IN THE
Supreme Court of the United States

JAMES EDWARD BARBER,
Petitioner,

v.

GOVERNOR OF ALA., ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

******EXECUTION SCHEDULED FOR JULY 20, 2023 AT 6: :00 P.M. CT/7:00 P.M. ET******

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July 20, 2023

CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Eleventh Circuit correctly hold that no amount of physical suffering and emotional anguish imposed by allowing hours-long and countless attempts to establish IV access in a lethal injection execution, including the prospect of a failed execution, can ever violate the Eighth Amendment?
2. Is it sufficient under *Baze* for a State to respond to repeated and consistent failures to carry out executions without imposing needless physical suffering and mental anguish by merely substituting execution personnel without any different qualifications, and by extending the time allowed to attempt an execution?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is James Edward Barber. Respondents are Kay Ivey, John Q. Hamm, Terry Raybon, Steve Marshall, and John and Jane Does 1-4. No party is a corporation.

RELATED PROCEEDINGS

State Proceedings

Ex parte Barber, No. CC-02-1794 (Ala. May 3, 2023)

Federal Proceedings

Barber v. Ivey, No. 23-cv-342 (M.D. Ala. July 7, 2023)

Barber v. Governor of Alabama, No. 23-12242 (11th Cir. July 20, 2023)

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PETITION FOR A WRIT OF CERTIORARI

James Edward Barber respectfully petitions for a writ of certiorari to review the decision of the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reproduced in the appendix to this petition at Pet. App. 1a-70a. The opinion of the U.S. District Court for the Middle District of Alabama is reported at No. 23-cv-342, 2023 WL 4410499 (M.D. Ala. July 7, 2023) and is reproduced at Pet. App. 71a-93a.

JURISDICTION

The Middle District of Alabama had jurisdiction over Mr. Barber's § 1983 claim pursuant to 28 U.S.C. § 1331. The Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

The Eleventh Circuit affirmed the denial of a preliminary injunction and denied Mr. Barber's motion for a stay on July 19, 2023, Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL/STATUTORY PROVISION INVOLVED

The Eighth Amendment of the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Alabama's death penalty statute, Ala. Code § 15-18-82(a), provides in relevant part:

> Where the sentence of death is pronounced against a convict, the sentence shall be executed at any hour on the day set for the execution, not less than 30 nor more than 100 days from the date of sentence, as the court may adjudge, 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.

INTRODUCTION

James Edward Barber is scheduled to be executed starting at 6:00 pm CT today by a method that is very likely to cause him needless pain and suffering. That is because Respondents have engaged in protracted efforts to obtain intravenous ("IV") access in three consecutive lethal injection executions since July 2022, and Mr. Barber is at an even greater risk than the most recent inmate to suffer from Alabama's failures. In each of the three prior cases, Respondents spent hours attempting to establish IV access, repeatedly puncturing Joe James, Jr., Alan Miller, and Kenneth Smith all over their bodies. Two of these executions—those of Mr. Miller and Mr. Smith—were eventually called off due to Respondents' failed efforts to establish IV access, while the third ended after Mr. James appeared to have been rendered unconscious before the lethal injection drugs were administered.

Following these botched executions, Governor Kay Ivey called for a halt on lethal injection executions and ordered a review into "the state's execution process." Pet. App. 150a. Unfortunately, and by Respondents' own admission, the review led to no meaningful changes in the Alabama's execution protocol or procedures. Pet.

App. 536a, 44:4-6 (counsel for Respondents admits that Alabama's lethal injection protocol "hasn't changed in a material way except for that reference to licenses"). Indeed, Respondents reported that they found "no deficiencies" in their execution procedures, and made no substantive changes to their protocol. Pet. App. 193a. The only noteworthy change extended the time for setting intravenous access during the execution. *Id.* at 95a, 98a ¶¶ 5, 15; *id.* at 439a, 141:12-21. The record indisputably shows, however, that IV access, when properly performed, usually takes a matter of minutes, and never more than an hour. *Id.* at 394a, 66:22-25; *id.* at 231a-232a ¶ 14; *id.* at 172a, 173a, ¶ 11, 15.

Despite Respondents' repeated botches, and notwithstanding the fact that Respondents have made no meaningful changes to their protocol or procedures to prevent last year's issues from reoccurring, the Eleventh Circuit and district court concluded that Mr. Barber is not likely to establish that he faces a "substantial risk of serious harm" under the Eighth Amendment. In so holding, both courts not only disregarded this Court's precedent in *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion) and *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), but also reached conclusions not supported by the undisputed evidence. In fact, the Eleventh Circuit went as far as concluding that there can *never* be an Eighth Amendment violation through repeated punctures to establish IV access, no matter how many futile attempts are made or for how long. That conclusion cannot be squared with this Court's holdings, which make clear that a punishment is cruel when it "'superadds' pain well beyond what's needed to effectuate a death sentence." *Bucklew*, 139 S. Ct.

at 1127. The Eleventh Circuit and district court decisions allow for Eighth Amendment violations to proceed regardless of the "superadded pain" that this Court has consistently said is prohibited.

The Court should grant certiorari and correct this error.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

In December 2003, Mr. Barber was found guilty of capital murder and sentenced to death. He does not challenge his conviction or death sentence.

A. Alabama's Lethal Injection Protocol and Procedures

In Alabama, lethal injection is the default method of execution. Ala. Code § 15-18-82.1(a). The State adopted an alternative method of execution—nitrogen hypoxia— in 2018. *See id.* § 15-18-82.1(b).

Lethal injection executions are governed by ADOC's lethal injection protocol. *See* Pet. App. 130a. An essential component of the protocol is establishing IV access. *Id.* at 105a ¶ 53. The protocol requires the IV Team to place two IV devices in the veins of the condemned individual. *Id.* at 146a. The protocol authorizes two methods that the IV Team can use to establish IV access: (1) "[t]he standard procedure," or (2) a "central line procedure" if "the condemned inmate's veins make obtaining venous access difficult or problematic." *Id.* The protocol does not include any time limitations for the IV Team to establish IV access. During discovery, Respondents stat-

ed that the "standard procedure" is the "ordinary procedures used by trained medical personnel to obtain IV access." *Id.* at 199a.

B. The Three Most Recent Lethal Injection Execution Attempts in Alabama

ADOC has spent prolonged periods of time attempting to establish IV access in each of its three most recent attempts to execute death row inmates by lethal injection.

Joe Nathan James, Jr.

On July 28, 2022, Mr. James remained strapped to the gurney for approximately three hours, making his execution one of the longest in American history. *See Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13781, 2022 WL 17069492, at *4 (11th Cir. Nov. 17, 2022) (per curiam), *cert. denied sub nom. Hamm v. Smith*, 143 S. Ct. 1188 (2023). When ADOC eventually opened the curtain to witnesses around 9:00 PM in order to allow Mr. James to say his final words, Mr. James could do not so because he appeared to be unconscious. Pet. App. 621a. The State's own autopsy performed after the execution shows that Mr. James had punctures all over his body, including his elbow joints, right foot, forearm, both wrists, and both hands. *Id.* at 256a. Following the execution, ADOC Commissioner Hamm told reporters that "nothing out of the ordinary" happened. *Id.* at 251a. The State later stated that the delay was due to difficulties establishing an IV line. *Id.*

Alan Miller

About two months later, in September 2022, Respondents attempted to carry out the execution of Alan Miller. Days before this execution, Commissioner Hamm (a defendant in that litigation) guaranteed in a sworn affidavit that ADOC was ready to carry out Mr. Miller's execution by lethal injection. Pet. App. 272a. Despite that representation, ADOC failed to establish IV access in Mr. Miller. Mr. Miller submitted an affidavit in this litigation detailing how he was repeatedly punctured over the course of 90 minutes as the State tried to establish an IV line in his right elbow, right hand, left elbow, right foot, right inner forearm, left arm, and right arm. *Id.* at 266a-239a ¶¶ 16-47. Mr. Miller also attests how the IV Team struck his nerves with a needle, resulting in excruciating pain, like he "had been electrocuted." *Id.* at 268a ¶¶ 30-32. In the immediate aftermath of the failed execution, in which the State attempted to gain IV access for roughly 90 minutes, ADOC said that "there just was not sufficient time to gain vein access in the appropriate manner in this case, and we just ran out of time." *Id.* at 220a, 19:10-18.

Kenneth Smith

ADOC attempted to execute Mr. Smith on November 17, 2022, despite its failures to timely establish IV access in its previous two lethal injection attempts. Pet. App. 327a ¶ 3. Mr. Smith was strapped to the execution gurney for four hours, and the IV Team spent almost two of those hours puncturing Mr. Smith's body with needles. *Id.* at 304a-313a ¶ 154, 158-220. A member of the IV Team then jabbed a larger needle into Mr. Smith's collarbone area in attempt to start a central IV line. *Id.* at 277a-278a ¶ 11. According to Mr. Smith's complaint, Mr. Smith felt sharp and

intense pain as the needle was repeatedly inserted into his collarbone area. *Id.* Eventually, around midnight, and after the repeated attempts to gain IV access all across his body, the IV Team stopped the attempted execution. *Id.* at 307a ¶ 177. Following the attempt, Commissioner Hamm held a press conference and said that the "execution team" made "several" attempts to establish IV access and eventually "ran out of time." *Id.* at 316a ¶ 231.

C. Respondents' Subsequent Lethal Injection Investigation

In response to this spate of botched executions, Governor Ivey ordered a moratorium on lethal injection executions in Alabama and a "top-to-bottom review of the state's execution process." Pet. App. 150a. This review lasted approximately three months. *See id.* at 98a, 104a ¶¶ 17, 48.

Following this review, Respondents concluded that were "no deficiencies" in their execution procedures and practices. Pet. App. 193a. Respondents then took two actions: (1) they amended Ala. R. App. P. 8(d)(1) to give the Governor authority to set an extended "time frame" for executions to occur (here, 30 hours), *see id.* at 123a; and (2) they replaced their IV personnel, Pet. App. 76a, 92a. Respondents first claimed to have hired new personnel for their IV Team at the July 5, 2023 evidentiary hearing, after refusing to provide discovery relating to new IV Team members in the weeks leading up to this hearing. *See id.* at 445a-450a, 117:24-122:20; *id.* at 194a-195a.

D. Mr. Barber's Prior History of Difficult Venous Access and Physical Condition

Mr. Barber has a history of medical personnel being unable to access his veins, as well as physical conditions that heighten his risk for superadding pain at the hands of ADOC's IV Team. At the July 5, 2023, evidentiary hearing, Mr. Barber testified about multiple instances in which ADOC personnel failed to establish IV access on his veins. Mr. Barber testified that personnel at the Donaldson Correctional Facility used a needle to draw blood "probably eight times, all different places, and [the clinician] couldn't do it." Pet. App. 433a, 105:7-15. That attempt was eventually halted due to the pain caused to Mr. Barber. *Id.* at 433a, 105:15-17. Mr. Barber said that in addition to that experience, ADOC personnel have had trouble accessing his veins "a few [other] times" including at Holman Correctional Facility, where the clinician was unable to establish IV access. *Id.* at 434a, 106:4-8.

Further, Mr. Barber has a Body Mass Index (BMI) of 29. Pet. App. 180a. A higher BMI, such as Mr. Barber's, "makes it much more difficult to locate suitable veins." *Smith*, 2022 WL 17069492, at *5. Mr. Barber's BMI is nearly identical to that of Mr. Smith (29.7), who ADOC attempted and failed to execute on November 17, 2022. *See id.* Mr. Barber's BMI is higher than that of Mr. James, whom ADOC spent multiple hours trying to establish IV access in July 28, 2022. *See id.*

E. Expert Evidence Regarding Setting of IV Lines

The *unrebutted* evidence presented in the evidentiary hearing before the district court shows that establishing IV access is a common medical procedure that should be accomplished within minutes, and even in extreme circumstances, should

never take longer than an hour. Pet. App. 231a-232a ¶ 14; *id.* at 172a-173a ¶ 11. Mr. Barber submitted uncontroverted evidence from three different nurses with expertise in starting and maintaining IV lines, explaining the "ordinary procedures used by trained medical personnel to obtain IV access." Pet. App. 199a.

According to Lynn Hadaway, a registered nurse for more than 50 years who appeared as an expert witness at the evidentiary hearing, starting a peripheral IV line takes on average 6 to 9 minutes. Pet. App. 394a, 66:22-25. Ms. Hadaway testified that multiple attempts to set an IV line increases the pain associated with the experience, and likewise "increase[s] the likelihood of complications" such as striking an inmate's nerve, which feels like being electrocuted. *Id.* at 395a-396a, 67:13-68:7. Ms. Hadaway explained that the professional standards for setting IV lines, which she helped write, contemplate what is commonly referred to as the "two-stick rule," which states that if the same person cannot set an IV line after two needle punctures, a more experienced person should take over the process or advanced equipment should be used. *Id.* at 389a, 61:11-23; *see also id.* at 395a-396a, 67:11-68:12. Over the course of Ms. Hadaway's decades-long career, she has never seen an instance in which IV access takes anywhere between 90 minutes to three hours. *Id.* at 395a, 67:6-8. In Ms. Hadaway's uncontroverted expert opinion, it is possible to establish IV access for a lethal injection without imposing the unnecessary pain of an hours-long attempt to find veins. *Id.* at 408a, 80:9-16.

Ms. Hadaway also testified about the redacted licenses that Respondents produced in this litigation, which purportedly belong to the members of the IV

Team who will attempt to carry out the execution of Mr. Barber. Pet. App. 403a-408a, 75:24-80:4; DE 50, PX-54. Those licenses suggest that members of the team are comprised of emergency medical technicians and one registered nurse. DE 50, PX-54 (Respondents *removed* the requirement that a physician serve on the IV Team). Ms. Hadaway made clear that the licenses do not show that the members of the IV Team are competent to set IV lines—either through the "standard procedure" or through the "central line procedure." *Id.* at 403a-408a, 75:24-80:4. That is because setting IV lines is not within the scope of practice for most EMTs or registered nurses. *Id.* at 404a-408a, 76:5-80-4.

Ms. Hadaway's testimony was corroborated by two other registered nurses who submitted affidavits. The first nurse, Tina Roth, has spent the past four decades setting and maintaining IV lines across a wide variety of body types, medical conditions, and uncooperative patients in hospitals. Pet. App. 230a ¶ 3. According to Ms. Roth, a reasonable and appropriate amount of time required to start a peripheral IV line is approximately 5 to 10 minutes. *Id.* at 231a-232a ¶ 14. Ms. Roth said that continually attempting to puncture a person with a needle multiple times spanning 60 minutes is unprofessional, superadds pain, and is a "breach of the standard of care owed to patients." *Id.* at 232a ¶ 18.

The second nurse, Lisa St. Charles, has set more than 1,000 IV lines throughout the course of her career, and said that absent certain circumstances, it should "never take longer than 15 minutes to set an IV line." Pet. App. 172a-173a ¶ 11. Notably, Ms. St. Charles said that the "longer it takes to set an IV line, the

greater discomfort and pain a patient experiences," and that she has never seen or heard of any nurse who has spent 60 minutes or longer attempting to set an IV line. *Id.* at 173a ¶¶ 15, 17. Ms. St. Charles' medical opinion is that "a duration of 60 minutes or longer would cause significant undue pain and distress." *Id.* at 173a ¶ 17.

Respondents submitted no evidence controverting the testimony of Ms. Hadaway or the affidavits of Ms. Roth or Ms. Charles.

II. PROCEEDINGS BELOW

A. Procedural History and Discovery

In his Complaint filed on May 25, 2023, Mr. Barber alleged that Respondents' plan to execute him by lethal injection violates the Eighth Amendment's prohibition of cruel and unusual punishment. *See* Pet. App. 115a ¶ 103. He alleged that each of the past three times Respondents have implemented their lethal injection protocol, they have botched those executions by taking hours to try to establish IV access. *See id.* at 115a-116a ¶ 104. Further, Mr. Barber alleged that Respondents failed to address their repeated failures to implement their lethal injection protocol during or after their investigation of the three botched executions. *See id.* at 116a ¶ 105.

On June 5, 2023, Mr. Barber filed a motion for preliminary injunction. *See* Pet. App. 152a. Around the same time, Mr. Barber also served expedited discovery on Respondents. More specifically, Mr. Barber served interrogatories and requests for production seeking information regarding: (i) the botched executions, (ii) the De-

fendants' short-lived investigation following the attempted execution of Mr. Smith, (iii) the lethal injection protocol, (iv) the members of the IV Team, and (v) the vetting process for employing the IV Team. *Id.* at 600a-605a, 609a-616a.

On June 20, 2023, Respondents asked the district court that any injunction be "limited in scope so as to permit Barber's July 20, 2023, execution to be conducted by nitrogen hypoxia." Pet. App. 581a. On June 30, 2023, Mr. Barber filed a motion to compel discovery due to Respondents' deficient discovery responses. *Id.* at 583a. The district court held an evidentiary hearing on July 5, 2023.

B. The Lower Court Decisions

The district court denied Mr. Barber's motion for preliminary injunction on July 7, 2023. The district court found that Mr. Barber "successfully identified nitrogen hypoxia as a feasible, readily implemented alternative method of execution." Pet. App. 84a. But the district court then found that Mr. Barber did not show a substantial likelihood of success on the merits because he did not demonstrate that he faces a "substantial risk of serious harm" from his pending lethal injection execution. *Id.* at 83a-86a. The district court pretermitted consideration of the other factors for a preliminary injunction. *Id.* at 92a-93a. On July 11, 2023, Mr. Barber appealed the district court's denial of his preliminary injunction motion to the Eleventh Circuit.

On July 19, 2023, the Eleventh Circuit affirmed the district court in a 2-1 decision. Judge Jill Pryor issued a dissenting opinion.

REASONS FOR GRANTING THE PETITION

This case presents the Court with the opportunity to clarify both when a condemned inmate faces a "substantial risk of serious harm" under the Eighth Amendment because an execution will "superadd[] pain well beyond what's needed to effectuate a death sentence," *Bucklew*, 139 S. Ct. at 1126-27, and what a state must do when its demonstrated failures to carry out executions consistent with the Eighth Amendment create such a substantial risk. Respondents' pattern of engaging in failed, protracted efforts to carry out an execution (three times, in this case) demonstrates an objectively intolerable risk of harm under *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality opinion) (differentiating between isolated mishap and pattern). The undisputed evidence presented by Mr. Barber demonstrates that Respondents' protracted efforts are beyond Eighth Amendment limits. Respondents will impose needless pain over numerous hours, and extend the duration of the execution beyond tolerable levels, imposing physical and emotional anguish. To carry out an execution over the course of numerous hours while puncturing the inmate's body countless times and with increasing pain is both "cruel" and most definitely "unusual." Contrary to the findings of the courts below, the evidence in the record demonstrates that the supposed changes that Respondents made following the three botched executions last year did not address or even relate to the underlying issues causing the repeated failures, and thus do not diminish Mr. Barber's substantial risk of serious harm.

I. THE DECISIONS OF THE DISTRICT COURT AND ELEVENTH CIRCUIT CONFLICT WITH THIS COURT'S PRECEDENTS CONCERNING SUBSTANTIAL RISK OF SERIOUS HARM.

The Eleventh Circuit affirmed the district court's finding that Mr. Barber failed to show how Alabama's plan to execute him by lethal injection poses a substantial risk of serious harm. Pet. App. 23a; *Barber*, 2023 WL 4410499, at *9-10. In particular, the district court found Mr. Barber's claim showed only a "speculative" risk of pain, which the Eleventh Circuit held was not clear error. Pet. App. 29a; *Barber*, 2023 WL 4410499, at *9-10. Accordingly, even though both courts acknowledged that Mr. Barber met his burden to show a feasible, readily available execution method—nitrogen hypoxia—exists in Alabama, they found Mr. Barber failed to demonstrate a substantial likelihood of success on the merits of his Eighth Amendment claim.

The holdings below are in conflict this Court's holdings in *Baze* and *Bucklew*. The *Baze* Court made clear that while "an isolated mishap alone does not give rise to an Eighth Amendment violation," "a series of abortive attempts" at executing an inmate "would present a different case." 553 U.S. at 50 (quoting *La. ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947)). Such a pattern, *Baze* held, "would demonstrate an 'objectively intolerable risk of harm' that officials may not ignore." *Id.* Additionally, *Bucklew* reiterated the well-established principle that a punishment is unconstitutionally cruel when it "'superadds' pain well beyond what's needed to effectuate a death sentence." *Bucklew*, 139 S. Ct. at 1127.

That is precisely the situation here. Alabama has botched three executions in a row due to the same underlying problem: "protracted efforts to establish IV access." *See Smith*, 2022 WL 17069492, at *5. In each execution, inmates were repeatedly punctured for hours in an attempt to find a vein. Pet. App. 156a-157a. Two of the executions were eventually called off before midnight, while the third ended after the inmate appeared to be unconscious before the lethal drugs were even administered. *Id.* at 621a. This "series of abortive attempts"—in which the executions were botched for the same reason—provides this Court the opportunity to clarify that the "different case" discussed in *Baze* violates the Eighth Amendment. It is certainly "unusual"—no State has botched three executions in a row, using the same procedures, and no State has refused to correct the issues underlying the "abortive attempts" before proceeding with executions again. It is likewise "cruel." There is no plausible justification for imposing needless physical pain (not to mention the emotional anguish of an hours-long attempted execution that may simply fail) when the State concedes a painless alternative is readily available. Alabama's well-established pattern of botching executions is thus the prototypical example of an "objectively intolerable risk of harm" that prevents Respondents from pleading that they are "subjectively blameless." *Baze*, 553 U.S. at 50.

Mr. Barber will likely suffer the same grisly fate as those before him because Respondents have made no meaningful changes to their execution protocol or procedures. Pet. App. 193a (Respondents admitting no meaningful changes made to execution procedures); *id.* at 571a (Respondents admitting no meaningful changes to

protocol). In fact, Respondents believe there are "[n]o deficiencies" in "Alabama's execution procedures." *Id.* at 193a. And to make matters worse, Alabama has proven incapable of accessing Mr. Barber's veins in the past, as he testified to the district court, and his BMI is higher than or nearly the same as those whose executions were botched last year. Pet. App. 433a, 105:7-17; *see also id.* at 180a.

That means Mr. Barber will experience "'superadd[ed]' pain well beyond what's needed to effectuate" his death sentence. *Bucklew*, 139 S. Ct. at 1127; *see also* Pet. App. 54a ("[T]he record undoubtedly show[s] that there is a pattern of ADOC superadding pain during executions throughout its prolonged attempts to establish IV access."). The unrebutted evidence "from Mr. Barber's three expert witnesses establishes that IV access should take only a few minutes and never more than an hour, even with a resisting and uncooperative subject." *Id.* Respondents "offered no evidence to refute th[at] testimony." *Id.* Nor did Respondents present any evidence refuting the fact that the level of pain associated with needle punctures increases with each repeated attempt. *Id.* at 172a-173a ¶¶ 11, 15, 17; *id.* at 232a ¶¶ 16-20. As the unrebutted evidence shows, when a lethal injection execution is performed correctly, it can be done without "subjecting th[e] person to unnecessary pain." *Id.* at 408a, 80:13-16. Yet because Respondents have made no meaningful changes to their execution procedures, Mr. Barber will be forced to endure that unnecessary pain as his death "linger[s]" from repeated attempts to gain IV access and as he faces "superadded" "terror" from knowing that his execution will be prolonged for several hours. *Baze*, 553 U.S. at 46, 48.

The decisions below disregard *Baze* and *Bucklew*. The Eleventh Circuit concluded that "protracted efforts to obtain IV access"—no matter how long they take—do not "give rise to an unconstitutional level of pain." Pet. App. 21a. According to the Eleventh Circuit, "[t]he cause of the futility—whether it be a medical condition or pattern of difficulty by the IV Team in securing vein access—does not matter." *Id.* at 23a n.20. What matters instead is that "repeatedly and futilely" puncturing inmates and prolonging their death over the course of several hours "is not an Eighth Amendment violation." *Id.* (citing *Nance v. Comm'r, Ga. Dep't of Corr.*, 59 F.4th 1149 (11th Cir. 2023)).

Those conclusions cannot be squared with what "the law has always asked": whether "the punishment 'superadds' pain well beyond what's needed to effectuate a death sentence." *Bucklew*, 139 S. Ct. at 1127. Under the Eleventh Circuit's order, there can ***never*** be an Eighth Amendment violation regardless of how many times the inmate is punctured, regardless of how long his death lingers, and regardless of the emotional anguish he is forced to endure. That is not the law, and it never has been. *See Baze*, 553 U.S. at 48 (explaining that punishments have always been impermissibly cruel when they involve "infliction of pain for the sake of pain"). It is not the case, then, that no matter how "futil[e]" it is to set an IV line, there can never be a constitutional violation. *Baze* and *Bucklew* make clear that a line exists—and the Eleventh Circuit ignored it.

Beyond disregarding this Court's precedent, the Eleventh Circuit and district court also disregarded the record. Both courts concluded that Mr. Barber is not like-

ly to show that he faces a substantial risk of serious harm because: (1) no members of the previous IV Teams will be on the IV Team for Mr. Barber, and (2) Alabama extended the amount of time that the IV Team is permitted to carry out his execution by an additional six hours. Yet no evidence in the record supports that conclusion.

First, as to the IV Team, Respondents have never said that the botched execution last year were the fault of the previous team members. To the contrary, Respondents themselves said that the only problem with the last three executions was a lack of time. *See, e.g.*, Pet. App. 220a, 19:10-18 (ADOC representing to the district court that the State "just ran out of time" in the Miller execution); *id.* at 180a & n.5 (ADOC Commissioner telling the media that the IV team in the Smith execution "ran out of 'time'"); *id.* at 452a, 124:20-25 (Defendants telling the district court that the previous executions suffered from a "time crunch"). Thus, replacing the IV Team members makes no difference if the problems associated with the botched executions had nothing to do with the team itself.

Additionally, "it is difficult to see how personnel changes would cut off the pattern" of botched executions given Respondents' belief that there are "[n]o deficiencies" in their execution procedures, personnel or otherwise. Pet. App. 59a. That means regardless of who is on the IV Team for Mr. Barber's execution, the members will be following the same protocol and procedures that led to the botched executions last year. And while both the Eleventh Circuit and district court credited the affidavit of Warden Raybon—who said that he participated in the interview process

for the current team and that they have "experience in setting IV lines"—that representation means nothing "without knowing facts about the old team for comparison." *Id.* at 60a.

Second, regarding the extended time frame, the undisputed evidence in the record shows that increasing the amount of time superadding pain to Mr. Barber's execution *raises* the prospects of a constitutional violation, not lowers it. *See* Pet. App. 27a. Indeed, Mr. James was repeatedly punctured over the course of 3 hours; Mr. Miller was repeatedly punctured over the course of 90 minutes; and Mr. Smith was repeatedly punctured over the course of 2 hours. Now, Defendants have even more time to superadd pain to Mr. Barber's execution even though the record indisputably shows that setting an IV line should take a matter of minutes, never more than an hour, and repeated attempts increases the risk of severe harm. *See id.* at 394a, 66:22-25 (expert testimony stating that a peripheral IV line takes less than 10 minutes to set); *id.* at 395a-396a, 67:13-68:7 (expert testimony stating that pain increases with each failed attempt to start an IV line); *id.* at 231a-232a ¶ 14 (nurse affidavit stating that a peripheral IV line takes approximately 5-10 minutes to set); *id.* at 172a-173a ¶¶ 11, 15 (same).

Thus, the extended time frame "mak[es] it more, not less, likely that Mr. Barber will suffer additional pain inflicted through prolonged attempts to access his veins." Pet. App. 62a. That is especially clear in light of *Baze's* recognition that a one-hour cap in Kentucky's protocol represented an "important safeguard[]" against unconstitutional punishment. 553 U.S. at 55. Yet Defendants have taken the oppo-

site approach—extending the window in which they can torture Mr. Barber. And under the Eleventh Circuit's reasoning, that is not a problem, because "repeatedly and futilely" subjecting an inmate to punctures can never cross the line into "unnecessary pain." Pet. App. 23a n.20.

Contrary to the findings of the Eleventh Circuit and district court, the record shows Respondents are ignoring an objectively intolerable risk of harm. Three consecutive attempts to establish IV access that span hours apiece is a pattern. It is a pattern that Respondents—in identifying "no deficiencies" in their lethal injection procedures, have chosen to ignore.

II. ANOTHER FEASIBLE, READILY AVAILABLE METHOD OF EXECUTION EXISTS IN ALABAMA.

Both the Eleventh Circuit and district court acknowledged that Mr. Barber is likely to succeed on the second element of his method-of-execution claim because he "successfully identified nitrogen hypoxia as a feasible, readily implemented alternative method of execution." Pet. App. 65a; *Barber*, 2023 WL 4410499, at *7. This accords with clear Eleventh Circuit precedent, as the Eleventh Circuit has twice held that nitrogen hypoxia is an available alternative method as a matter of law. *See Price v. Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1328 (11th Cir. 2019) (per curiam); *Smith*, 2022 WL 17069492, at *5.

Nitrogen hypoxia also eliminates the risk of pain and suffering posed by repeated attempts at establishing IV access. That is because nitrogen hypoxia does not require the setting of any IV lines, and therefore entirely avoids the medical procedure that the State has proven incapable of performing. *See Smith*, 2022 WL

17069492, at *5 (finding that a complaint similar to Mr. Barber's "sufficiently pleaded that nitrogen hypoxia will significantly reduce his pain").

III. THIS CASE IS A STRONG VEHICLE FOR ADDRESSING THESE ISSUES.

This case is on direct appeal from interlocutory judgment. This case does not present any jurisdictional or substantive issues impeding this Court's review, and the factual record is largely uncontroverted. The Eleventh Circuit's decision upholding the denial of Mr. Barber's motion for preliminary injunction misreads this Court's precedents regarding what an inmate must show to establish a substantial likelihood of success on the merits for a method-of-execution claim. The protections available under the Eighth Amendment are an issue of profound legal, moral, and social significance warranting this Court's review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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