No. _____

IN THE

Supreme Court of the United States

KENNETH EUGENE SMITH,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

APPLICATION FOR STAY OF EXECUTION

Mr. Smith's execution is scheduled for a "time frame" that begins at 12:00 a.m. CST on January 25, 2024, and runs until 6:00 a.m. CST on January 26, 2024.

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Kenneth Eugene Smith respectfully requests that this Court stay his execution pending the disposition of his petition for writ of certiorari that he is filing contemporaneously with this application. That petition presents important questions regarding the constitutionality of the State of Alabama's second attempt to execute Mr.

Smith. Having tried and failed to execute Mr. Smith by lethal injection on November 17, 2022, the State now intends to use nitrogen hypoxia—a method of execution never before attempted by any state or the federal government—pursuant to a protocol that has never been tested. The threatened injury to Mr. Smith outweighs the harm that a stay would cause the State, and such relief is in the public interest. A stay is warranted to consider the weighty issues raised. *Lonchar v. Thomas*, 517 U.S. 314, 320–21 (1996); *Barefoot v. Estelle*, 463 U.S. 880, 893–94 (1983).

Mr. Smith is able to meet the requirements for a stay, because he can make a strong showing that he is likely to succeed on the merits of his claims. *Nken v. Holder*, 556 U.S. 418, 426 (2009). This Court also balances the harm to the parties and the public interest. *Id.* As set forth below, Mr. Smith has shown a likelihood of success on the merits, and the equities weigh in favor of granting a stay.

First, Mr. Smith is likely to succeed on the merits of his Eighth Amendment claim. The Eighth Amendment prohibits a State's successive attempt to execute a condemned person after "a series of abortive attempts or even a single, cruelly willful attempt." *See Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring); *see also Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality op.). In *Baze*, this Court distinguished "innocent misadventures," which do not give rise to an Eighth Amendment violation, from "a series of abortive attempts," which would. 553 U.S. at 50. Under *Baze*, there are two key features of "innocent misadventures." The first is that they are "isolated"; the second is that they are unforeseeable events for which State officials are blameless. *Id.*

The Alabama Court of Criminal Appeals neither acknowledged nor applied the critical distinction that this Court laid out in *Resweber* and *Baze*. Instead, citing *Resweber*, the Court of Criminal Appeals reasoned that if it was not "cruel and unusual punishment to execute an inmate who has been subjected to a current of electricity in a previous failed execution attempt," then *a fortiori* it is not cruel and unusual to allow a second execution attempt after a failure to set IV lines. Pet. App. 24a. That wholly misapplies the reasoning underlying *Baze* and *Resweber*.

Properly applied to the undisputed facts in this case, *Baze* and *Resweber* point strongly to Eighth Amendment protection from the State's second attempt to execute Mr. Smith. "Innocent misadventures," which do not give rise to Eighth Amendment violations, are aborted execution attempts that are both isolated and unforeseeable. The State's first attempt to execute Mr. Smith was anything but—Mr. Smith's was *the third execution in a row* that the State botched or failed to complete. What's more, the State's attempt to execute Mr. Smith failed for the same reason as the two prior botched attempts: difficulty placing IV lines despite protracted efforts. For Mr. Smith, this meant repeated needling while strapped to a gurney for hours. Despite two identical failures, ADOC did nothing to prevent a third. It conducted no investigation, and it made no effort to ensure that past errors would not recur in its attempt to execute Mr. Smith. ADOC cannot now contend that it had no way of knowing the hot stove would burn a third time. The two consecutive failed or botched attempts demonstrate that the State's first attempt to execute Mr. Smith (*i.e.*, what turned out to be the third straight failed or botched execution by the State of Alabama) presented an objectively intolerable risk of harm, and the State's and ADOC's willful

blindness to that risk forecloses any argument that they were "subjectively blameless for purposes of the Eighth Amendment." *Id.* (quoting *Resweber*, 329 U.S. at 470–71 (Frankfurter, J., concurring)).

Second, Mr. Smith will be irreparably harmed absent a stay. *See Nken*, 556 U.S. at 426. There is nothing more final and irreversible than death. Without a stay of his execution, Mr. Smith faces an unconstitutional death that will strip him of his "final dignity." *Miller v. Hamm*, No. 2:22-CV-506-RAH, 2022 WL 4348724, at *21 (M.D. Ala. Sept. 19, 2022) (citing *Smith v. Comm'r, Ala. Dep't of Corrs.*, No. 21-13581, 2021 WL 4916001, at *5 (11th Cir. Oct. 21, 2021) (Pryor, J., concurring)), *vacated*, No. 22A258, 143 S. Ct. 50 (Mem) (Sept. 22, 2022). ADOC's recent string of failed execution attempts—including the one Mr. Smith already suffered—is the only evidence needed to support this assertion.

Third, the balance of equities weighs heavily in favor of a stay. For starters, a stay best serves the public interest, which "is served when constitutional rights are protected." *Melendez v. Sec'y, Fla. Dep't of Corrs.*, No. 21-13455, 2022 WL 1124753, at *17 (11th Cir. Apr. 15, 2022) (internal quotation marks and citation omitted); *see also Dahl v. Bd. of Trustees of W. Michigan Univ.*, 15 F.4th 728, 736 (6th Cir. 2021) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (internal quotation marks and citation omitted)); *Ray v. Comm'r, Ala. Dep't of Corrs.*, 915 F.3d 689, 701 (11th Cir. 2019) ("[T]he public has a serious interest in the proper application and enforcement of the Establishment Clause . . . ."); *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) (same). Carrying out a sentence that no longer comports with constitutional protections is not in the public interest.

There is also the fact that the irreparable harm that denying a stay would cause Mr. Smith far outweighs the harm that granting a stay would cause ADOC. To be sure, the State and victims have an interest in carrying out timely executions. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006). But a delayed execution is a temporary harm that is ultimately redressable; a premature execution is permanent and irreparable. *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) (considering the "irreparability of the injury" of a premature execution to be "self-evident").

CONCLUSION AND PRAYER FOR RELIEF

Mr. Smith respectfully requests that this Court grant this application and stay his execution.

DATED: January 18, 2024

Respectfully submitted,

/s/ Robert M. Grass

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