No. 23A664
CAPITAL CASE

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
Alabama Court of Criminal Appeals

OPPOSITION TO APPLICATION FOR A STAY OF EXECUTION PENDING PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Kenneth Smith is scheduled to be executed by nitrogen hypoxia, perhaps the most humane method of execution ever devised. Such treatment is much better than Smith gave Elizabeth Sennett nearly thirty-six years ago. Smith and an accomplice tricked Elizabeth into letting them into her home, only to stab her eight times in the chest and twice in the neck—all to make a quick buck. Now Smith says his execution will be cruel and unusual because fourteen months ago, he was "stabbed" (Pet.8) with a needle to obtain IV access during a prior execution attempt. Smith's application for a stay should be denied for four reasons.

First, Smith's stay application should "not be entertained" because he failed to seek a stay in any of the courts below. SUP. CT. R. 23.3. The rule is not a technicality, and its import here is tremendous because Smith's application relies on disputed factual allegations about what happened during the first execution attempt. Moreover, because Smith never sought a stay from the state trial court, the court of appeals, or the Alabama Supreme Court, there is no record and no ruling below on the balance of the equities. He is asking this Court to grant him a preliminary injunction based solely on allegations, not evidence. It would be highly irregular if this Court were the first to pass upon Smith's fact-bound request.

Second, the decision of the Alabama Court of Criminal Appeals (ACCA)[1] rested on both the merits of Smith's claim and Smith's failure to meet state pleading requirements governing petitions for postconviction relief. Pet.App.21a-26a. Smith

[1] On January 12, 2024, the Alabama Supreme Court denied certiorari review of ACCA's decision denying Smith's second state-court petition for post-conviction relief.

failed to plead specific facts that would entitle him to relief. That state-law ground for denying his second petition for postconviction relief means Smith is unlikely to succeed because this Court is unlikely to grant certiorari. *See Lee v. Kemna*, 534 U.S. 362, 375 (2002) ("This Court will not take up a question of federal law presented in a case 'if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.'") (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)).

Third, the lower court's Eighth Amendment ruling was clearly correct. Smith relies almost entirely on *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), in which an inmate survived an attempted electrocution due to a mechanical failure. Because it was an accident, the Court *rejected* his argument that it would be unconstitutional to try again using the same method. Smith says his facts are "more egregious," Pet.13, but he wasn't subjected to an electrical current; Alabama attempted to establish an IV and never administered the lethal injection drugs. If a second attempted electrocution is constitutional, so is Smith's execution by nitrogen hypoxia. *Resweber* is still good law, and it dooms Smith's petition. *Accord State v. Broom*, 51 N.E.3d 620 (Ohio 2016), *cert. denied sub. nom. Broom v. Ohio*, 580 U.S. 1038 (2016); *Broom v. Shoop*, 963 F.3d 500, 512 (6th Cir. 2020) (Ohio Supreme Court's decision was a "direct application of Supreme Court precedent"). Smith presents no authority to the contrary, let alone a division of authorities on the question presented.

Fourth, the equities favor the State. Smith challenged the State's lethal injection protocol and demanded nitrogen hypoxia as his method of execution. Now, he

characterizes nitrogen hypoxia as "new," "novel," and "experimental." Pet.2, 4 n.4, 18. Such allegations cannot fairly be the basis for relief now—after Smith litigated successfully for the method of execution he will receive. Moreover, Smith's claim accrued after the first execution attempt on November 17, 2022, but he waited six months to bring this second postconviction petition on May 12, 2023, resulting in the emergency request at hand.

STATEMENT OF THE CASE

A. Smith Murders Liz Sennett in 1988.

On April 7, 1988, Kenneth Smith was indicted for capital murder by a Colbert County, Alabama grand jury for murdering Elizabeth Sennett in a sordid murder-for-hire plot. *Smith v. State*, 908 So. 2d 273, 279-81 (Ala. Crim. App. 2000). Smith's crime was not impulsive or spontaneous, but demonstrated planning and cold-blooded deception, including the active recruitment of others to participate in the murder. *Id.* at 280; *accord Smith v. State*, 588 So. 2d 561, 565 (Ala. Crim. App. 1991). Elizabeth welcomed Smith and his accomplice into her home, and they savagely beat her and stabbed the defenseless woman eight times in the chest and once on each side of the neck. *Id.* Smith was convicted of a capital offense: murder "done for a pecuniary or other valuable consideration or pursuant to a contract or for hire." Ala. Code §13A-5-40(a)(7).

B. Smith's 2022 Execution Date.

In November 2022, Alabama attempted to execute Smith by lethal injection. Following last-minute litigation that delayed Smith's execution, the State was unable to access Smith's veins and ultimately called off his execution. *See* Pet.App.17a-18a.

Smith continued pressing his 42 U.S.C. §1983 suit to obtain nitrogen hypoxia as his method of execution, and Commissioner Hamm ultimately provided Smith that relief. Pet.App.4a-5a. A consent judgment was required, along with "an injunction prohibiting [ADOC] from any attempt to execute Mr. Smith by lethal injection." Pl's Oppo. to Defs.' Mot. to Dismiss, *Smith v. Hamm, et al.*, No. 2:22-cv-00497 (M.D. Ala. Sept. 6, 2023), ECF No. 108. When Hamm agreed to Smith's demand, the court noted that "[i]n no fewer than two hearings before this Court, [Smith] has confirmed that nitrogen hypoxia is his chosen and preferred method of execution" and entered the consent judgment and injunctive relief. Final Judgment and Order at 1, *Smith v. Hamm, et al.*, No. 2:22-cv-00497 (M.D. Ala. Sept. 20, 2023), ECF No. 112. Importantly, it was Smith who had argued that absent a consent judgment and injunction, "there [would be] nothing precluding Defendants from later reversing course and undertaking an execution via lethal injection." *Id.* at 2. In short, Smith won federal relief, ensuring that he would never face the risks he associates with lethal injection.

C. Proceedings Below.

While Smith's initial §1983 lawsuit was pending, however, he returned to state court to pursue a second postconviction petition, including an Eighth Amendment

claim that *any* future attempt to execute him, by any means, would constitute cruel and unusual punishment. The state circuit court dismissed that petition, finding that it was insufficiently pleaded. In reaching that determination, the court applied Rules 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure. Rule 32.3 reads, "The petitioner shall have the burden of *pleading* and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." (Emphasis added). Rule 32.6(b) describes the burden of pleading postconviction claims as "a clear and specific statement of the grounds upon which relief is sought, *including full disclosure of the factual basis of those grounds*. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant further proceedings." (Emphasis added).

Smith appealed the circuit court's decision, and ACCA affirmed the denial of relief, finding that Smith's petition was insufficiently specific to warrant further proceedings under Alabama's procedural rules. Specifically, the court noted:

> Smith alleged generally that he had suffered physical pain during the November 2022 execution attempt when the execution team "repeatedly" attempted to insert needles in his arms and hands "for nearly two hours" and that he had told the team that "they were penetrating his muscles and causing severe pain." However, he did not allege specifically how many times the team attempted to insert the IV lines, or exactly how long the attempts continued. He also made only a bare allegation that he "continues" to suffer physical pain, without alleging specific facts describing that pain. Finally, he made a bare allegation that he suffers from post-traumatic stress disorder causing difficulty sleeping, nightmares, hypervigilance, hyperarousal, and disassociation, without alleging specific facts regarding how those symptoms rise to the level of a constitutional violation. Smith's general assertions in his petition are wholly insufficient to satisfy his burden of pleading.

Pet.App.22a.

ACCA affirmed on the separate ground that Smith's argument was "meritless" in any event. Pet.App.23a. Relying on the four-Justice principal opinion in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), which concluded that a failed execution by electric chair did not preclude a later execution using the same method, the court reasoned that "[i]f it is 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 it is certainly not cruel and unusual punishment to execute an inmate after the failure to insert an IV line in a previous failed execution attempt." Pet.App.24a. Citing an Ohio Supreme Court case rejecting a similar challenge, ACCA reasoned that "when the execution team was unable to insert the IV lines, the attempt to execute Smith was aborted and Smith's life was never at risk because the drugs were never administered." Pet.App.24a-25a. Because in Smith's federal case challenging the lethal injection protocol, "Smith 'sufficiently pleaded that nitrogen hypoxia will significantly reduce his pain,'" the "second attempt at execution will not be cruel and unusual punishment." Pet.App.25a. Accordingly, the Court concluded that Smith's claim was both "insufficiently pleaded and meritless." Pet.App.26a.

REASONS TO DENY THE APPLICATION

I. Smith Did Not Request A Stay In The Court Below.

This Court's Rule 23 provides that "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." SUP. CT. R. 23.3; *see Dolman v. United States*, 439 U.S. 1395, 1397-98

(1978) (Rehnquist, J., as Circuit Justice) ("Our Rule 27 provides that applications for a stay here will not normally be entertained unless application for a stay has first been made to a judge of the court rendering the decision sought to be reviewed."); *Bateman v. Arizona*, 329 U.S. 1302, 1304 (1976) ("In all cases, the fact weighs heavily 'that the lower court refused to stay its order pending appeal.'") (quoting *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers)).

And in the death penalty context, the Court has emphasized that "[a] stay of execution should first be sought from the" court below. *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983). Smith never sought a stay from the state trial court, the Alabama Court of Criminal Appeals, or the Alabama Supreme Court. Alabama courts entertain motions for stays of execution when an inmate gives them the opportunity. *See, e.g., Arthur v. State*, 71 So. 3d 733, 738 (Ala. Crim. App. 2010) (noting that "the Alabama Supreme Court granted the motion for a stay and stayed Arthur's execution"); *Ex parte Julius*, 584 So. 2d 1288 (Ala. 1989) (denying motion for stay of execution); *Tarver v. State*, 761 So. 2d 266 (Ala. Crim. App. 2000) (same). But Smith decided to keep his powder dry until he got to this Court. His strategy should be rejected, not rewarded.

Enforcement of Rule 23 is especially important for this application, which relies on disputed factual contentions that Smith has never proven. If Smith had moved for a stay below, the state courts might have ruled on the balance of the equities and issued relevant factual findings. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) ("In close cases the Circuit Justice or the Court will balance the equities and

weigh the relative harms to the applicant and to the respondent."). But there is no record here or ruling on the equities because Smith brought his request to this Court in the first instance. This Court should not be the first to consider whether to grant Smith an injunction, particularly where his litigation strategy has deprived the Court of any record upon which it could base that ruling. Smith lacks the "manner and degree of evidence required" to justify the extraordinary relief of an injunction because he never submitted evidence to the state courts. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

II. There Is No Reasonable Probability That This Court Will Grant Certiorari And Reverse.

To obtain a stay pending disposition of his petition for certiorari, Smith must show that there is a reasonable probability that this Court will grant review and a fair prospect that the Court would reverse. *See, e.g.*, *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers). Neither is likely. Even though the Alabama Court of Criminal Appeals rejected Smith's claim on the merits, it also rejected it for failure to comply with state-law pleading requirements, so either this Court lacks jurisdiction over the federal question or this case is a poor vehicle. On the merits, Smith does not cite a single decision from any Court at odds with the decision below. His entire argument relies on dicta from opinions of this Court that refute his claims rather than aid them. Smith's strained argument, based on a set of facts that this Court has encountered "once in in its history," Pet.10, does not warrant this Court's review.

A. The Decision Below Was Alternatively Decided on State-Law Grounds.

This Court lacks jurisdiction to address federal questions decided by state courts that are also supported by adequate and independent state-law grounds. *Foster v. Chatman*, 578 U.S. 488, 497 (2016); *see also Lee*, 534 U.S. at 375. This rule prevents this Court from issuing advisory opinions because a ruling on a federal issue will not affect the ultimate outcome of a case where the judgment below is supported by adequate and independent state-law grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). "Ordinarily, a violation of a state procedural rule that is firmly established and regularly followed will be adequate to foreclose review of a federal claim." *Cruz v. Arizona*, 598 U.S. 17, 25-26 (2023) (cleaned up). And the state ruling is not "independent of federal law" when the state law's application "depends on a federal constitutional ruling." *Foster*, 578 U.S. at 497. In other words, if the state court first needed to ascertain federal law before applying the state law grounds, the grounds are not independent.

The ACCA dismissed Smith's petition for failure to meet the state post-conviction pleading requirements under Rules 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure. Rule 32.3 places on habeas petitioners "the burden of pleading … the facts necessary to entitle the petitioner to relief." And Rule 32.6 requires the petitioner's pleading to include "a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings."

Invoking those rules, the ACCA concluded that Smith insufficiently pleaded that he "suffered physical pain" during the previous execution attempt, that he "continues" to suffer physical pain, and that he suffers psychological pain as well. Pet.App.22a. These pleading rules are routinely applied and adequate. *E.g.*, *Capote v. State*, No. CR-20-0537, 2023 WL 5316187, at *12 (Ala. Crim. App. Aug. 18, 2023); *Wimbley v. State*, No. CR-20-0201, 2022 WL 17729209, at *16 (Ala. Crim. App. Dec. 16, 2022). To be sure, state pleading standards may not be independent when their application is "intertwined" with a federal constitutional question. *See, e.g.*, *Frazier v. Bouchard*, 661 F.3d 519, 525 (11th Cir. 2011). But in this case, the decision below rejected Smith's claim regardless of whether he is right that "a single, cruelly willful attempt" (Pet.i) could render a second execution attempt unconstitutional. Even if the State could not execute someone who had suffered "physical and psychological pain" from a prior attempt, Pet.i, 13, 14, 16, 17-18, ACCA held that Smith's claim would fail because he inadequately pleaded those harms. *See* Pet.App.22a. Thus, were this Court to adopt Smith's view of the Eighth Amendment, "the same judgment would be rendered by the state court," and this Court's decision would be "advisory." *Herb*, 324 U.S. at 126; *see also Coleman*, 501 U.S. at 731.

Even if insufficient to preclude review, the alternative state-law ground relied upon below would greatly complicate the case, making it an unattractive vehicle for

answering the question presented. Indeed, Smith's petition repeatedly relies on the same allegations the courts below rejected as insufficiently pleaded. Pet.6, 16, 18.[2]

B. Smith's Eighth Amendment Argument Is Unsupported by Precedent.

Smith argues that the Eighth Amendment categorically bars his execution because the State previously attempted to execute him by lethal injection but stopped after failing to establish IV lines. But the "punishment[]," U.S. Const. amend. VIII, for Smith's crime is "death," Ala. Code §13A-5-30, not being "jabbed," Pet.17. Smith has no argument that his actual punishment (death) or his actual method (nitrogen hypoxia) is unconstitutional. Even if being "jabbed" could be considered a part of Smith's punishment, it was not cruel. There was nothing cruel about *stopping* the execution (before drugs were administered) because it could not be completed in time and instead—at Smith's request—using a different method of execution.

Smith rests his entire argument on *Resweber* and *Baze*, but neither supports him. This Court is not likely to grant certiorari and reverse.

1. In *Resweber*, Louisiana unsuccessfully attempted to execute an inmate with the electric chair. 329 U.S. at 460-61 (principal opinion). The inmate argued that attempting to execute him again with the same method violated the Constitution. *Id.* at 461. In his view, "he had once gone through the difficult preparation for execution and had once received through his body a current of electricity intended to cause

[2] Citing *McBurnett v. State*, 266 So. 3d 122 (Ala. Crim. App. 2018), Smith insists (Pet.6, 16) that his allegations must be accepted as true, but that only applies if the allegations are sufficiently pleaded in the first place. *See*, *e.g.*, *Poole v. State*, 988 So. 2d 604, 607 (Ala. Crim. App. 2007).

death," *id.*, and it would violate the Eighth Amendment to "require him to undergo this preparation again" and "subject[] him to a lingering or cruel and unusual punishment," *id.* at 464. The principal opinion of this Court assumed that the inmate had actually been electrocuted and nonetheless found those allegations constitutionally irrelevant: The Constitution proscribed only "cruelty" that is "inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Id.* Thus, although the "unforeseeable accident" resulted in "mental anguish" and "physical pain," it did not make his "subsequent execution any more cruel in the constitutional sense than any other execution"; the "purpose" was not "to inflict unnecessary pain," and the second attempt would inflict no more pain than necessary. *Id.*

Justice Frankfurter concurred for two reasons. First, he understood the Eighth Amendment not to apply to the States, *id.* at 469, 471-72, and second, applying the Due Process Clause, he stated that a second attempt would not "offend[] a principle of justice '[r]ooted in the traditions and conscience of our people,'" *id.* at 470-71. He ended his opinion with a "hypothetical": If a state engaged in a "series of abortive attempts at electrocution or even a single, cruelly willful attempt," such a situation could "raise different questions." *Id.* at 471. But he believed it best to leave that question to "the gradual process" of common-law judging. *Id.*

In sum, "five justices in *Resweber* agreed that the Constitution does not prohibit a state from executing a prisoner" following an unsuccessful execution attempt, provided that "the state (1) did not intentionally, or maliciously, inflict unnecessary

pain during the first, failed execution, and (2) will not inflict unnecessary pain during the second execution, beyond that inherent in the method of execution itself." *Broom v. Shoop*, 963 F.3d 500, 512 (6th Cir. 2020).[3]

Resweber disposes of Smith's claim. First, Smith's claim is almost identical to the claim the Court rejected. Both argued that the physical and mental pain from the first attempt bars the second. Pet.18; *Resweber*, 329 U.S. at 464. Here, the State did not purposefully fail to obtain IV access, just as it did not intentionally cause the electric chair to malfunction in *Resweber*. Nor (in this litigation) is there an issue with nitrogen hypoxia causing more pain than necessary in Smith's upcoming execution. In short, both cases involved "an accident, with no suggestion of malevolence." *Resweber*, 329 U.S. at 463. That was enough in *Resweber* and it is enough here.[4]

Smith claims that the facts here are "more egregious" than those of *Resweber*, Pet.13, but he has it backward. While the inmate in *Resweber* was electrocuted, no amount of a lethal drug was administered to Smith. And unlike in *Reseweber*, Smith will not face the same method of execution twice. Smith obtained a consent judgment

[3] Smith's attempt to accord special status to the solo concurrence is illogical. He claims that Justice Frankfurter cast "the decisive vote" (Pet.9, 11), but *Resweber* was a 5-4 decision, so each of the five Justices in the majority could be said to have cast the decisive vote. Smith's unexplained citation to the *Marks* rule fares no better; given that Justice Frankfurter did not apply the Eighth Amendment *at all*, it's hard to see how his reasoning could be the narrowest ground. *Accord Baze v. Rees*, 553 U.S. 35, 50 (2008) (describing the four-Justice plurality as the "principal" opinion).

[4] Smith's claim might fail even under the view of the *Resweber* dissenters, who found it significant that the attempt was not one "where a prisoner was placed in the electric chair and released *before* being subjected to the electric current." *Resweber*, 329 U.S. at 477 (Burton, J., dissenting) (emphasis added); *see Broom*, 963 F.3d at 512.

and an injunction that ensure he will never again face an IV team attempting to obtain access to his veins. Smith instead faces execution by "his chosen and preferred method of execution." Final Judgment and Order at 1, *Smith v. Hamm*, et al., 2:22-cv-00497 (M.D. Ala. Sept. 20, 2023), ECF No. 112.

Justice Frankfurter's concurrence (which did not even apply the Eighth Amendment) does not help Smith either. Justice Frankfurter reserved judgment on a hypothetical case that is materially different from Smith's. Here, as in *Resweber*, any pain from the State's unsuccessful attempt to establish IV access was accidental, not "cruelly willful," nor was it "a series of abortive attempts" to execute Smith. And in any event Justice Frankfurter was contemplating an inmate who had survived electrocution, 329 U.S. at 471-72, not one who survived attempted administration of an IV and to whom "the drugs were never administered," Pet.App.25a.

In *Baze*, this Court considered whether a particular method of execution was unconstitutional because of a purported risk that the method would be improperly administered. 553 U.S. at 41. To address that question, the plurality elaborated on *Resweber*: "The principal opinion noted that 'accidents happen for which no man is to blame,' and concluded that such 'an accident, with no suggestion of malevolence' did not give rise to an Eighth Amendment violation." *Id.* at 50 (quoting *Resweber*, 329 U.S. at 462, 463, 463-64; citations omitted). Reframing Justice Frankfurter's opinion within "present Eighth Amendment analysis," the plurality explained that "unlike an 'innocent misadventure,'" "a series of abortive attempts at electrocution" could violate the Eighth Amendment because it could show that "*the procedure at issue* gives rise

to a 'substantial risk of serious harm.'" *Id.* (emphasis added). *Baze* thus undermines Smith's position because it demonstrates that the Eighth Amendment inquiry is whether "the procedure at issue" (here, nitrogen hypoxia) poses an improper risk. *Baze* did not create a categorical exemption from capital punishment for certain inmates, Stay.Appl.2; Pet.14; rather, it created a distinction between accidents (no Eighth Amendment problem) and executions intentionally conducted through a series of episodes (potential Eighth Amendment problem). But Smith isn't challenging his method of execution. At best for him, *Baze* sheds no light on his present claim; worse, it focuses the analysis on the future method, not any past harm to the inmate.[5]

2. As Smith recognizes (Pet.15), the Ohio Supreme Court in *State v. Broom*, 51 N.E.3d 620 (Ohio 2016), rejected a similar claim, and this Court denied certiorari, *Broom v. Ohio*, 580 U.S. 1038 (2016) (mem.). The Ohio Supreme Court confronted the issue of whether a second execution attempt would violate the Eighth Amendment's ban on cruel and unusual punishment and the additional issue of whether a second execution attempt would violate the Ohio Constitution. The court first determined that the Eighth Amendment does not categorically bar a state from making a second attempt to execute an inmate, reasoning:

> Based on *Resweber*, we determine, as did the Eighth District, that there is no per se prohibition against a second execution attempt based on the Cruel and Unusual Punishments Clause of the Eight Amendment. The state's intention in carrying out the execution is not to cause unnecessary physical pain or psychological harm, and the pain and emotional

[5] Smith also suggests (at 14) that the Court should grant certiorari to clarify what it meant in *In re Kemmler*, 136 U.S. 436, 447 (1890), when it said that "punishments are cruel when they involve torture or a lingering death." But it's plain that *Kemmler* was speaking of particular methods of execution. *See id.* at 446 (listing "manifestly cruel and unusual" punishments, such as "burning at the stake" and "crucifixion").

> trauma Broom already experienced do not equate with the type of torture prohibited by the Eighth Amendment.

51 N.E.3d at 631.

The court then considered whether the petitioner had satisfied his burden of establishing that "the state in carrying out a second execution attempt is likely to violate its protocol and cause [him] severe pain" and found that he had not. *Id.* at 633. Having resolved those two questions, the court held that "the Eighth Amendment does not bar the state from carrying out [the petitioner's] execution." *Id.* The court also held that Ohio's constitution does not preclude the state from executing him. *Id.*

3. In sum, as this Court and the Ohio Supreme Court concluded, the Eighth Amendment's Cruel and Unusual Punishments Clause does not impose a per se prohibition on a second execution attempt. *Resweber*, 329 U.S. at 462-66; *Broom*, 51 N.E.3d at 631-33.[6] Smith did not allege below and does not argue now that the State intentionally or maliciously inflicted unnecessary pain on him during the unsuccessful preparations for his execution on November 17, 2022. He did not allege below and does not argue that the State intends to inflict pain on him during his second execution. And critically, he did not allege below and does not argue that Alabama's method of execution—nitrogen hypoxia, the method *he specifically requested in his federal proceeding*—presents a "substantial risk of serious harm." *Glossip v. Gross*, 576 U.S.

[6] Smith's claim is foreclosed by precedent. Even if it were not, Smith's petition offers no alternative. He has no argument that the original public meaning of the Eighth Amendment forbids executing him. He does not even argue that his position is supported by "the evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (quoting *Trop v.* Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). There is certainly no national consensus on this fringe case, no evidence of a trend in state legislation that could help Smith.

863, 877 (2015) (cleaned up). Again, as ACCA noted, Smith previously sued Alabama officials, pleading "that nitrogen hypoxia will significantly reduce his pain." Pet.App.26a. (quoting *Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13781 (11th Cir. Nov. 17, 2022)). Smith's case is on all fours with *Resweber* and *Broom*.

Lastly, Smith's rule would escalate the guerilla war against the death penalty, which starts with decades of "abusive litigation," *Baze*, 553 U.S. at 105 (Thomas, J., concurring in judgment), continues with attacks and pressure exerted on the manufacturers of execution equipment, *Bucklew v. Precythe*, 139 S. Ct. 1112, 1120 (2019), and inevitably involves last-minute stays, *id.* at 134. If Smith wins, once the State finally manages to attempt to carry out an inmate's lawful sentence—taking a step as minimal as establishing an IV—*anything* that would cause the State to call off the execution could vacate the death sentence. There is no likelihood that this Court will grant certiorari and that Smith would prevail in his appeal.

III. The Equitable Factors Strongly Favor the State.

In November 2022, Smith told this Court that "nitrogen hypoxia is an available and feasible method of execution that would reduce the intolerable risk created by ADOC's implementation of its lethal injection protocol." Opp. to Mtn to Vacate Stay at 12, *Comm'r, Ala. Dep't of Corr. v. Smith*, No. 22A441 (Nov. 17, 2022). Smith ultimately requested and obtained a consent judgment in that federal litigation, and the State has agreed to use nitrogen hypoxia as his method of execution. The district court's order in that case noted that "[i]n no fewer than two hearings before this Court, [Smith] has confirmed that nitrogen hypoxia is his chosen and preferred method of execution." Final Judgment and Order at 1, *Smith v. Hamm*, ECF No. 112.

Because capital punishment is constitutional, "[i]t necessarily follows that there must be a means of carrying it out." *Baze*, 553 U.S. at 47. When an inmate identifies an alternative method of execution as part of an Eighth Amendment §1983 challenge, he is taking the position that the alternative procedure is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain" compared to the challenged method. *Id.* at 52. Having prevailed in his previous §1983 lawsuit and obtained nitrogen hypoxia in lieu of lethal injection, Smith cannot reasonably assert (or rely on) a fear that his pending execution will be painful or the source of irreparable harm.

Yet Smith alleges that he will be irreparably harmed due to "ADOC's recent string of failed execution attempts" (Stay App. 4), and because "the State now intends to use nitrogen hypoxia—a method of execution never before attempted by any state or the federal government," *id.* at 2. This Court has stated that it will "not for a moment countenance 'last-minute' claims relied on to forestall an execution," especially where such claims "reflect[] a prisoner's 'attempt at manipulation.'" *Nance v. Ward*, 597 U.S. 159, 174 (2022) (citing *Bucklew*, 139 S. Ct. at 1134). Smith, having obtained his "chosen and preferred method of execution," should not be permitted to seek a stay of execution on the basis that the Eighth Amendment would be violated by use of that very method. If nitrogen hypoxia is feasible, readily available, and reduces the significant risk of suffering that Smith alleges to have occurred with lethal injection, then the Eighth Amendment should be satisfied.

Judicial estoppel is one tool to police unjustified method-of-execution claims.

In a recent writing in the Sixth Circuit, Judge Thapar explained:

> Rooted in equity, the rule of judicial estoppel "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citing 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.30, p. 134–62 (3d ed. 2000)). And it may prove a useful tool for identifying inmates who are more interested in delaying their executions than in avoiding unnecessary pain. *See Bucklew*, 139 S. Ct. at 1129.

Middlebrooks v. Parker, 22 F.4th 621, 628 (6th Cir. 2022) (citations edited). "When a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). In this case, the equities demand that Smith be prohibited from deliberately changing his position as to the constitutionality of nitrogen hypoxia as a method of execution according to the exigencies of this moment. *Id*. at 750.

The stage of this litigation also counsels against using equitable powers to stay Smith's execution. Reviewing his claim on the merits would require this Court to accept as true his disingenuous characterization of the evidence of "Alabama's recent history of botched or failed executions." Pet.16. This Court can do no more than speculate about what Smith could eventually prove with evidence, and that is no basis to delay his sentence when it has already been more than 35 years since his heinous crime. *See Hill v. McDonough*, 547 U.S. 573, 584-85 (2006).

CONCLUSION

Respondent respectfully requests that this Court deny Smith's application for a stay of execution.

Respectfully submitted,

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