No. _____

IN THE

Supreme Court of the United States

KENNETH EUGENE SMITH,

Petitioner,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, et al.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

The State of Alabama has chosen Kenneth Eugene Smith—a death-row inmate whom a jury voted 11-1 to sentence to life without parole, and whom the State has already attempted to execute once before—to be the first person in the United States to ever be executed by its novel and untested nitrogen hypoxia Protocol. That "Alabama has chosen this condemned person, this protocol, and this moment, even though Mr. Smith is suffering mentally and physically from the posttraumatic stress Alabama caused when it botched its first attempt to execute him in 2022," raises serious concerns. *See* Pet. App. 33a (J. Pryor, J., dissenting). Indeed, Mr. Smith was selected for execution even though he has not been able to fully exhaust claims raised in a state court postconviction proceeding arising from that failed attempt, which is a deviation from the state's custom, and treats Mr. Smith differently than other similarly situated inmates. And the State is proceeding despite the mounting evidence of Mr. Smith's escalating PTSD symptoms, which create a substantial risk that he will vomit during the execution and asphyxiate, causing prolonged or superadded pain and suffering. Indeed, the State has attempted to make eleventh-hour changes to its Protocol to address that risk but has, in doing so, created a situation where Mr. Smith could be without food or water for hours while he awaits execution.

The questions presented are:

Did the Eleventh Circuit deviate from established precedent when it affirmed the denial of a motion for a preliminary injunction on the ground that his planned execution by nitrogen hypoxia using the Alabama Department of Corrections' Protocol would violate his right to be free from cruel and unusual punishment under the Eighth Amendment by exposing him to a substantial risk of being left in a persistent vegetative state, experiencing a stroke, and/or asphyxiation?

Did the Eleventh Circuit deviate from established precedent when it held that Mr. Smith lacked standing to assert his claim that his planned execution would violate his right to equal protection under the Fourteenth Amendment against the state officials responsible for carrying out his execution?

PARTIES TO THE PROCEEDING

Petitioner is Kenneth Eugene Smith. Respondents are John Hamm, in his capacity as Commissioner of the Alabama Department of Corrections and Terry Raybon, in his capacity as the Warden of the Holman Correctional Facility. Because the petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

State Proceedings

State v. Smith, No. CC-89-1149 (Colbert Cty. Cir. Ct. Nov. 14, 1989)

Smith v. State, No. CR-89-1290, 620 So.2d 732 (Ala. Crim. App. Sept. 18, 1992)

State v. Smith, No. CC-89-1149 (Colbert Cty. Cir. Ct. May 21, 1996), amended sentencing order (Sept. 25, 1997)

Smith v. State, No. CR-97-0069, 908 So.2d 273 (Ala. Crim. App. Dec. 22, 2000)

Ex parte Smith, No. 1000976, 908 So.2d 302 (Ala. Mar. 18, 2005)

Smith v. State, Jefferson County, No. CC1989-1149-60 (Jefferson Cty. Cir. Ct. July 13, 2011)

Smith v. State, No. CR 07-1412, 160 So.3d 40 (Ala. Crim. App. Feb. 7, 2014)

Smith v. State, No. 1130536 (Ala. Aug. 22, 2014)

Smith v. State, No. 1000976 (Ala. Nov. 10, 2022)

Smith v. State, Jefferson County, No. CC-1989-001149.61 (Jefferson Cty. Cir. Ct. Aug. 11, 2023)

Smith v. State, No. 1000976 (Ala. Nov. 1, 2023)

Smith v. State, No. CR-2023-0594 (Ala. Crim. App. Dec. 15, 2023)

Ex parte Smith, No. SC 2023-0934 (Ala. Jan. 12, 2024)

Federal Proceedings

Smith v. Alabama, No. 04-10643, 546 U.S. 928 (Oct. 3, 2005)

Smith v. Dunn, No. 2:15-cv-0384, 2019 WL 4338349 (N.D. Ala. Sept. 12, 2019)

Smith v. Comm'r, Ala. Dep't of Corrs., No. 19-14543-P, 850 F. App'x 726 (11th Cir. Apr. 6, 2021), *reh'g denied* (May 19, 2021)

Smith v. Hamm, No. 21-579, 142 S. Ct. 1108 (Feb. 22, 2022)

Smith v. Comm'r, Ala. Dep't of Corr., No. 22-13781-P, 2022 WL 17069492 (11th Cir. Nov. 17, 2022)

Smith v. Comm'r, Ala. Dep't of Corr., No. 22-13846-P, 2022 WL 19831029 (11th Cir. Nov. 17, 2022)

Smith v. Alabama, No. 22-6049 (22A423), 143 S. Ct. 440 (Nov. 16, 2022)

Hamm v. Smith, No. 22A441, 143 S. Ct. 440 (Nov. 17, 2022)

Hamm v. Smith, No. 22-580, 143 S. Ct. 1188 (May 15, 2023)

Smith v. Hamm, No. 2:22-cv-497, 2023 WL 4353143 (M.D. Ala. July 5, 2023)

Smith v. Hamm, No. 2:23-CV-656-RAH, 2024 WL 116303, at *1 (M.D. Ala. Jan. 10, 2024)

Smith v. Alabama, No. 22A664 (Jan. 19, 2022)

Smith v. Comm'r, Ala. Dep't of Corr., No. 24-10095 (11th Cir. Jan. 24, 2024)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth Eugene Smith respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Memorandum Opinion and Order of the United States District Court for the Middle District of Alabama partially granting Respondents' motion to dismiss and denying Mr. Smith's preliminary injunction motion is attached as Appendix B. Pet. App. 36a–83a. The Eleventh Circuit Decision affirming the District Court decision is attached as Appendix A. Pet. App. 1a–35a.

JURISDICTION

The district court had subject matter jurisdiction over Mr. Smith's Second Amended Complaint, Pet. App. 147a–183a, under 28 U.S.C. §§ 1331, 1343(a)(3), 2201(a), and 1367(a) because Mr. Smith asserted four federal claims arising under 42 U.S.C. § 1983 and a related state claim seeking declaratory and injunctive relief.

On November 8, 2023, Mr. Smith filed his complaint, which he amended on November 20 and again on November 28. *See* District Court ECF Docket Entry ("DE") 1; DE 16, 18, 32.[1] On November 20, Mr. Smith moved for a preliminary injunction to prohibit Respondents from attempting to execute him on January 25, 2024 by nitrogen hypoxia

[1] "DE" citations are to entries on the docket of the District Court for the Middle District of Alabama in this case. "Doc." citations are to documents filed on the docket of the United States Court of Appeals for the Eleventh Circuit in this case.

using the Alabama Department of Corrections' Execution Procedures (August 2023) ("Protocol"). *See* DE 19. On December 4, Respondents moved to dismiss Mr. Smith's claims. *See* DE 39. On January 10, 2024, the district court (Huffaker, J.) partially granted Respondents' motion to dismiss and denied Mr. Smith's preliminary injunction motion. Pet. App. 36a–83a. Later that day, Mr. Smith filed a timely notice of appeal. *See* DE 70.

The United States Court of Appeals for the Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291. Accordingly, this Court retains the power of direct review under 28 U.S.C. § 1291. Thus, this Court has the jurisdiction to review Mr. Smith's appeal.

CONSTITUTIONAL PROVISIONS INVOLVED

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

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

On January 25, 2024, the Alabama Department of Corrections ("ADOC") intends to attempt the nation's first-ever nitrogen-hypoxia execution. In 2019, this Court acknowledged that nitrogen hypoxia has "never been used to carry out an execution and ha[s] no track record of successful use." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1130 (2019) (internal quotation marks and citations omitted). That remains the case, and the

procedures in the Alabama's nitrogen hypoxia Protocol have never been tested. Pet. App. 2a, 33a. And it will be the State's second attempt to execute Mr. Smith, having tried and failed to execute him by lethal injection in November 2022.

The State intends to proceed despite serious concerns raised by two Eleventh Circuit judges. To be sure, that "Alabama has chosen this condemned person, this protocol, and this moment, even though Mr. Smith is suffering mentally and physically from the posttraumatic stress Alabama caused when it botched its first attempt to execute him in 2022," is troubling. *See* Pet. App. 34a (J. Pryor, J., dissenting). Moreover, Judge Wilson separately concurred to express his "concerns" that the circumstances of Mr. Smith's execution "may rise to a cruel and unusual execution." Pet. App. 27a (Wilson, J., concurring). Specifically, Judge Wilson outlined his concerns about "what would occur if Smith were to vomit after nitrogen has been turned on, because ADOC has no protocol to handle this situation." *Id.* Instead, ADOC's representative "testified that the execution team will do nothing if this were to happen, which could lead Smith to asphyxiating." *Id.* "And expert testimony established that if Smith were to vomit once nitrogen is introduced, Smith faces a likelihood of asphyxiating on his own vomit." *Id.* Judge Wilson also expressed concern about "Smith's prior failed execution and subsequent litigation," Pet. App. 28a, which ended abruptly when the State suddenly announced on August 25, 2023 that it had a new protocol for nitrogen hypoxia for which Mr. Smith would be its test subject.

Despite those serious concerns, the Eleventh Circuit majority concluded that it was bound by this Court's precedents to affirm the district court's denial of a preliminary injunction on his Eighth Amendment claim. Indeed, the court of appeals stated that it was

"impossible" to reverse. Pet. App. 21a n.6. It further concluded that Mr. Smith lacked standing to assert his Fourteenth Amendment claim because he sued the Alabama official statutorily empowered to carry out his execution instead of the Alabama Attorney General. As explained below, both conclusions are contrary to this Court's established precedent.

A. Factual Background

Mr. Smith was convicted of capital murder in 1996. *See Smith v. Comm'r, Ala. Dep't of Corr.*, 850 F. App'x 726, 726 (11th Cir. 2021) (per curiam). The jury recommended a sentence of life imprisonment without the possibility of parole by a vote of 11 to 1. *See id.* Mr. Smith nevertheless awaits execution because the trial court overrode the jury's recommendation and sentenced him to death. *See id.*

Mr. Smith's execution is scheduled for January 25, 2024 by nitrogen hypoxia. Pet. App. 2a. This is the second time that the State has scheduled Mr. Smith's execution. On November 17, 2022, ADOC attempted, but failed, to execute Mr. Smith by lethal injection. Pet. App. 4a–5a. Before that, in August 2022, Mr. Smith had commenced an action in the United States District Court for the Middle District of Alabama asserting, among other things, that his execution by lethal injection would violate his Eighth Amendment rights (the "Lethal Injection Action"). *See Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13781, 2022 WL 17069492, at *1 (11th Cir. Nov. 17, 2022) (per curiam). In that action, Mr. Smith alleged that nitrogen hypoxia was a feasible and available alternative method of execution that would significantly reduce the risk posed to him by ADOC's plan to execute him by lethal injection. *See id.* at *5. In doing so, Mr. Smith did not waive his right to challenge

ADOC's Protocol for executing condemned people by nitrogen hypoxia, which did not yet exist and which ADOC would not disclose for another year.

ADOC's attempt to execute Mr. Smith in November 2022 "caused him severe and ongoing physical and psychological pain, including severe post-traumatic stress disorder." Pet. App. 148a ¶ 4. Mr. Smith was strapped to a gurney for nearly four hours, including for about two hours while—unknown to him—a stay was in effect. Pet. App. 4a. Afterwards, three unidentified men unsuccessfully searched for veins in Mr. Smith's arms, hands, and feet, repeatedly inserting and manipulating needles in his limbs and ignoring his complaints of great pain. *See Smith v. Hamm*, No. 2:22-cv-00497, DE 71 ¶ 180–88 (M.D. Ala.). *See id.* at ¶¶ 180–88. Then they attempted to access Mr. Smith's veins through a central line procedure by inserting a large gauge needle under his collarbone, which felt to Mr. Smith "like he was being stabbed in the chest" and caused intense pain. *Id.* at ¶¶ 190–210. When ADOC aborted its execution attempt and released Mr. Smith from the gurney restraints, Mr. Smith was unable to move his arms, sit up, stand, walk, dress, or undress himself without assistance. *See id.* at ¶¶ 226–30. Due to ADOC's failed attempt execution attempt, Mr. Smith has post-traumatic stress disorder ("PTSD"). Pet. App. 33a.

In December 2022, Mr. Smith filed an amended complaint to enjoin the state from any further attempts to execute him by lethal injection ("the Lethal Injection Action"). Pet. App. 5a. That same month, he also served discovery requests on ADOC about the failed execution attempt. *See Smith v. Hamm*, No. 2:22-cv-00497, DE 80 (M.D. Ala.). For the next nine months, ADOC avoided responding to those requests by moving to dismiss Mr. Smith's operative complaint, despite this Court having already held that Mr. Smith stated

a plausible Eighth Amendment claim. *Smith v. Hamm*, No. 2:22-cv-00497, DE 78, 80, 95, 97, 100 (M.D. Ala.). Commissioner Hamm also filed a petition for a writ of certiorari in this Court challenging the Eleventh Circuit's holding that Mr. Smith had plausibly alleged that nitrogen hypoxia is an available alternative method of execution because, according to ADOC, "nitrogen hypoxia remains unavailable as a matter of fact." *Hamm v. Smith,* No. 22-580, Petition for a Writ of Certiorari at 10 (Dec. 20, 2022).

In May 2023, Mr. Smith filed a Rule 32 petition in the Alabama circuit court arising from ADOC's failed execution attempt the previous November (the "Petition").[2] Mr. Smith alleged that a second attempt to execute him would violate the Eighth Amendment because it would follow a "a series of abortive [execution] attempts . . . or . . . a single cruelly willful attempt." *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring).

For ten months after ADOC's failed attempt to execute Mr. Smith by lethal injection, ADOC threatened Mr. Smith with another attempt by the same method while successfully opposing discovery in the Lethal Injection Action based on their pending motion to dismiss Mr. Smith's claims. In July, the district court denied the defendants' motion to dismiss Mr. Smith's Eighth Amendment claim, *see Smith v. Hamm*, No. 2:22-cv-497, 2023 WL 4353143, at *7 (M.D. Ala. Jul. 5, 2023), which eliminated all obstacles to discovery. The parties' initial disclosures were due on August 29, and the defendants'

[2] The circuit court dismissed the Petition on August 11. Since then, the Alabama Court of Criminal Appeals affirmed and the Alabama Supreme Court denied Mr. Smith's petition for certiorari on January 12, 2024. This Court denied certiorari on January 24, 2024. *See Smith v. Alabama*, No. 23-6517; 23A664. Mr. Smith could still seek review through a federal habeas proceeding.

responses to Mr. Smith's discovery requests—some of which had been outstanding for nine months—were due the following week. *See* Pet. App. 30a.

But, on August 25, the State moved in the Alabama Supreme Court for authority to execute Mr. Smith by nitrogen hypoxia. *Id.* Given Mr. Smith's pending state court Petition, the State's desire to execute Mr. Smith was contrary to its "custom" to "wait[] to move for an inmate's execution until he has exhausted his conventional appeals: direct appeal, state postconviction, and federal habeas." *See Woods v. Comm'r, Ala. Dep't of Corr.*, 951 F.3d 1288, 1291 (11th Cir. 2020). Simultaneously, the Respondents moved to dismiss the Lethal Injection Action as moot, representing that Respondent Hamm had determined that nitrogen hypoxia would be an available method of execution for Mr. Smith. Pet. App. 30a. That same day, ADOC released a heavily redacted version of the Protocol.

On September 20, the district court entered a judgment enjoining Respondents "from executing Kenneth Eugene Smith by lethal injection" and dismissed the Lethal Injection Action. *See Smith v. Hamm*, No. 2:22-cv-497, DE 112 (M.D. Ala.). Before the district court dismissed the Lethal Injection Action, Mr. Smith made clear through counsel that he was "doing [his] due diligence on that [recently released and heavily redacted] protocol" and "reserve[d] [his] rights" to assert "claims as appropriate, in an appropriate forum at the appropriate time." DE 44-1 at 3:6–24; *see also id.* at 4:10–13.

In the meantime, on November 1, a six-Justice majority of the Alabama Supreme Court granted the State's motion for authority to execute Mr. Smith over the dissent of two Justices. On November 8, Governor Ivey "set a thirty-hour time frame for the execution to

occur beginning at 12:00 a.m. on Thursday, January 25, 2024, and expiring at 6:00 a.m. on Friday, January 26, 2024." DE 62-41.

B. Procedural Background

Also on November 1, Mr. Smith filed a complaint in the district court, which he amended on November 20 and again on November 28. In the operative complaint, Mr. Smith asserts four federal claims under 42 U.S.C. § 1983 and a related state claim. Pet. App. 147a–183a. Specifically, Mr. Smith sought a declaration and a corresponding injunction that attempting to execute him by nitrogen hypoxia using the Protocol would, among other things, violate his right to equal protection under the Fourteenth Amendment and violate his right to be free from cruel and unusual punishment under the Eighth Amendment. Pet. App. 175a–177a. Mr. Smith asserted his claims against Respondent Hamm in his official capacity as ADOC Commissioner and Respondent Raybon in his official capacity as Holman Warden. Pet. App. 152a–153a ¶¶ 22–27.

In support of his Eighth Amendment claim, Mr. Smith alleges that there are feasible and available alternatives to executing him by nitrogen hypoxia using the Protocol. Consistent with his allegation in the Lethal Injection Action, Mr. Smith alleges that execution by nitrogen hypoxia is one such alternative if Respondents "amend the Protocol to cure its deficiencies" by among other things, "us[ing] a closed space or a hood" rather than a mask to supply nitrogen. Pet. App. 173a ¶ 102. Mr. Smith further alleges, "[a]lternatively, if Respondents are unwilling or unable to amend the Protocol so that it complies with constitutional requirements, the firing squad" is another feasible and available alternative. Pet. App. 174a ¶ 103.

On November 20, Mr. Smith moved for a preliminary injunction on all but his First Amendment claim. On December 4, Respondents moved to dismiss Mr. Smith's claims. At the same time Mr. Smith filed his preliminary injunction motion, he also moved for (i) leave to serve discovery, (ii) expedited discovery, and (iii) a scheduling order. The court permitted the parties to engage in limited discovery by serving up to five document requests, up to five interrogatories, and taking up to three depositions. On November 22, 2023, Mr. Smith finally received an unredacted copy of the Protocol after the district court ordered Respondents to produce it.

On January 10, 2024, the district court granted in part and denied in part Respondents' motion to dismiss and denied Mr. Smith's preliminary injunction motion. Pet. App. 36a–83a. The district court granted Respondents' motion to dismiss Mr. Smith's Fourteenth Amendment claim, but denied the motion as to the remainder of Mr. Smith's claims. Although Respondents did not raise the issue, the court held that Mr. Smith lacks standing to assert his Fourteenth Amendment claim against them. Pet. App. 57a. According to the district court, "Alabama law tasks the Attorney General with seeking and moving for an execution date with the Alabama Supreme Court." Pet. App. 58a. The district court concluded that Mr. Smith's injury—which the court characterized as being "selected for execution before his second state postconviction appeal has been exhausted and before the executions of other inmates"—"is fairly traceable back to the Attorney General, not the Commissioner of the ADOC or the Warden of Holman," Pet. App. 58a–59a, even though Alabama law directs that "[t]he warden . . . shall be the executioner" and "the Department of Corrections" alone is empowered "to carry out the execution." Ala. Code § 15-18-82(c), (d).

The court then denied Mr. Smith's motion for a preliminary injunction based on its finding that Mr. Smith was not likely to succeed on the merits of his Eighth Amendment. With respect to Mr. Smith's Eighth Amendment claim, the court held that Mr. Smith had shown a theoretical possibility that his execution under the Protocol could cause him substantial pain, but "there is simply not enough evidence to find with any degree of certainty or likelihood that execution by nitrogen hypoxia under the Protocol is substantially likely to cause Smith superadded pain short of death or a prolonged death." Pet. App. 76a–77a.

Mr. Smith appealed that decision to the U.S. Court of Appeals for the Eleventh Circuit. While that appeal was pending, new evidence developed of Mr. Smith's deteriorating health. Specifically, that on the evening of January 18, 2024, he reported to his counsel that he is vomiting consistently. Pet. App. 103a. The information bears directly on the risk that Mr. Smith will vomit during his scheduled execution and confirms his expert's opinion that Mr. Smith's condition will deteriorate as his execution approaches. *See* Pet. App. 244a ("It is my clinical opinion that the current plan of execution and the possibility of having to again face these procedures is completely terrifying for Mr. Smith and leading to ongoing deterioration."); Pet. App. 271a ("The new execution date set for Mr. Smith will begin a process of reexperiencing of reminders and details that are sure to be highly triggering for Mr. Smith."); *see also* Pet. App. 131a–133a.

On January 24, 2024, the Eleventh Circuit affirmed in a 2-1 decision. Pet. App. 1a–35a. As to Mr. Smith's Fourteenth Amendment claim, the Court's reasoning was brief. It noted that "testimony in the record confirms the Attorney General's primary role in selecting condemned inmates and serving as the final confirmation for an execution to proceed

during the course of Alabama's execution process" and "[w]ithout the Attorney General's actions, neither Hamm nor Raybon may proceed with their duties." Pet. App. 13a–14a. The court therefore reasoned that Mr. Smith's injury from Respondents' planned execution "fails on traceability grounds." *Id.* As to the Eighth Amendment claim, the court found no clear error, explaining that under its reading of *Glossip v. Gross*, 576 U.S. 863, 881 (2015)—a case about an established execution method—it was "impossible" to reverse because of the lack of evidence on the "effects of nitrogen hypoxia will have on Smith." Pet. App. 21a.

REASONS FOR GRANTING THE PETITION

I. The Eighth Amendment Prohibits Executions That Subject a Condemned Person to a Substantial Risk of Asphyxiation From Their Own Vomit, Persistent Vegetative State, or Stroke.

This Court has held that a method of execution violates the where there is a "'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Baze v. Rees*, 553 U.S. 35, 50 (2008) (quoting *Farmer v. Brennan*, 511 U.S. 825, 846 & n.9, (1994)); *see also Nance v. Ward*, 597 U.S. 159, 164 (2022) (holding that a plaintiff asserting a method-of-execution claim must prove "that the State's method of execution presents a 'substantial risk of serious harm'—severe pain over and above death itself" (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015))). A condemned person bringing a method of execution claim must also "show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew*, 139

S. Ct. at 1125. Mr. Smith submitted evidence to establish both elements of his Eighth Amendment claim.

A. The Record Establishes that Mr. Smith is at a Substantial Risk of Asphyxiating on His Own Vomit.

The Eleventh Circuit affirmed the district court's finding that Mr. Smith failed to show how Alabama's plan to execute him by nitrogen hypoxia poses a substantial risk of serious harm. In particular, the district court found the risk of Mr. Smith choking on his vomit during execution is "possible only upon the occurrence of a cascade of unlikely events." Pet. App. 77a. This ignores expert testimony, medical records, and even ADOC's own documents which demonstrates that Mr. Smith is at a real risk of vomiting during his execution.

First, it is undisputed that oxygen deprivation can cause nausea and vomiting among other things. *See* DE 62-52 at 5; DE 62-35 at 203:3–10). This is supported by ADOC's own internal document identifying nausea as a cause and symptom of oxygen deprivation. *See* DE 62-36 at ADOC_Hypoxia_000756 (emphasis added); *see also* DE 62-33 at 103:4–104:4. Moreover, both parties' experts rely on scientific literature documenting nausea as a symptom of oxygen deprivation. DE 62-19 at 6.

Second, Respondents do not dispute that Mr. Smith has PTSD from ADOC's first botched attempt to execute him. Nor do they dispute that vomiting is a documented symptom of PTSD. Since the botched execution, Mr. Smith has "demonstrated and reported across time several fairly common . . . gastrointestinal symptoms that can accompany posttraumatic stress," including nausea. DE 67 at 153:6–22; *See also* DE 62-54 at 20. Dr. Portfield explained that these symptoms would worsen as the execution draws

near. Pet. App. 272a ("The threat of having to experience another execution and all of its procedures will most certainly cause [Mr. Smith] severe suffering, destabilization and psychological deterioration.").

Third, Mr. Smith has documented evidence of recent and repeated vomiting as his scheduled execution approaches that is not responsive to prescription medication. DE 87-5 ¶ 3 ("The medical records note multiple instances of Mr. Smith reporting nausea and vomiting: 12/24/2023, 1/9/2024, and 1/18/2024."); DE 87-4 ¶ 2 ("On 12/24/2023, Mr. Smith reported nausea and vomiting. On 1/9/2024, Mr. Smith reported vomiting, and on a 1/18/2024 follow up, Mr. Smith reported intermittent nausea/vomiting/diarrhea x 2 weeks"). Just as Dr. Porterfield predicted, Mr. Smith's PTSD symptoms have worsened and will continue to worsen. DE 87-5 ¶ 6 ("The medical records that I reference here indicate that Mr. Smith is experiencing a worsening of his symptoms of PTSD. This is consistent with my opinions set forth in my prior report and declaration – that his PTSD related to the trauma of his first attempted execution on November 17, 2022 will be exacerbated by the approaching events and protocols of a second execution."). Both Dr. Porterfield and Dr. Yong concluded after reviewing these new medical records that Mr. Smith has a significant risk of nausea and vomiting during his execution. *See* DE 87-5 ¶ 7 ("It is my opinion to a reasonable degree of clinical certainty that there is a substantial and serious risk that Mr. Smith will experience nausea and vomiting during his execution, due to his condition of PTSD and his ongoing, worsening symptoms of nausea and vomiting seen over the last four weeks. This creates a significant risk that Mr. Smith will suffer substantial harm including but not limited to asphyxiating--that is, choking to death--on his

own vomit."); DE 87-4 ¶ 4 ("Given this new information, there is a significant risk that Mr. Smith will experience nausea and vomiting during his execution.").

Mr. Smith has presented concrete evidence demonstrating a real risk of vomiting during his execution when he is in the same environment where he was traumatized in November 2022. However, ADOC will not have the necessary equipment to address the very real possibility that Mr. Smith vomits while wearing a mask before nitrogen is flowing, even if they do intervene. Pet. App. 237a; Doc. 16 at 39–40 (Appellant's Opening Brief). Additionally, because ADOC will not intervene at all if he vomits once the nitrogen is flowing and has inadequate procedures to address vomiting if it occurs while breathing air is flowing, Mr. Smith is "sure or very likely" to asphyxiate on his vomit as he lays reclined on a gurney with a mask against his face. *See* DE 62-52 at 8; DE 62-35 at 307:16–308:6; DE 67 at 79:20–80:3.

B. The Eleventh Circuit and District Court Erroneously Credited Respondents' Eleventh Hour Modification to the Protocol.

In ignoring the mountain of evidence showing a real and substantial risk of vomiting, the district court weighed the evidence of Mr. Smith's vomiting risk against Respondents' last-minute plan to withhold any solid food from Mr. Smith for eight hours and any liquid nourishment for two hours before his scheduled execution, and ultimately concluded the protocol modifications rendered Mr. Smith's risk of experiencing nausea and vomiting "speculative." *See* Pet. App. 88a. In doing so, the court made two errors.

First, the court incorrectly stated that Mr. Smith had argued the Protocol was deficient for lack of a nothing-by-mouth order. Pet. App. 88a ("The Defendants will implement just what Smith previously argued the Protocol lacked: a nothing-by-mouth

order); *see also* Pet. App. 19a ("[Defendants' modification] was similar to one of Smith's suggested remedies to the Protocol to reduce the substantial risk of harm"). But Mr. Smith never proposed a nothing-by-mouth order as a remedy to the Protocol nor criticized its absence from the protocol.[3] To the contrary, Respondents first raised the issue of a nothing-by-mouth order when questioning Dr. Yong at the preliminary injunction hearing. DE 67 at 69.

Second, the district court's findings are based on the clearly erroneous assumption that a food and liquid restriction will alleviate the risk of Mr. Smith vomiting. This is contrary to evidence presented by Dr. Yong. Dr. Yong discussed the procedures for patients who vomit into the mask during the administration of anesthesia. Pet. App. 192a; Pet. App. 237a; *see, e.g.*, DE 67 at 69:12–19; 78:15–79:2; 162:6–13. As these patients were under nothing-by-mouth orders, it is clear that such modifications do not eliminate the risk of vomiting. Nor do they eliminate the risk for Mr. Smith who suffers from PTSD and has been experiencing vomiting that has not been alleviated by an antiemetic prescribed by ADOC for that purpose.

In crediting the Respondents' modification and ignoring Mr. Smith's evidence, the district court committed clear error in concluding there was no convincing evidence that Mr. Smith is at a substantial risk of asphyxiating on his own vomit. *See United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (holding that clear error occurs "when [,]

[3] As an alternative to reduce the risk of vomiting, Mr. Smith proposed a hood or firing squad. Pet. App. 173a, 174a.

although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed").

Even with the changes proposed by Respondents, Mr. Smith has demonstrated that the Protocol is "sure or very likely" to cause the "needless suffering" and "sufficiently imminent danger[]" of asphyxiation on his own vomit. *Helling v. McKinney*, 509 U.S. 25, 33–34 (1993). Indeed, the State's eleventh-hour change to its Protocol both subjects Mr. Smith to new harm—he will be unable to eat or drink anything for hours before his scheduled execution—and shows that the State is barreling ahead without a plan for any number of scenarios that could go horribly wrong.

There is little research regarding death by nitrogen hypoxia. When the State is considering using a novel form of execution that has never been attempted anywhere, the public has an interest in ensuring the State has researched the method adequately and established procedures to minimize the pain and suffering of the condemned person. It is therefore in the public's interest to ensure Respondents comply with the Constitutional protections afforded to Mr. Smith. The Eleventh Circuit ruled that the "lack of evidence here on the effects nitrogen hypoxia will have on Smith makes it impossible for us to reverse" because this Court's ruling in *Glossip v. Gross*, 576 U.S. 863, 881–84 (2015), "tied [its] hands." Pet. App. 21a n.6. But it cannot be that this Court's reasoning in *Glossip*, which involved an established execution method—*i.e.*, that a petitioner bears "the burden of persuasion," even when there is a "dearth of evidence," *id.*—applies to an *entirely new* method of execution that has never been tried before anywhere, or even tested. The State must bear some initial burden of production that the method it will use will not cause

superadded pain, lest it be permitted to unilaterally select a new mode of execution, that just a few months ago it argued was not possible, without any scientific support or the need to produce the documents explaining how and why that method was accepted. Otherwise, the State could select even highly experimental methods of execution simply because they had been untested.

C. The Record Establishes that Mr. Smith is at a Substantial Risk of Experiencing Dire Consequence Short of Death from Oxygen Infiltrating the Mask.

The Eleventh Circuit (like the district court) similarly ignored evidence that ADOC's Protocol fails to ensure an airtight seal which will allow oxygen to infiltrate the mask causing dire consequences short of death, including a persistent vegetative state or stoke.

First and foremost, it is undisputed that depriving a person of sufficient oxygen can cause dire consequences short of death, including transitioning into a persistent vegetative state, having a stroke, or suffocating. *See* DE 62-52 at 5; DE 67 at 161:14–162:5; DE 62:35 at 81:14–82:5; *see also* DE 62-53 ¶ 13.2. For this very reason, "[t]he use of a sealing facemask has been abandoned" by people willingly using nitrogen or other inert gases to engage in assisted suicide. DE 62-53 ¶ 5.1; *see also* DE 62-57 at ¶ 16; DE 62-34 at 7. While this risk must be mitigated by an airtight seal, the Protocol provides no procedures to establish or ensure an airtight seal of the mask.

The User's Manual for the mask expressly states that the mask must be properly fitted and sealed to prevent "leakage, which dangerously reduces respiratory protection." DE 62-28 at 4. To ensure proper fitting and seal, the User's Manual explicitly requires that a negative pressure test should be performed to test whether the mask is sealing correctly.

Id. at 7, 8. If a negative pressure test cannot be performed, the mask should not be used. *Id.*

The record is clear that ADOC has no intention of performing that test when the mask is placed on Mr. Smith. DE 62-33 at 150:11–21. Instead, ADOC intends to rely on the positive pressure created by the flow rate of nitrogen into the mask. *Id.* at 149:7–21. This is directly contrary to the User's Manual express warning that "positive pressure of air in the respirator does not reduce the importance of fit testing." DE 62-28 at 4. Instead the Eleventh Circuit improperly relied on footage that showed the impact of nitrogen being pumped into the mask. Pet. App. 20–21a. However, these tests did not account for any variability, were run only once in some instances and were not subject to peer review. DE 65 at 31–32.

Finally, the Eleventh Circuit acknowledged that ADOC's video demonstrations have "limited relevance given the vastly different circumstances the condemned faces—a second execution, by a novel method, through the use of an inert gas." Pet. App. 20a n. 5. But this reasoning applies equally to other evidence in the record. The mask that ADOC will use for the execution is an off-the-rack, one-size-fits-all mask that is designed for *industrial* use *to supply* workers with oxygen and protect them from environmental hazards. It was not intended for use in executions to deprive a condemned person, suffering from PTSD, of oxygen. For this reason, the district court clearly erred in finding it highly unlikely that the mask would dislodge or the seal would be broken, and the Eleventh Circuit should have reversed the denial of Mr. Smith's preliminary injunction motion.

D. Mr. Smith Established That There are Feasible and Available Alternatives, and the District Court Improperly Applied the Alternative Method Under *Nance*.

As the Eleventh Circuit held, the district court incorrectly applied a "veritable blueprint" standard in concluding that Mr. Smith failed to identify a feasible, readily implemented alternative. Pet. App. 22a n.7. Applying the proper standard, Mr. Smith established that there are feasible and available alternative methods, including amending the protocol to use a hood or a closed chamber instead of a mask to deliver nitrogen to him or a firing squad. *See e.g.*, Pet. App. 34a (J. Pryor, J., dissenting).

II. The Eleventh Circuit's Holding That Mr. Smith Lacked Standing To Assert His Fourteenth Amendment Claim is Contrary To this Court's Established Precedents.

The Eleventh Circuit's holding that Mr. Smith lacked standing to assert his Fourteenth Amendment claim is contrary to this Court's established precedents. The Court should grant certiorari and reverse.

The three-elements required to show Article III standing are well established. "First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotation marks omitted). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Id.* (citation and internal quotation marks omitted). "Third, it

must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.* at 561 (citation and internal quotation marks omitted).

The Eleventh Circuit held that Mr. "Smith's Fourteenth Amendment injury fails on traceability grounds." Pet. App. 14a. The Court reasoned that Mr. "Smith's execution selection injury is directly traceable to the Attorney General" because the Attorney General has the "primary role in selecting condemned inmates and serving as the final confirmation for an execution to proceed" and without those "actions neither Hamm nor Raybon may proceed with their duties" to carry out executions in Alabama. Pet. App. 13a–14a.[4] The Eleventh Circuit's conclusion is flawed for three reasons.

First, the Court of Appeals considered Mr. Smith's Fourteenth Amendment claim retrospectively as if he were seeking damages for an injury incurred when the State moved in the Alabama Supreme Court to execute him. But Mr. Smith sought prospective relief for an injury that will occur if Respondents are permitted to execute him and he loses his right to pursue relief in a federal habeas proceeding after denial of his state postconviction petition when the State would permit every other similarly situated condemned person to do so. *See* Pet. App. 180a (seeking "[a] preliminary and permanent injunction prohibiting Defendants from executing Mr. Smith by nitrogen hypoxia until he has exhausted his pending appeals or, alternatively, a stay of execution pending completion of Mr. Smith's appeals").[5] It is undisputed that the Respondents (Commissioner Hamm and Warden

[4] There was no dispute in the Court of Appeals or district court that Mr. Smith alleged an injury in fact that was redressable by the injunction he sought.

[5] Mr. Smith's appeals include pursuing his postconviction claim in federal habeas proceedings. *See* 28 U.S.C. § 2254(a).

Raybon)—not the Attorney General—have authority under state law to carry out Mr. Smith's execution. *See* Ala. Code § 15-18-82(b) ("It shall be the duty of the Department of Corrections of this state to provide the necessary facilities, instruments, and accommodations to carry out the execution."); Ala. Code § 15-18-82(c) ("The warden of the William C. Holman unit . . . shall be the executioner").

Second, the Court of Appeals improperly conflated Mr. Smith's injury with the right he is asserting contrary to this Court's decision in *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). There, this Court held that plaintiffs alleging environmental injury from a neighboring nuclear power plant had standing to sue the plant owner to assert a claim challenging the constitutionality of the Price-Anderson Act without which the power plants could not be completed. In so holding, this Court rejected the contention that plaintiffs "must demonstrate a connection between the injuries they claim and the constitutional rights being asserted." *Id.* at 78. In other words, the Court held that the plaintiffs' alleged injury was traceable to the defendants' conduct even though the defendants' conduct had nothing to do with the alleged constitutional violation. Here too, Mr. Smith has standing to pursue his Fourteenth Amendment claim against Commissioner Hamm and Warden Raybon because his injury—his imminent execution—is fairly traceable to them regardless of whether their conduct was responsible for the violation of his Fourteenth Amendment rights (which it is).

If followed to its logical conclusion, the Court of Appeals' holding would do violence to routine federal litigation. For example, inmates have standing to sue their jailers for alleged unlawful detention even though their jailors have nothing to do with the underlying

constitutional violation that allegedly makes the inmate's detention unlawful. *See Moody v. Holman*, 887 F.3d 1281 (11th Cir. 2018). And, under this Court's seminal decision in *Ex parte Young*, 209 U.S. 123 (1908) and its progeny, plaintiffs have standing to challenge the constitutionality of state law by suing the officials imbued by state law with authority to enforce those laws even though the state officials are not responsible for enacting them.

Moreover, the Court of Appeals' holding leaves Mr. Smith with no remedy for the violation of his Fourteenth Amendment right to equal protection. Mr. Smith would lack standing to assert his claim against the Attorney General because his injury is not redressable by the Attorney General. *See Lewis v. Gov. of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019) (en banc) ("[I]t must be the *effect of the court's judgment on the defendant*—not an absent third party—that redresses the plaintiff's injury, whether directly or indirectly." (emphasis in original)) An injunction prohibiting the Attorney General from executing Mr. Smith while his appeals are pending would do Mr. Smith no good because the Attorney General has no responsibility for carrying out his execution—only the Respondents have that responsibility.

Third, and finally, even ignoring this Court's decision in *Duke Power* as the Court of Appeals did, Mr. Smith had standing to assert his Fourteenth Amendment claim because Mr. Smith's selection for execution despite his pending postconviction appeal is fairly traceable to Respondents' conduct. Respondents were parties to Mr. Smith's then-pending action challenging ADOC's then-stated intention to attempt to execute him a second time by lethal injection. As Mr. Smith alleged (and demonstrated) below, the purpose of selecting Mr. Smith for execution by nitrogen hypoxia even though he has an appeal pending was to

moot that litigation and thereby spare them from discovery and disclosure of information that ADOC does not want subject to public scrutiny. *See* Pet. App. 163a–166a ¶¶ 65–72.

When Respondents moved in the district court to accomplish that purpose, they alleged that "Commissioner Hamm"—not the Attorney General—decided that Mr. Smith would be subject to execution by nitrogen hypoxia instead of lethal injection. *See* DE 62-42 at ¶ 3. And, under Alabama law, when the Attorney General moved in the Supreme Court to obtain authority to execute Mr. Smith, he did so as the State's lawyer to effectuate that determination and obtain authorization for the "*Commissioner of the Department of Corrections* to carry out the inmates' sentence of death within a time frame set by the governor." Ala. R. App. P. 8(d)(1).

Even setting aside those inconsistencies and the substance of Alabama law—that the Department of Corrections shall "carry out the execution," Ala. Code § 15-18-82(c); *see also* Ala. R. App. P. 8(d)(1), and that Warden Raybon "shall be the executioner," Ala. Code § 15-18-82(c)—the Court of Appeals' reasoning that "testimony in the record confirms the Attorney General's primary role in selecting condemned inmates and serving as the final confirmation for an execution to proceed during the course of Alabama's execution process," Pet. App. 13a–14a, is incorrect as a factual matter. For one thing, the Court of Appeals provided no citation to where in the record that testimony was given. But also Commissioner Hamm agreed in his testimony at the preliminary injunction hearing before the district court that he "ha[s] the authority in [his] capacity as the Commissioner to call off the execution . . . or to abort or to turn off the gas." DE 67 at 101:24–102:3. And he agreed that he would make that determination of whether to "call off the execution" based

on his "judgment." *Id.* at 102:4–6; *see also* DE 62-33 (ADOC 30(b)(6) corporate representative deposition testimony) at 46:19–46:23 (answering the question, "if there is no flat line on the EKG in 30 minutes, does [the execution] continue," then "we would confer with the commissioner, and he will make those determinations at the time"); *id.* at 47:6–11 ("Q: . . . if there is no flat line on the EKG in 30 minutes, it's discretionary, it's up to the commissioner as to whether or not to continue, right? A: Correct."); *cf. also id.* at 61:21–62:10 (agreeing that Mr. Smith should not be treated any differently that other inmates who elected to be executed by nitrogen hypoxia). That testimony plainly is that the Commissioner—not the Attorney General—has both the statutory and practical authority about whether "to proceed during the course of Alabama's execution process," Pet. App. 13a–14a, contrary to the Court of Appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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