defendant-Appellee below) is the Commissioner of the Alabama Department of Corrections (ADOC). Respondent (Plaintiff-Appellant below) is Kenneth Eugene Smith. No party is a corporation.

LIST OF ALL RELATED PROCEEDINGS

Supreme Court of the United States, No. 22A441, *Hamm v. Smith*, judgment entered Nov. 17, 2022.

United States Court of Appeals for the Eleventh Circuit, No. 22-13846, *Smith v. Commissioner, Alabama Department of Corrections*, judgment entered Nov. 17, 2022 (issuing stay).

United States District Court for the Middle District of Alabama, No. 2:22-cv-00497-RAH, *Smith v. Commissioner, Alabama Department of Corrections*, judgment entered Nov. 17, 2022 (denying stay).

United States Court of Appeals for the Eleventh Circuit, No. 22-13781, *Smith v. Commissioner, Alabama Department of Corrections*, judgment entered Nov. 17, 2022 (reversing merits determination).

United States District Court for the Middle District of Alabama, No. 2:22-cv-00497-RAH, *Smith v. Commissioner, Alabama Department of Corrections*, judgment entered Nov. 9, 2022 (denying motion to amend on the merits).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

United States Code

Code of Alabama

Other Authorities

DECISIONS BELOW

The district court's decision denying Smith's motion to amend his complaint under Rule 59(e) is available at 2022 WL 16842050 and is reprinted in the Appendix ("App.") at App.21.

The Eleventh Circuit's opinion reversing the judgment for Petitioner is available at 2022 WL 17069492 and is reprinted at App.1.

STATEMENT OF JURISDICTION

The Eleventh Circuit entered judgment reversing the district court on November 17, 2022. The jurisdiction of this Court is timely invoked under 28 U.S.C. §1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Section 15-18-82 of the Alabama Code provides, in pertinent part:

> (a) Where the sentence of death is pronounced against a convict, the sentence shall be executed … by lethal injection unless the convict elects execution by electrocution or nitrogen hypoxia as provided by law. If electrocution or nitrogen hypoxia are held unconstitutional, the method of execution shall be lethal injection. If lethal injection is held unconstitutional or otherwise

> becomes unavailable, the method of execution shall be by nitrogen hypoxia.

Section 15-18-82.1 of the Alabama Code provides, in pertinent part:

> (b) A person convicted and sentenced to death for a capital crime at any time shall have one opportunity to elect that his or her death sentence be executed by electrocution or nitrogen hypoxia.
>
> …
>
> (i) An election for a choice of a method of execution made by a convict shall at no time supersede the means of execution available to the Department of Corrections.

INTRODUCTION

Just a few weeks ago, this Court vacated the Eleventh Circuit's stay of Respondent Kenneth Smith's execution. *See Hamm v. Smith*, 22A441, 2022 WL 17039195 (U.S. Nov. 17, 2022). It was the second time in as many months that the Court was left to correct an eleventh-hour error from the Eleventh Circuit entered the day of a scheduled execution. *See also Hamm v. Miller*, 213 L. Ed. 2d 1157 (U.S. Sept. 22, 2022).

But preceding its latest stay order, the Eleventh Circuit issued an equally erroneous ruling on the merits. On November 17, only a few hours before it issued the stay, the court concluded that Smith had plausibly alleged that nitrogen hypoxia was a feasible, readily implemented alternative method of execution, App.14, despite all parties' agreement that Alabama has not finalized a protocol for execution by nitrogen hypoxia—and despite Smith's assertion that "[h]ow it will be done remains unknown," DE24-1:34.[1]

That decision obviously and inexplicably contravenes this Court's precedent and warrants summary reversal. "[A]n inmate must show that his proposed alternative method is not just theoretically 'feasible' but also 'readily implemented,'" *Bucklew v. Precythe*, 139 S. Ct. 1112, 1129 (2019) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)), which is why he must "provid[e] the State with a veritable blueprint for carrying the death sentence out" and "persuade[] a court

[1] "DE" refers to docket entries in the district court in this litigation, *Smith v. Hamm*, No. 2:22-cv-00497-RAH (M.D. Ala. 2022). "DE" pin cites correspond with CM/ECF pagination.

that the State could readily use his proposal to execute him," *Nance v. Ward*, 142 S. Ct. 2214, 2223 (2022). "In other words, he must make the case that the State really can put him to death, though in a different way than it plans." *Id.* at 2222-23. A method of execution that "remains unknown" (DE24-1:34) and lacks an established protocol (DE1:3, 14; DE24-1:21) is plainly not one that can be "readily implemented." *Bucklew*, 139 S. Ct. at 1129.

That precedent has been a dead letter in the Eleventh Circuit for three and a half years now. It all began just a week after this Court issued *Bucklew*, when inmate Christopher Price sought an emergency stay of execution in the Eleventh Circuit. *Price v. Commissioner*, 920 F.3d 1317 (11th Cir. 2019). Even though the court of appeals "agree[d] that Price did not come forward with sufficient detail about how the State could implement nitrogen hypoxia to satisfy *Bucklew*'s requirement," the court held that was not "Price's burden to bear" because Alabama had "by law previously adopted nitrogen hypoxia as an official method of execution." *Id.* at 1328. Henceforth, merely "pointing to the executing state's official adoption of [a] method of execution" would be enough to plead and prove that it is feasible and readily implemented. *Id.* No need to show that an alternative method is available as a matter of *fact*—showing that it has been adopted as a matter of *law* would suffice. Holding otherwise, the court reasoned, "would lead to an absurd result." *Id.*

Though three Justices from this Court subsequently noted the Eleventh Circuit's *Price* analysis was "suspect under [this Court's] precedent," *Price v.*

Dunn, 139 S. Ct. 1533, 1538 (2019) (Thomas, J., concurring in denial of certiorari), the court of appeals unflinchingly extended its approach here. Smith has repeatedly asserted that nitrogen hypoxia is "available" only "[a]s a matter of law." DE1:12; DE24-1:6, 19. And the Eleventh Circuit again declared that nitrogen hypoxia "could not be considered unavailable simply because no mechanism to implement the procedure had been finalized," App.13-14 (citing *Price*, 920 F.3d at 1328), as though finding a "mechanism to implement the procedure"—that is, finding available materials and developing a functional execution protocol—is just a sideshow to the main event. And so even though Smith, like "Price[,] did not come forward with sufficient detail about how the State could implement nitrogen hypoxia to satisfy *Bucklew*'s requirement," *Price*, 920 F.3d at 1328, the court held that Smith satisfied *Bucklew*'s requirement anyway. That reasoning "amounts to no more than a headlong attack on precedent." *Bucklew*, 139 S. Ct. at 1126.

The Eleventh Circuit has disregarded this Court's precedent for three and a half years—and death-row inmates have taken notice, repeatedly relying on *Price* to abrogate one of the essential elements of their method-of-execution claims. When given the chance to correct course, the Eleventh Circuit doubled down. This case is an even stronger candidate for summary reversal than habeas cases like *Dunn v. Reeves*, 141 S. Ct. 2405 (2021), for it does not reduce to a question of proper deference or discretion—the Eleventh Circuit has simply written this Court's holdings out of the Supreme Court Reporter.

The Court should grant certiorari and summarily reverse so that *Baze*, *Glossip*, *Bucklew*, and *Nance* will apply in every circuit.

STATEMENT

A. Smith's Crime

On March 18, 1988, Kenneth Smith and his accomplice, John Parker, murdered Elizabeth Dorlene Sennett in a sordid murder-for-hire plot. *Smith v. State*, 908 So. 2d 273, 279-81 (Ala. Crim. App. 2000). They were hired by Elizabeth's husband, Charles Sennett, who was "involved in an affair," had "incurred substantial debts," and "had taken out a large insurance policy on his wife." *Id.* at 279. Charles had agreed to "pay them each $1,000 in cash." *Id.*

Smith and Parker arrived at the Sennett house "around 9:30" the morning of the murder. *Id.* at 280. Smith "knocked on the door," and when Elizabeth answered he told her that Mr. Sennett had invited them "to look around the property to see about hunting on it." *Id.* She invited them in and sat down. Smith began to engage her in conversation. *Id.*

Then Parker "walked up behind Elizabeth and started hitting her"; he "went into a frenzy." *Id.* The pair ambushed Elizabeth, punching, beating, and bludgeoning her, and then stabbing her over and over with the "black handle survival knife" that Smith and Parker had brought with them. *Id.* In addition to the countless lacerations and abrasions that she sustained, Elizabeth suffered a total of ten stab wounds—eight to her chest and two to her neck—which proved fatal. *Id.* at 279.

And because "[t]he murder was supposed to look like a burglary that went bad," *id.*, Smith "messed up some things in the house to make it look like a burglary" and stole the Sennetts' VCR. *Id.* at 280. Then Smith and his accomplice drove away "to get [their] money." *Id.*

Smith's crime was neither impulsive nor spontaneous. It demonstrated planning and cold-blooded deception, including the active recruitment of others to participate in the murder. *Id.*; *see also Smith v. State*, 588 So. 2d 561, 565 (Ala. Crim. App. 1991). Smith was convicted of murder "done for a pecuniary or other valuable consideration or pursuant to a contract or for hire," Ala. Code §13A-5-40(a)(7), a capital offense.

B. Alabama Passes a Statute Permitting Prisoners to Elect Nitrogen Hypoxia as a Method of Execution

Fast-forward 30 years. On March 22, 2018, the governor signed Alabama Laws Act 2018-353, which statutorily approved nitrogen hypoxia as a method of execution in Alabama. Pursuant to Alabama Code §15-18-82.1(b)(2), as modified by the act, an inmate whose conviction was final before June 1, 2018, had thirty days from that date to inform the warden of the correctional facility in which he was housed that he was electing to be executed by nitrogen hypoxia.

The law did not create an execution protocol for nitrogen hypoxia, nor did it guarantee nitrogen hypoxia's eventual availability. It provided inmates an opportunity to elect nitrogen hypoxia, while expressly noting that "[a]n election for a choice of a

method of execution made by a convict shall at no time supersede the means of execution available to the Department of Corrections." Ala. Code §15-18-82.1(i).

"Smith did not elect nitrogen hypoxia during the election window." DE22:4.

C. The Eleventh Circuit Declares Nitrogen Hypoxia Available as a Matter of Fact Because it Has Been Adopted as a Matter of Law

In *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), this Court reaffirmed the method-of-execution framework previously articulated in *Baze v. Rees*, 553 U.S. 35 (2008) (plurality op.), and *Glossip v. Gross*, 576 U.S. 863 (2015). Under the *Baze-Glossip* test, the *Bucklew* Court explained, a prisoner must show (1) "a substantial risk of severe pain," and (2) a "feasible" and "readily implemented" alternative. 139 S. Ct. at 1121 (quotation marks omitted). There, Bucklew demanded death by nitrogen hypoxia but failed to show nitrogen was a "readily implemented alternative." *Id.* at 1129-32. That "Missouri law permit[ted] the use of this method of execution" was not enough. *Id.* at 1142 (Breyer, J., dissenting) (citing Mo. Rev. Stat. §546.720 (2002)).

Seven days after this Court published *Bucklew*, Christopher Price, a prisoner on Alabama's death row, appealed to the Eleventh Circuit a district court's denial of his emergency petition to stay his execution. Addressing this Court's week-old *Bucklew* decision, Price asserted that "*Bucklew* holds that an alternative method of execution is 'readily implemented' if

the 'State could carry it out "relatively easily and reasonably quickly,"'" and that "[e]ven if the nitrogen hypoxia protocol that Mr. Price affirmatively put forward in his renewed preliminary injunction motion is not sufficient to satisfy this standard … the fact that the [Alabama Department of Corrections (ADOC)] might have its own nitrogen hypoxia protocol finalized by 'the end of the summer' ought to be." Br. of Appellant 8-9, *Price*, 920 F.3d 1317 (No. 19-11268).

The Eleventh Circuit was persuaded. Publishing its decision within two days of Price's appeal, the court ultimately rejected Price's petition on separate grounds but nevertheless agreed that "nitrogen hypoxia [was] an available method of execution for him because the Alabama legislature ha[d] authorized it." *Price v. Commissioner*, 920 F.3d 1317, 1326 (11th Cir. 2019). "If a State adopts a particular method of execution," the court reasoned, "it thereby concedes that the method of execution is available to its inmates." *Id.* at 1328-29.[2]

So while the Eleventh Circuit "agree[d] that Price did not come forward with sufficient detail about how the State could implement nitrogen hypoxia to satisfy *Bucklew*'s requirement," the court "d[id] not believe

---

[2] The court never addressed how its reasoning squared with *Bucklew* in light of the fact that Bucklew "claimed that execution by 'lethal gas' was a feasible and available alternative method," *Bucklew*, 139 S. Ct. at 1121, and Missouri law expressly permitted the use of "lethal gas." *See* Mo. Rev. Stat. §546.720 (2002); *Bucklew*, 139 S. Ct. at 1142 (Breyer, J., dissenting) ("Missouri law permits the use of this method of execution.").

that was Price's burden to bear." *Id.* "[P]ointing to" the Alabama Code was enough. *Id.*

D. Nitrogen Hypoxia Remains Unavailable as a Matter of Fact

Ever since the *Price* court declared that "pointing to" a method of execution included in a State's method-of-execution statute suffices to show a readily implemented alternative, *Price*, 920 F.3d at 1329, inmates have pushed the exact argument Smith pushes here. *See, e.g.*, ECF No. 1 at 6, *Smith v. Dunn*, 2:19-cv-00927 (M.D. Ala. Nov. 25, 2019) ("As a matter of law, nitrogen hypoxia is an available and feasible alternative method of execution.") (citing *Price*, 920 F.3d at 1328-29); ECF No. 1 at 6, *Reeves v. Dunn*, No. 2:20-cv-00027 (M.D. Ala. Jan. 10, 2020) (same); ECF No. 1 at 16-17, *Woods v. Dunn*, 2:20-cv-00058 (M.D. Ala. Jan. 23, 2020) (alleging nitrogen hypoxia "is a known and readily implemented alternative already adopted by the State"); DE1:12 (nitrogen available "[a]s a matter of law").

And for as long as inmates have argued nitrogen hypoxia is available "as a matter of law," the State has responded that the method remains unavailable as a matter of fact. *See, e.g.*, ECF No. 10 at 33, *Smith v. Dunn*, 2:19-cv-00927 (M.D. Ala. Jan. 31, 2020) ("Although the ADOC has been working on a hypoxia protocol for more than a year, there is still no protocol in place, and Smith offers no protocol of his own."); ECF No. 19 at 40, *Woods v. Dunn*, 2:20-cv-00058 (M.D. Ala. Feb. 6, 2020) (same); ECF No. 59-1 at 2, *Miller v. Hamm*, 2:22-cv-00506 (M.D. Ala. Sept. 15, 2022) (affidavit from ADOC Commissioner John Q.

Hamm stating "ADOC cannot carry out an execution by nitrogen hypoxia on September 22, 2022"); DE31:13 (refuting nitrogen hypoxia availability).

Smith has not sought to prove that Alabama has the protocol necessary to implement nitrogen hypoxia. Instead, his allegations suggest that the method is *not* available. *See, e.g.*, DE1:3, 14 ("nitrogen hypoxia protocol" is "unknown"; "ADOC has not established a protocol for executing condemned people by nitrogen hypoxia"); DE24-1:20 (same); *id.* at 34 ("To date, ADOC has released no protocol for accomplishing [execution by nitrogen hypoxia]. How it will be done remains unknown.").[3]

E. Lower Court Proceedings

On June 24, 2022, the State of Alabama moved for the Alabama Supreme Court to set an execution date for Smith. *See* DE13-1:2. The court set Smith's execution for November 17, 2022. *Id.*

On August 18, 2022, Smith sued Commissioner Dunn and ADOC under §1983 on the theories that (1) "Defendant's lethal injection process will subject Plaintiff to an intolerable risk of torture, cruelty, or substantial pain," violating the Eighth Amendment; and (2) "Defendants failed to provide Plaintiff with information necessary to make a knowing and

[3] In his Second Proposed Amended Complaint (DE68-1, filed December 5, 2022) Smith continues to argue that "[a]s a matter of law, nitrogen hypoxia is an available and feasible alternative method of execution," DE68-1:61, and continues to rely on expert testimony that "[h]ow [execution by nitrogen hypoxia] will be done remains unknown," *see id.* at 34 (incorporating "Declaration of Joel B. Zivot" (DE24-1, Ex. A)).

voluntary waiver" of the "right to elect to be executed by nitrogen hypoxia," violating the Fourteenth Amendment. DE1:16-17. Defendants filed a motion to dismiss (DE10), and on October 16 the district court issued a memorandum opinion granting the motion (DE22)[4] and entered final judgment dismissing the case with prejudice (DE23).

Smith filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) three days later (DE24), requesting the opportunity to amend his complaint and attaching a proposed amended complaint (DE24-1) to his filing. In his proposed amended complaint, Smith abandoned his Fourteenth Amendment claim and expanded on his Eighth Amendment theory. *Id*.

Smith argued that, "[a]s a matter of law, nitrogen hypoxia is an available and feasible alternative method of exaction." DE24-1:19 (citing *Price*, 920 F.3d at 1328-29). Yet Smith simultaneously asserted that, as a matter of *fact*, "[t]o date, ADOC has not established a protocol for executing condemned people by nitrogen hypoxia." DE24-1:21. Additionally, Smith attached an expert declaration from Dr. Joel Zivot, who further asserted that "ADOC has released no protocol for accomplishing" execution by nitrogen hypoxia, and that "[h]ow it will be done remains unknown." *Id.* at 34.

---

[4] There, the district court granted Defendants' motion to dismiss as to the Commissioner and dismissed "Smith's claims against the ADOC ... upon Smith's consent," DE22:15, leaving the Commissioner the lone Defendant.

On November 9, the district court rejected Smith's request to amend, deciding amendment would be futile because "the proposed Amended Complaint fail[ed] to state sufficient factual detail to raise a plausible Eighth Amendment method of execution challenge." App.31. The court briefly addressed nitrogen hypoxia's alleged availability, however, and noted that the Eleventh Circuit had previously rejected the State's availability argument "[b]ecause the State of Alabama voluntarily adopted nitrogen hypoxia by statute." App.38 n.4.

Smith appealed the district court's ruling to the Eleventh Circuit. In his opening brief, he again alleged that "[n]itrogen hypoxia is a feasible and readily available alternative." Smith's Opening Br. 23. Smith elaborated on this assertion in his reply brief, arguing that *Bucklew* was inapplicable because it "was decided on summary judgment"—as though a "matter of law" would benefit from discovery—and that the Eleventh Circuit's decision in *Price* "foreclosed" the State's argument; all Smith needed to do to "satisfy his burden" was "point[] to'" the Alabama Code. Smith's Reply Br. 6-8 (quoting *Price*, 920 F.3d at 1328).

Once again, the Eleventh Circuit was persuaded. On the day of Smith's scheduled execution, the court of appeals reversed and remanded the district court's decision, concluding that in his proposed amended complaint Smith "pleaded sufficient facts to plausibly support an Eighth Amendment method-of-execution claim." App.10. Noting that "the Commissioner continues to argue that Smith failed to provide an available alternative method," the court chided the State for "completely miss[ing] [its] point from *Price*,"

and once again declared nitrogen hypoxia "an available alternative method"—even though the State lacks a "mechanism to implement the procedure." App.13-14.

The circuit court declined to address three Justices' observation that the very ruling it cited and extended "was suspect under [Supreme Court] precedent," *Price v. Dunn*, 139 S. Ct. at 1533, 1538 (2019) (Thomas, J., concurring in denial of certiorari), nor did it acknowledge this Court's recent reminder that prisoners bringing method-of-execution challenges under §1983 "must make the case that the State really can put him to death, though in a different way than it plans." *Nance v. Ward*, 142 S. Ct. 2214, 2222-23 (2022).

REASONS FOR GRANTING THE WRIT

This Court has repeatedly made clear that an inmate challenging his method of execution must "present a 'proposal' that is 'sufficiently detailed' to show that an alternative method is both 'feasible' and 'readily implemented.'" *Nance*, 142 S. Ct. at 2222 (quoting *Bucklew*, 139 S. Ct. at 1129). And the Eleventh Circuit has repeatedly made clear that it will not apply that precedent.

Smith was required to "provid[e] the State with a veritable blueprint for carrying the death sentence out." *Id.* at 2223. Instead, he alleged that the State "has not established a protocol for executing condemned people by nitrogen hypoxia," and that "[h]ow it will be done remains unknown." DE24-1:21, 34. Even so, the Eleventh Circuit held "that nitrogen hypoxia is an available alternative method for method-

of-execution claims," solely because the method is authorized as a matter of law. App.14.

But the same was true in *Glossip* and *Bucklew*, where proposed alternative methods were *statutorily* available but not *practically* available. And a citation to the Alabama Code is not a "veritable blueprint." *Nance*, 142 S. Ct. at 2223. Instead, an alternative method must be "readily implemented," not just "theoretically 'feasible.'" *Bucklew*, 139 S. Ct. at 1129. Moreover, even where a prisoner meets this initial requirement, he must still show "that the state has refused to adopt [the alternative method] without a legitimate penological reason." *Id.* at 1125. Smith's complaints make clear that he cannot meet these requirements and has no intention of trying to. Yet his case proceeds.

The Eleventh Circuit's decision represents "a headlong attack on precedent." *Bucklew*, 139 S. Ct. at 1126. And it has foisted years of meritless litigation upon Alabama, increasing the costs of lawful sentences and, at times, frustrating the State's ability to carry them out. Worse, the court of appeals shows no sign of changing course. This Court should correct it.

I. The Eleventh Circuit's Decision Is A Headlong Attack On This Court's Precedent.

To prevail on an Eighth Amendment method-of-execution claim, "a prisoner must show a feasible and readily implemented alternative method of execution … that the State has refused to adopt without a legitimate penological reason." *Bucklew*, 139 S. Ct. at 1125; *see also Baze*, 553 U.S. at 52 (plurality op.);

Glossip, 576 U.S. at 877.[5] Because "[t]he prisoner is not challenging the death sentence itself," he "must make the case that the State really can put him to death." *Nance*, 142 S. Ct. at 2222-23.

Nevertheless, the Eleventh Circuit held that nitrogen hypoxia is not "unavailable simply because no mechanism to implement the procedure had been finalized," and thus deemed it an "available alternative method." App.13-14. That conclusion is flagrantly incompatible with this Court's Eighth Amendment jurisprudence. If no "mechanism *to implement*" an execution exists, the execution cannot be "*implemented*" at all—"readily" or otherwise. *Bucklew*, 139 S. Ct. at 1129 (emphasis added).

A. Rather Than Arguing Nitrogen Hypoxia Is a Feasible, Readily Available Alternative, Smith's Allegations Confirm the Method's Unavailability.

1. Alternative Methods of Execution Must Be Readily Implemented, Not Just Theoretically Feasible.

"[P]lead[ing] and prov[ing] a known and available alternative" is a "substantive element[] of an Eighth Amendment method-of-execution claim." *Glossip*, 576

---

[5] As noted above, method-of-execution claims also require the prisoner to prove that "a substantial risk of severe pain" under the State's chosen method. *Glossip*, 576 U.S. at 867. While the State disputes that attempting to establish intravenous access can meet this high bar, the Eleventh Circuit's most obvious errors manifest in its treatment of the *Baze-Glossip* framework's alternative-method requirement.

U.S. at 880. To satisfy this substantive element, "an inmate must show that his proposed alternative method is not just theoretically 'feasible,' but also 'readily implemented,'" *Bucklew*, 139 S. Ct. at 1129, such that "the State could readily use his proposal to execute him," *Nance*, 142 S. Ct. at 2223. A successful method-of-execution claim thus demands more than availability as a matter of law or theory; a prisoner must show his proposed alternative method is available as a matter of fact.

The Court's decision in *Glossip* underscores this conclusion. There, Oklahoma's lethal-injection protocol "allow[ed] the Oklahoma Department of Corrections to choose among four different drug combinations." *Glossip*, 576 U.S. at 873. Two of the authorized combinations included the drug midazolam; the other two relied on pentobarbital or sodium thiopental. *Id.* at 873 n.1. The *Glossip* petitioners—four death-row inmates—"alleged that Oklahoma's use of midazolam violate[d] the Eighth Amendment's prohibition of cruel and unusual punishment." *Id.* at 873. They proffered that instead of midazolam "the State could use sodium thiopental as part of a single-drug protocol" and "that it might also be constitutional for Oklahoma to use pentobarbital." *Id.* at 878.

The *Glossip* petitioners' two proposed alternatives suffered the same defect: "[B]oth sodium thiopental and pentobarbital [were] unavailable to Oklahoma's Department of Corrections" as a matter of fact. *Id.* at 878; *see also id.* at 869-72 (discussing pressure from "anti-death-penalty advocates" that rendered sodium thiopental and pentobarbital "unavailable," and

States like Oklahoma's subsequent "turn[] to midazolam"). "Petitioners [did] not seriously contest [that] factual finding," nor did they "identif[y] any available drug or drugs that could be used in place of those that Oklahoma [was] unable to obtain." *Id.* at 879. Because this *factual* unavailability precluded petitioners from "identify[ing] an alternative that [was] 'feasible[] [and] readily implemented,'" their claim failed, *id.* at 877, even though Oklahoma's execution protocol contemplated using sodium thiopental and pentobarbital, *see id.* at 873 n.1.

The argument that a method's legal availability guarantees its ready availability fared even worse in *Bucklew*. 139 S. Ct. 1112. Missouri's method-of-execution statute expressly included (and still includes) "the administration of lethal gas," Mo. Rev. Stat. §546.720.1. Russell Bucklew thus pushed the theory that nitrogen hypoxia's legal availability could overcome its factual unavailability, pointing out that "Missouri allows [lethal gas] by statute" and thus concluding that "[t]he method is available to Missouri, should it choose to try to develop a protocol for it." Petitioner's Reply Brief 19, *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (No. 17-8151).

But that theory was (and still is) wrong. Rejecting Bucklew's argument, the Court reiterated that "an inmate must show that his proposed alternative method is not just theoretically 'feasible,' but also 'readily implemented.'" *Bucklew*, 139 S. Ct. at 1129. "This means the inmate's proposal must be sufficiently detailed to permit a finding that the State could carry it out 'relatively easily and reasonably quickly.'" *Id.* And "Mr. Bucklew's bare-bones proposal [fell] well short of that

standard." *Id.*; *see also id.* (noting Bucklew "ha[d] presented no evidence on essential questions like how nitrogen gas should be administered … in what concentration … or how the State might ensure the safety of the execution team, including protecting them against the risk of gas leaks"). While "the alternative-method requirement 'can be overstated,'" a prisoner bringing a method-of-execution claim nevertheless "should ordinarily be able to plead some alternative method of execution that would significantly reduce the risk of severe pain." *Id.* at 1136 (Kavanaugh, J., concurring).

Because "[d]istinguishing between constitutionally permissible and impermissible degrees of pain … is a *necessarily* comparative exercise," "[t]o decide whether the State has cruelly 'superadded' pain to the punishment of death isn't something that can be accomplished by examining the State's proposed method in a vacuum, but only by 'compar[ing]' that method with a *viable* alternative." *Id.* at 1126 (quoting *Glossip*, 576 U.S. at 878) (emphasis added). That "Missouri law" and "[t]hree other States" had authorized nitrogen hypoxia could not carry the day. *Id.* at 1142 (Breyer, J., dissenting).

So it was no stretch for the *Nance* Court, five months prior to the Eleventh Circuit's decision below, to reaffirm that a prisoner bringing a method-of-execution challenge "must … present a 'proposal' that is 'sufficiently detailed' to show that an alternative method is both 'feasible' and 'readily implemented,'" for it is that ready implementation that prevents a §1983 method-of-execution claim from sounding in federal habeas. 142 S. Ct. at 2222 (quoting *Bucklew*,

587 U.S. at 1129). Because "[t]he prisoner is not challenging the death sentence itself," the Court explained, he must "provid[e] the State with a veritable blueprint for carrying the death sentence out" and thus "give[] the State a pathway forward" to effect its lawful execution. *Id.* at 2223.

Simply put, to bring a viable §1983 method-of-execution claim, "theoretical[] feasib[ility]"—or availability "as a matter of law"—will not do. *Bucklew*, 139 S. Ct. at 1129. The prisoner must show his alternative method can in fact be "readily implemented" in a manner that allows his execution to proceed. *Id.*

2. Instead of Pleading How Nitrogen Hypoxia Could Be Readily Implemented, Smith Alleges That How It Will Be Implemented Remains Unknown.

Smith pleads that nitrogen hypoxia is "available" "[a]s a matter of law," DE1:6;DE24-1:6, 19, while alleging that the actual method for executing inmates with nitrogen "remains unknown," DE24-1:34. The problem with Smith's complaint is not that his "recitation of the elements of a cause of action" is too "formulaic," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), but that he affirmatively disclaims any intent to "recit[e]" those elements at all. Even though "plead[ing] … a known and available alternative" is a "substantive element[] of an Eighth Amendment claim," *Glossip*, 576 U.S. at 880, Smith continues to assert that availability "[a]s a matter of law" is all he needs. Smith is wrong. A misguided legal theory is not

a concrete "proposal ... sufficiently detailed" to show Alabama how to carry out his execution. *Bucklew*, 139 S. Ct. at 1129.

Though Russell Bucklew had to concede that Missouri lacked a workable "protocol for lethal gas," Petitioner's Reply Br. 19, *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (No. 17-8151), he at least attempted to provide evidence that "nitrogen-induced hypoxia would be an easy method of execution to administer" and cited experts and studies to that effect, Petitioner's Opening Br. 15, *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (No. 17-8151). Smith, however, has affirmatively argued—repeatedly—that nitrogen hypoxia is available only "[a]s a matter of law," DE24-1:19; *see also, e.g.*, DE1:12; DE68-1:61, while simultaneously asserting that, as a matter of *fact*, "ADOC has not established a protocol for executing condemned people by nitrogen hypoxia," DE24-1:20, and "[h]ow it will be done remains unknown," *id.* at 34.[6]

If "[h]ow [a method of execution] will be done remains unknown," *id.*, then that method of execution is not "readily implemented," *Bucklew*, 139 S. Ct. at 1129. Smith undoubtedly could have "pl[ed] some alternative method of execution that would significantly reduce the risk of severe pain," *id.* at

[6] And those statements echo the facts on the ground. As explained above, *supra* Statement §§C-D, nitrogen hypoxia was unavailable in *Price* and has remained unavailable since. While the State is working to finalize a protocol, nitrogen hypoxia still "ha[s] never been used to carry out an execution and ha[s] no track record of successful use." *Bucklew*, 139 S. Ct. at 1130 (quotation marks omitted).

1136 (Kavanaugh, J., concurring), but he chose to follow the *Price* playbook and plead an "unknown" one instead. A prisoner who proclaims he has no idea how to effect his preferred method of execution cannot possibly have "ma[de] the case that the State really can put him to death, though in a different way than it plans." *Nance*, 142 S. Ct. at 2222-23. Were it otherwise, the *Glossip* petitioners would have succeeded. After all, sodium thiopental and pentobarbital—the petitioners' preferred lethal-injection drugs—were legally available in Oklahoma. *Glossip*, 576 U.S. at 873 n.1. And Bucklew's argument that nitrogen hypoxia was included in Missouri's method-of-execution statute and thus "available to Missouri" if only the State would "develop a protocol for it," Petitioner's Reply Br. 19, *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (No. 17-8151), would have prevailed.

But whether an alternative method of execution is available does not "depend on the vagaries of state law." *Nance*, 142 S. Ct. at 2224. That "framework would perversely incentivize States to delay or even refrain from approving even the most humane methods of execution." *Price*, 139 S. Ct. at 1539 (Thomas, J., concurring in denial of certiorari). Worse still, even if States in the Eleventh Circuit make the most humane methods of execution practically available, they will still face meritless challenges as inmates remain free to compare new methods that have to work in the real world to old methods that need work only in theory. Even a method that "anti-death-penalty advocates" have rendered unavailable (*Glossip*, 576 U.S. at 870) remains a valid comparator if an inmate can "point[] to" a statute that arguably authorizes the

method. *Price*, 920 F.3d at 1328. If "[i]t would be strange to read such state-by-state discrepancies into … how §1983 and the habeas statute apply to federal constitutional claims," *Nance*, 142 S. Ct. at 2225, then surely state law does not negate a "substantive element[] of an Eighth Amendment method-of-execution claim," *Glossip*, 576 U.S. at 880. Quite the contrary. "[T]he Eighth Amendment is the supreme law of the land, and the comparative assessment it requires can't be controlled by the State's choice of which methods to authorize in its statutes." *Bucklew*, 139 S. Ct. at 1128. Yet the Eleventh Circuit has repeatedly embraced that flawed approach.[7]

The decision below contravenes this Court's precedent in numerous ways. Summarily reversing will confirm that a prisoner's method-of-execution claim cannot survive where he "[does] not come forward

---

[7] Even under that approach, Alabama's method-of-execution statute would not suggest nitrogen hypoxia is legally available. Just the opposite—the law contemplates methods of executions' unavailability, stating that "[a]n election for a choice of a method of execution made by a convict shall at no time supersede the means of execution available to the Department of Corrections." Ala. Code §15-18-82.1(i). So even if "pointing to" a preferred method's inclusion in a state statute could show availability, *Price*, 920 F.3d at 1328; *but see Bucklew*, 139 S. Ct. at 1129, it still would not follow that Alabama's statute constitutes a "conce[ssion] that [nitrogen hypoxia] is available to its inmates," *Price*, 920 F.3d at 1328. Rather, the statute acknowledges that the State may lack "the means" to carry out an execution by nitrogen hypoxia and makes no representation otherwise. Ala. Code §15-18-82.1(i).

with sufficient detail … to satisfy *Bucklew*'s requirement," *Price*, 920 F.3d at 1328—even when he brings his claim in the Eleventh Circuit.

B. Nor Can Smith Argue That Alabama Lacks Any Penological Justification for Declining to Use Nitrogen Hypoxia Without a Functional Protocol.

Beyond "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain," a prisoner "must show … that the State has refused to adopt [the alternative method] without a legitimate penological reason." *Bucklew*, 139 S. Ct. at 1125. Smith has never attempted to meet this requirement. And his pleadings show why he cannot: Alabama undoubtedly has a "legitimate penological reason" to implement a method of execution only after finalizing a protocol for that method, and, as Smith avers, "[t]o date, ADOC has not established a protocol for executing condemned people by nitrogen hypoxia." DE24-1:21.

It should be unremarkable that Alabama would want to protect its "interest in preserving the dignity of the procedure," *Baze*, 553 U.S. at 57 (plurality op.), by ensuring that it has answers to "essential questions" like "how nitrogen gas should be administered," "in what concentration," "how quickly and for how long it should be introduced," and how to "ensure the safety of the execution team," *Bucklew*, 139 S. Ct. at 1129. Yet the Eleventh Circuit ignores all these concerns, treating a functional execution protocol as nothing more than a superfluous accessory to the execution itself, *see* App.13-14; *Price*, 920 F.3d at 1328,

and Smith pushes the same view here. But the means define the method, and a workable protocol—*i.e.*, a "veritable blueprint" (*Nance*, 541 U.S. at 2223)—is necessary to show that a method of execution is not just "theoretically 'feasible' but also 'readily implemented.'" *Bucklew*, 139 S. Ct. at 1125.

Moreover, "the Constitution affords a 'measure of deference to a State's choice of execution procedures' and does not authorize courts to serve as 'boards of inquiry charged with determining "best practices" for executions.'" *Id.* at 1125 (quoting *Baze*, 553 U.S. at 47)). "There are … many legitimate reasons why a State might choose, consistent with the Eighth Amendment, not to adopt a prisoner's preferred method of execution." *Id.* (listing examples).

Passing a law permitting prisoners to elect death by nitrogen hypoxia did not require Alabama "to be the first to experiment with a new method of execution," *Bucklew*, 139 S. Ct. at 1130; *see also, e.g.*, *Baze*, 553 U.S. at 57. Particularly here, where Smith himself alleges that a workable protocol for that method "has not [been] established" and "remains unknown." DE24-1:21, 34.

* * *

Smith was required to "plead … a known and available alternative," *Glossip*, 576 U.S. at 880, a method "not just theoretically 'feasible' but also 'readily implemented.'" *Bucklew*, 139 S. Ct. at 1129. But he pled the opposite, asserting that Alabama has not finalized its protocol for nitrogen hypoxia and that no one yet knows "[h]ow it will be done." DE24-1:34. And while Smith has had every opportunity to propose a

protocol that "the State could readily use … to execute him," *Nance*, 142 S. Ct. at 2223, he refuses to do so.[8]

Without a viable protocol, Smith cannot show that nitrogen hypoxia is a "feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain," let alone "that the State has refused to adopt [nitrogen hypoxia] without a legitimate penological reason." *Bucklew*, 139 S. Ct. at 1125. For all the reasons discussed above, Smith and the Eleventh Circuit's contrary position "amounts to no more than a headlong attack on precedent." *id.* at 1126. This Court should say so.

II. Correcting The Eleventh Circuit's End Run Around This Court's Precedent Is Important For Comity, Finality, And Federalism.

"The Constitution allows capital punishment." *Bucklew*, 139 S. Ct. at 1122. It also "affords a 'measure of deference to a State's choice of execution procedures' and does not authorize courts to serve as

---

[8] Despite averring he is "qualified to explain how inhaling nitrogen gas would cause death," Smith's expert, Dr. Zivot, disclaimed any attempt to provide a workable protocol because he declared himself "duty bound as a physician not to guide or advise ADOC or any other prison system on how nitrogen may be used for an execution." DE24-1:35. While Dr. Zivot may, of course, decline to provide a "proposal … sufficiently detailed to permit a finding that the State could carry [Smith's execution] out relatively easily and reasonably quickly," *Bucklew*, 139 S. Ct. at 1129, Smith cannot press an Eighth Amendment claim while deliberately ignoring what "the Eighth Amendment requires," *Glossip*, 576 U.S. at 880.

'boards of inquiry charged with determining "best practices" for executions.'" *Id.* at 1125. Alabama permits that penalty and expects "a measure of deference" to its decision.

The Eleventh Circuit disregards that deference. Alabama has reasonably decided not to execute inmates by nitrogen hypoxia until it has finalized a workable protocol for that method of execution. But apparently this approach does not meet the Eleventh Circuit's standards: "[T]he State bears the responsibility to formulate a protocol detailing how to effectuate execution by nitrogen hypoxia," the court concluded, and if it has not done so that's too bad; death by nitrogen is "available" "because the State voluntarily included nitrogen hypoxia in its statute." *Price*, 920 F.3d at 1328-29. Never mind that this Court had already rejected that exact reasoning by the time the Eleventh Circuit embraced it. *See Glossip*, 576 U.S. at 877; *Bucklew*, 139 S. Ct. at 1121; *cf.* Tr. Oral Arg. at 40:15-21, *Bucklew*, 139 S. Ct. at 1121 (Sotomayor, J.) ("[I]f a statute, your statute … lists available alternatives, it's your job to find them and your job to put them into place.").

And for good reason. By pretending an alternative method of execution is readily implemented when it is (at best) theoretically feasible, the Eleventh Circuit converts attacks on methods into de facto attacks on sentences, in turn dragging Alabama prisoners' method-of-execution challenges straight into "the core of habeas corpus." *Nance*, 142 S. Ct. at 2217. With such judicial manipulation come the "significant costs," all too familiar to this Court, that "intrude[] on

state sovereignty to a degree matched by few exercises of federal judicial authority." *Davila v. Davis*, 137 S. Ct. 2058, 2070 (2017) (quotation marks, citations omitted). By eliminating the comparator from "a *necessarily* comparative exercise," *Bucklew*, 139 S. Ct. at 1126, the Eleventh Circuit converts challenges to methods into second or successive challenges to sentences, "frustrat[ing] both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998) (quotation marks omitted), and "den[ying] society the right to punish some admitted offenders," *Harrington v. Richter*, 562 U.S. 86, 103 (2011). So much for "deference." *Bucklew*, 139 S. Ct. at 1125.

So what's the practical upshot of all this? Less finality, more delay. By omitting one of the essential elements Smith was required to prove, the Eleventh Circuit greenlit last-minute litigation that concluded over four hours *after* the time Smith's execution was scheduled to *begin*—in turn leaving an hour and a half before the death warrant expired and frustrating the State's ability to carry out its lawful sentence. Worse, this all took place *thirty-four years* after Smith and his accomplice beat and stabbed Elizabeth Sennett to death for a couple-thousand dollars. *See Smith v. State*, 908 So. 2d 273, 279 (Ala. Crim. App. 2000). That's nearly double the 18-year "average time between sentencing and execution." *Bucklew*, 139 S. Ct. at 1144 (Breyer, J., dissenting). And if the decision below is not reversed, Smith's execution may soon join

those rarified "some instances" in which the delay between crime and punishment "rises to more than 40 years." *Id.*

"The people of [Alabama], the surviving victims of Mr. [Smith's] crimes, and others like them deserve better." *Id.* at 1134. This litigation never should have gotten off the ground; Smith has insisted that "[h]ow" the State will use nitrogen in executions "remains unknown," DE24-1:34, and an "unknown" method of execution plainly is not a "readily available" one, *Bucklew*, 139 S. Ct. at 1129. Yet the court below somehow concluded that an execution procedure is "'readily implemented,'" *Bucklew*, 139 S. Ct. at 1129, even absent a "mechanism to implement the procedure," App.13-14. Through such reasoning, the Eleventh Circuit has nullified this Court's precedent and usurped the State's sovereign prerogative to develop and implement its execution protocols.

"[T]he question of capital punishment," however, "belongs to the people and their representatives." *Bucklew*, 139 S. Ct. at 1134. This Court should return it to them.

CONCLUSION

The Court should grant Alabama's petition for a writ of certiorari and summarily reverse.

Respectfully submitted,

STEVE MARSHALL
Attorney General

EDMUND G. LACOUR JR.
Solicitor General
Counsel of Record

THOMAS A. WILSON
Deputy Solicitor General

RICHARD ANDERSON
Assistant Attorney General

STATE OF ALABAMA
Office of the Attorney General
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@AlabamaAG.gov

DECEMBER 2022