NO. 22-580

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

REPLY BRIEF FOR PETITIONER

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CAPITAL CASE
QUESTION PRESENTED

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?

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REPLY BRIEF

"Available." Smith keeps using that word. But in the context of method-of-execution claims, it does not mean what he (or the Eleventh Circuit) thinks it means.

An alternative method of execution is "available" only if the prisoner can show it is "not just 'theoretically feasible' but also 'readily implemented.'" *Bucklew v. Precythe*, 139 S. Ct. 1112, 1129 (2019). A method available only "[a]s a matter of law" (DE1:12; DE71:47) won't do. And the assertion that a method is "readily implemented" when there is "no mechanism to implement" it (App.13-14) is a koan as irreconcilable with logic as it is with this Court's precedent.

So Smith never tries to square the decision below with this Court's decisions. Instead, he deems nitrogen "immediately available" in the first sentence of his brief and never looks back. Foregoing legal argument for ceaseless question-begging—and not once denying that his claim strikes at "habeas's core," *Nance*, 142 S. Ct. 2214, 2222 (2022)—Smith confirms the error of the decision below.

Smith then spends the balance of his brief trying to explain why that error isn't so bad. "There is no reason for this Court to intervene," he says (at 31), because the circumstances are unique and the case might go away. Neither premise holds water. First, Smith's argument underscores the breadth of the Eleventh Circuit's exception to *Bucklew*. And second, developments on the ground are irrelevant to the only allegation Smith made regarding nitrogen hypoxia's

availability—that it is "available" "[a]s a matter of law." DE71:47. As for Smith's argument-by-gotcha, the notion that the State waived its right to seek certiorari rests on mischaracterization of the record and misunderstanding of the district court's jurisdiction.

"A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). This is one of those situations.

ARGUMENT

I. Smith's Brief Shows Why The Decision Below Is Irreconcilable With This Court's Precedent.

A. Like the Court Below, Smith Badly Misunderstands What Constitutes a "Readily Available" Alternative Method.

1. When a prisoner brings a method-of-execution challenge under §1983, this Court's "precedents and history require asking whether the State had some other feasible and readily available method to carry out its lawful sentence." *Bucklew*, 139 S. Ct. at 1127. The alternative method not only must be "theoretically 'feasible,' but also 'readily implemented,'" *id.* at 1129, such that "the State could readily use his proposal to execute him," *Nance v. Ward*, 142 S. Ct. 2214, 2223 (2022). Practical availability matters. Theoretical availability does not. Pet.16-20.

But according to Smith and the Eleventh Circuit, when "Alabama authorized nitrogen hypoxia" the method suddenly became "immediately available." BIO.i. How does this work? Legislation is not creation; passing a law does not automatically bring its object into being. And what does Smith mean by "immediately available"? "[P]ointing to the executing state's official adoption of [a] method of execution," *Price v. Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1328 (11th Cir. 2019), is worlds apart from "providing the State with a veritable blueprint for carrying the death sentence out," *Nance*, 142 S. Ct. at 2223. If "no mechanism *to implement* the procedure has been finalized," App.14, then by definition the procedure is not "readily *implemented*." *Bucklew*, 139 S. Ct. at 1129 (emphases added).

Smith's brief highlights the fundamental error at the heart of the Eleventh Circuit's *Price* decision and the decision below: The court's definition of "available," like Smith's, is foreign to this Court's method-of-execution jurisprudence. Smith block-quotes (at 9) Alabama Laws Act 2018-353 ostensibly to support the claim that "the State made execution by nitrogen hypoxia immediately available." But the statutory text merely confirms the statute provided inmates the option to "elect … nitrogen hypoxia." Ala. Code §15-18-82.1(b). That's it. All the statute made "immediately available" was the "opportunity to elect" a method of execution. *Id.* And an "opportunity to elect" nitrogen plainly is not a "proposal that is sufficiently detailed to show that [nitrogen hypoxia] is both feasible and readily implemented," *Nance*, 142 S. Ct. at 2222 (quotation marks omitted).

Smith never grapples with this basic—and dispositive—terminological problem. Instead, he attempts to bulldoze a path forward through brute-force repetition. Smith asserts in the first sentence of his brief that nitrogen is "immediately available," and then reasserts the proposition on nearly every page thereafter. He even declares the development of a functional protocol for implementing nitrogen "beside the point." BIO.21.

But "he who lives by the *ipse dixit* dies by the *ipse dixit*." *Morrison v. Olson*, 487 U.S. 654, 726 (Scalia, J., dissenting). Content to beg the question at the heart of this case, Smith all but concedes the error of the Eleventh Circuit's reasoning. An alternative method of execution that is "available" only "[a]s a matter of law" (DE71:47)—or "immediately available" because authorized by statute (BIO.i)—is neither "readily available" nor "readily implemented." *Bucklew*, 139 S. Ct. at 1125. Pet.20-24.[1]

2. Smith's strategy of high-volume *ipse dixit* leads him astray in other ways, too. First, by assuming that Alabama's method-of-execution statute automatically renders nitrogen practically available, Smith overlooks his burden of showing Alabama lacks a "legitimate penological reason" for declining to implement a method of execution until it has finalized a

[1] Rather than defend his theory of availability "[a]s a matter of law" (DE71:47), Smith edits this language out of his own allegations (BIO.8, 11) and rebrands the concept as "immediately available." BIO.i, 2, 9, 20, 21, 22, 23. Whatever "immediately available" means to Smith, it does not comport with the "readily available" standard set out by this Court.

functional protocol for it. *Bucklew*, 139 S. Ct. at 1125. But the State undoubtedly has a legitimate penological interest in "preserving the dignity of the procedure," *Baze v. Rees*, 553 U.S. 35, 57 (2008) (plurality op.), by ensuring that it answers "essential questions" about a method of execution (*Bucklew*, 139 S. Ct. at 1129) before implementing it. Pet.24-25.

And by postulating that state legislation can somehow render an alternative method "readily available," Smith fails to recognize that "state law does not 'control[]' the Eighth Amendment inquiry." *Nance*, 142 S. Ct. at 2225. So he devotes much of his brief to irrelevant argument. For example, trying to show the decision below "does no violence to this Court's precedents" (BIO.3), Smith submits that Missouri's statutory authorization of "lethal gas" was "more a vestige of a bygone era than a present intention to execute any condemned person by lethal gas, much less nitrogen, which, in any event, is not 'lethal gas.'" *Id.* at 25-26.

Not only would Smith's interpretation come as news to the four Members of this Court who concluded nitrogen hypoxia "is a form of execution by lethal gas" that "Missouri law permits," *Bucklew*, 139 S. Ct. at 1142 (Breyer, J., dissenting), but it's a non sequitur. The alternative-method inquiry "can't be controlled by the State's choice of which methods to authorize." *Id.* at 1128-29. Rather, the prisoner "must make the case that the State really can put him to death."

Nance, 142 S. Ct. at 2222-23. "[P]ointing to" a statute, *Price*, 920 F.3d at 1328, cannot make that case.[2]

Moreover by assuming a statute creates a presumption of ready availability, Smith forgets that "he," not the State, bears the burden of "mak[ing] the case that the State really can put him to death." *Nance*, 142 S. Ct. at 2222-23. This leads Smith to argue points unhelpful to his case, like that his expert's testimony "does not establish whether execution by nitrogen is feasible and readily implemented." BIO.32. That neither Smith nor his expert allege nitrogen is "feasible and readily implemented" (*id.*) only underscores Smith's failure to carry his burden.[3]

B. *Price* and the Decision Below Allow Prisoners Like Smith to Launder Their Habeas Claims through §1983.

The "*necessarily* comparative exercise" of evaluating an allegedly unconstitutional method against "a viable alternative," *Bucklew*, 139 S. Ct. at 1126, is the linchpin preventing §1983 method-of-execution claims from veering into the "'core of habeas corpus,'"

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[2] Attempting to reconcile the decision below with *Glossip*, Smith asserts that *other* Eleventh Circuit decisions have properly applied *Glossip*'s framework in different contexts. BIO.24-25. But these decisions predate *Price*, do not square *Price* with this Court's precedent, and are no defense of the Eleventh Circuit's decision to extend *Price*'s error here.

[3] In the operative complaint (DE71), Smith walks back his previous averment that the State "has not established a protocol." DE24-1:21. But Smith still fails to allege availability beyond "a matter of law" (DE71:47), thus failing to meet the fundamental requirements of his claim.

Nance, 142 S. Ct. at 2221. So if a prisoner attacks a method without "providing … a veritable blueprint" showing the State "really can put him to death" some other way, the action effectively seeks to "prevent[] the State from executing him" and falls within "habeas's core." *Id.* at 2221-22; Pet.27-28. And that is exactly the action Smith and other inmates (Pet.10-11) have brought in *Price*'s wake. Ignoring *Nance*, Smith never even attempts to argue otherwise.

But don't just take the State's word for it. Smith openly characterizes his lawsuit in exactly these terms. Just last month, Smith asserted that procedural exemptions for "'a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence'" apply to his case. DE78-1:2 (quoting Fed. R. Civ. P. 26(a)(1)(B)(iii)). Why? Because "this action challenges Mr. Smith's sentence." *Id.* Not even Smith believes "the substance of [a] claim" brought under *Price*'s rationale "points toward §1983." *Nance*, 142 S. Ct. at 2223. He easily could have "pl[ed] some alternative method of execution that would significantly reduce the risk of severe pain." *Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring). But that would have "give[n] the State a pathway forward." *Nance*, 142 S. Ct. at 2223.

"[C]ourts should not tolerate abusive litigation tactics." *Hill v. McDonough*, 547 U.S. 573, 583 (2006). Yet by dissolving the distinction between the "two main avenues to relief on complaints related to imprisonment," *id.* at 579, the Eleventh Circuit invites them. While federal courts of appeals often misconstrue and misapply AEDPA (and routinely receive

summary correction from this Court), they rarely invent doctrines that make the statute inapplicable to actions that "challenge[] [prisoners'] sentence[s]" (DE78-1:2) and plainly fall "'within the core of habeas corpus.'" *Nance*, 142 S. Ct. at 2221. But the decision below pulls off this remarkable feat, nullifying both this Court's precedent and AEDPA.

II. The Court Should Act Now.

A. The Court Can Resolve the Issue Presented.

1. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (some quotation marks omitted). Smith conjectures that there is "momentum toward finalizing the protocol" and argues that "[a]ny question about the availability of nitrogen hypoxia will become moot when Alabama finalizes its nitrogen hypoxia protocol." BIO.29-30. Not so.

Not only does Smith divine this "momentum" from a case in which the ADOC Commissioner unequivocally declared "ADOC cannot carry out an execution by nitrogen hypoxia," ECF No. 59-1 at 2, *Miller v. Hamm*, 2:22-cv-00506 (M.D. Ala. Sept. 15, 2022), but even a finalized protocol would not render the "'issue[] here … no longer live,'" *Nike*, 568 U.S. at 91. The issue here is whether alleging availability "[a]s a matter of law" (DE71:47)—not as a matter of fact—suffices to state a viable method-of-execution claim. A finalized

protocol is irrelevant to the theory that "authoriz[ing] nitrogen hypoxia … made it immediately available." BIO.i. Smith's claim that a protocol's "develop[ment]" and finalization are "beside the point" (BIO.7) confirms that even if ADOC finalizes a protocol, the parties will retain a "'legally cognizable interest in the outcome'" of the petition. *Nike*, 568 U.S. at 91. Smith will still bear the burden of "providing the State with a veritable blueprint for carrying the death sentence out," and he will undoubtedly continue in his efforts to avoid "giv[ing] the State a pathway forward." *Nance*, 142 S. Ct. at 2223.[4]

2. For similar reasons, Smith's handwaving over the case's posture is unfounded—and contradicted by his own argument. Smith complains he "has had no opportunity for discovery into the status of ADOC's efforts to finalize its nitrogen hypoxia protocol" and that the State "holds [him] to a standard of proof that does not apply at this stage." BIO.31. But availability "[a]s a matter of law" (DE71:47) does not require discovery; by Smith and the Eleventh Circuit's lights, nitrogen became "immediately available" the moment Alabama's legislature passed Alabama Laws Act 2018-353. BIO.i. And Smith affirmatively disclaims the relevance of any "discovery into [a nitrogen protocol's] status" when he insists the protocol's "develop[ment]" is "beside the point." BIO.21, 31. The

[4] Nor does a backlog of "48 condemned people" awaiting execution by nitrogen hypoxia support a "plausible inference" that nitrogen is "readily implemented." BIO.33. If anything, it cuts the other way.

problem with Smith's complaint is not that his "[f]actual allegations" fail to surpass "the speculative level," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007), but that Smith doesn't think he needs *factual* allegations at all.[5]

B. The Issue Is Too Important to Ignore.

Smith tries to minimize the egregiousness of the decision below by asserting that no "conflict among the courts of appeals" is likely to arise because *Price* limited itself to "the 'particular circumstances here,' and those circumstances are unique." *Id.* (quoting *Price*, 920 F.3d at 1328). But summary reversal is appropriate even (especially) where "the law is settled and stable." *Hansen*, 450 U.S. at 791 (Marshall, J., dissenting). What matters is that "the decision below is clearly in error" under this Court's precedent. *Id.* The relevant "conflict" here is vertical, not horizontal; that no other court of appeals so brazenly defies this Court's method-of-execution jurisprudence does not counsel against correction.

Moreover, Smith's evidence of "unique[ness]" only reveals that the Eleventh Circuit's decision is not so

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[5] Smith's "judicial estoppel" argument (BIO.34) is equally groundless. The context of State counsel's quote makes clear he was disclaiming any intent to seek cert before that day's scheduled execution, not waiving the right to further review. DE69:3. More fundamentally, the premise of Smith's argument conflates the jurisdictional significance of notices of appeal with the jurisdictional insignificance of cert petitions. Revealingly, he has continued to litigate before the district court since the State filed this petition, *see* DE76; DE78-1:2—strange behavior if he thought that court lacked jurisdiction.

confined. The supposedly limiting "circumstances here" were, in the *Price* court's words, that "the State by law previously adopted nitrogen hypoxia as an official method of execution." 920 F.3d at 1328. But Smith concedes that Oklahoma and Mississippi also "authorized nitrogen hypoxia as a method of execution." BIO.27. So Smith redeploys his primary strategy: Those States are different, he declares, because "unlike Alabama" they do not "make nitrogen hypoxia available." *Id.* Smith's attempt to minimize *Price* and the decision below highlights both his devotion to question-begging and the folly of applying state law to the alternative-method inquiry.

This illogic has consequences and should not persist any longer. By foisting on the State a "heavy burden of showing that a method of execution is unavailable as soon as its legislature authorizes it to employ a new method," *Price v. Dunn*, 139 S. Ct. 1533, 1539 (2019) (Thomas, J., concurring in denial of certiorari), *Price* relieves the inmate of "his burden of showing a readily available alternative," *Bucklew*, 139 S. Ct. at 1130. And if contravening precedent weren't bad enough, this "burden-shifting framework … perversely incentivize[s] 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, by permitting method-of-execution claims that omit this Court's "known and available alternative" requirement, *Bucklew*, 139 S. Ct. at 1125, the Eleventh Circuit has opened §1983 to "action[s] challeng[ing] [prisoners'] sentence[s]," DE78-1:2. And prisoners beyond Smith have taken notice (Pet.10-

11), slapping §1983 labels on "actions that lie 'within the core of habeas corpus.'" *Nance*, 142 S. Ct. at 2217. Thus circumventing AEDPA, they "frustrat[e] 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).

Perhaps worst of all, the decision below confirms the Eleventh Circuit has no intention of following this Court's precedent. A month after *Price*, three Justices explained that the Eleventh Circuit's logic was "suspect under [this Court's] precedent." *See Price*, 139 S. Ct. at 1538 (Thomas, J., concurring in denial of certiorari). And five months before the decision below, a majority of the Court confirmed that method-of-execution claims require "a veritable blueprint for carrying the death sentence out." *Nance*, 142 S. Ct. at 2223.

Yet when given a chance to correct course, the Eleventh Circuit doubled down. Apparently "[t]he Commissioner completely misse[d] [the court's] point from *Price*." App.14. But instead of explaining why that "point" was not suspect under this Court's precedent—or defending it at all—the Eleventh Circuit (again) simply declared nitrogen "available." *Id.* It's *ipse dixit* all the way down.

* * *

The decision below "reflects a clear misapprehension" of this Court's method-of-execution precedents. *Tolan v. Cotton*, 572 U.S. 650, 659 (2014) (*per curiam*). It "cannot be reconciled with the principles set out in"

those cases. *Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.*, 450 U.S. 147, 150 (1981) (*per curiam*).

And the Eleventh Circuit is not going to correct itself. "If summary reversal is ever warranted, it is warranted here." *Andrus v. Texas*, 142 S. Ct. 1866, 1879 (2022) (Sotomayor, J., dissenting from denial of certiorari).

CONCLUSION

The Court should grant Alabama's petition and summarily reverse the decision below.

Respectfully submitted,

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