Nos. 24A893 & 24-6778

In the Supreme Court of the United States

JESSIE HOFFMAN,
Applicant-Petitioner,
v.

GARY WESTCOTT, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION AND PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT.

INTRODUCTION

Plaintiff's strategy to jam this Court less than 48 hours away from his execution is inexplicable. The Fifth Circuit's decision vacating the district court's injunction against his execution came out *on Friday*. Yet he did not touch this Court's docket until midnight *on Sunday*. Not only that, but his questions presented today also could have been litigated *over eight months ago—i.e.*, the amount of time Plaintiff has tried to use Rule 60(b)(6) to reopen an old method-of-execution challenge rather than file this new lawsuit. In a context where an applicant's diligence is paramount, these days- and months-long delays alone foreclose Plaintiff's demand for "last-minute intervention." *Barr v. Lee*, 591 U.S. 979, 981 (2020) (per curiam).

But, even if the Court reaches the merits stay factors, Plaintiff does not satisfy them—not least because Plaintiff seeks a stay of execution by nitrogen hypoxia, a request that this Court, the Eleventh Circuit, and Alabama district courts have uniformly rejected as to executions under a virtually identical protocol. *See Frazier v. Hamm*, 2025 WL 361172 (M.D. Ala. Jan. 31, 2025) (no appeal); *Grayson v. Hamm*, 2024 WL 4701875 (M.D. Ala. Nov. 6, 2024), *aff'd sub nom.*, *Grayson v. Comm'r, Ala. Dep't of Corr.*, 121 F.4th 894 (11th Cir. 2024), *stay of execution denied*, *Grayson v. Hamm*, 145 S. Ct. 586 (2024); *Smith v. Hamm*, 2024 WL 1160303 (M.D. Ala. Jan. 10, 2024), *aff'd sub nom.*, *Smith v. Comm'r, Ala. Dep't of Corr.*, 2024 WL 266027 (M.D. Ala. Jan. 24, 2024), *stay of execution denied*, *Smith v. Hamm*, 144 S. Ct. 414 (2024). The district court in this case enjoined Plaintiff's execution on March 11, holding that

execution by firing squad qualified as an adequate alternative. *See Bucklew v. Precythe*, 587 U.S. 119, 134 (2019) (Plaintiff bears the burden of proving "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"). On the State's motion, however, the Fifth Circuit vacated that injunction on Friday, March 14, as "not just wrong" but "[c]onstitution[ally] backwards." Pet.App.2a (Ho and Oldham, JJ.). For it was "premised on the odd notion that the Eighth Amendment somehow requires Louisiana to use an admittedly *more* painful method of execution—namely, execution by firing squad rather than by nitrogen hypoxia," which everyone agrees is physically painless. *Id.*

The Court is not reasonably likely to grant certiorari, much less reverse. Plaintiff claims that the Fifth Circuit deemed superadded *psychological* (rather than *physical*) pain "not relevant" to the Eighth Amendment analysis—and thus contradicted this Court's and other circuits' precedents. Pet.19. That is unequivocally false. The Fifth Circuit held that Plaintiff "presented no such evidence of superadded terror to the court—let alone evidence of how execution by a firing squad would substantially mitigate that terror." Pet.App.8a. There is no split of authority, and Plaintiff is left with only fact-bound arguments that are wrong and, in any event, call for mere error-correction. Plaintiff also claims that the Fifth Circuit erred by refusing to address the district court's denial of Plaintiff's motion to reconsider the dismissal of his Religious Land Use and Institutionalized Persons Act (RLUIPA) claim—*i.e.*,

that he must be able to breathe oxygen when he dies. But this Court's precedents hold that Plaintiff cannot use RLUIPA to stop his execution; the Court is hardly likely to grant certiorari when unable to directly review the underlying merits determination given that the district court dismissed that claim earlier in the litigation in a non-final order; and in all events, the district court properly denied reconsideration of that claim.

Plaintiff offers no reason to depart from this Court's and others' judgments in uniformly denying stays of execution by nitrogen hypoxia, which (again, everyone agrees) is physically painless. The Court should deny the application and the petition.

STATEMENT

In the interests of time and efficiency, the State here addresses only the core relevant facts, and it expounds where necessary in the argument section below.

A. On the night before Thanksgiving Day in 1996, Plaintiff Jessie Hoffman kidnapped, robbed, and raped Mary "Molly" Elliot. *State v. Hoffman*, 768 So. 2d 542, 550 (La. 2000). Plaintiff kidnapped Molly at gunpoint, drove her to an ATM, forced her to withdraw $200, and robbed her. *Id.* Plaintiff subsequently raped Molly in the backseat of her own car in a remote area of St. Tammany Parish. *Id.* He then marched her—still naked—"down a dirt path which was overgrown with vegetation and in an area full of trash used as a dump." *Id.* "Her death march ultimately ended at a small, makeshift dock" on Middle Pearl River, where Plaintiff "forced [her] to kneel" and "shot [her] in the head, execution style." *Id.* Molly "likely survived for a few minutes after being shot." *Id.* But she was not discovered until Thanksgiving Day, when a

duck hunter came across her naked body on the dock. *Id.* at 549. For his part, Plaintiff "soon thereafter" took his girlfriend shopping with Molly's money. *Id.* at 550.

A jury convicted Plaintiff of first degree murder, and he was sentenced to death. *Id.* at 549; *see* App.15 ¶ 61. His direct appeal was litigated to finality. *Hoffman v. Louisiana*, 531 U.S. 946 (2000) (denying petition). And he exhausted all of his state and federal post-conviction remedies. *See State v. Hoffman*, 2020-00137 (La. 10/19/21), 326 So. 3d 232, 235–36, 242 (collecting his post-conviction cases).

B. Although lethal injection was Louisiana's method of execution when Plaintiff murdered Molly, drug companies have since made it extraordinarily difficult for States to obtain the necessary drugs. As a result, Louisiana and other States recently have turned to nitrogen hypoxia because there are no supply concerns with nitrogen. For Louisiana, that time came in the spring of 2024, when the Legislature amended La. R.S. 15:569 to adopt nitrogen hypoxia as a method of execution. Nitrogen hypoxia is Louisiana's only currently available method. App.450 ¶ 17; App.724.

Over the past year, Louisiana's Department of Public Safety & Corrections constructed a nitrogen hypoxia system that mirrors Alabama's—and since 2024, Alabama itself has successfully carried out four nitrogen hypoxia executions. In general terms, the system delivers pure nitrogen to a full-face silicon mask with a plexi-glass screen known as a "source respirator"—industrial grade and superior to medical grade masks. App.452–53 ¶ 31; App.834. Thick, cushion material presses against the face and creates a "virtually air tight seal." *Id.* The mask has a one-way

inlet valve allowing for airflow into the mask from the industrial tube that delivers both ambient air and nitrogen. *Id.* The mask also allows for exhaling through another one-way exhaust valve. *Id.* (Plaintiff appears to complain that the system "uses industrial grade, not medical grade, nitrogen," Pet.5; he omits that medical grade nitrogen is comparatively inferior because it has more impurities than does Louisiana's ultra-high grade nitrogen. App.452 ¶ 28; App.680–81.)

The State's expert, Dr. Antognini, is the only expert in this case who inspected and tested Louisiana's system. Specifically, he laid down on the gurney with the mask on at the intended flow rate—and he testified that he "could breathe very comfortably with the mask on." App.838. He also took a video (Defs.' Ex. 19; App.842) demonstrating how quickly pure nitrogen displaces oxygen in the mask: By 30 seconds, the air inside the mask is only 4.4% oxygen; 1.8% by 40 seconds; and so on. App.849.

C. Almost immediately after the Legislature adopted nitrogen hypoxia, Plaintiff attempted to reopen a dismissed-as-moot case challenging Louisiana's lethal-injection protocol. *See Hoffman v. Jindal*, No. 12-cv-796 (M.D. La.). That case was dismissed a few years ago because Louisiana was (and still is) currently unable to obtain the necessary drugs. With nitrogen now permitted under Louisiana law, however, Plaintiff filed a Rule 60(b)(6) motion claiming that "there has since been a material and extraordinary change of circumstances that gives rise to a live controversy between the parties." Mem. in Support of Mot. for Relief from J. at 1, *Hoffman v. Jindal* (*Hoffman I*), No. 12-cv-796 (M.D. La. June 14, 2024), ECF 318-1.

For the next eight months, however, the district court took no action on that motion—and Plaintiff refused to file this lawsuit.

Indeed, it was not until Plaintiff's death warrant issued in early February 2025 that the *Hoffman I* docket bounced back. The district court issued an order reopening the case—"on procedurally dubious grounds," as the Fifth Circuit in this case would later observe, Pet.App.3a. *Hoffman I*, ECF 337. The State sought mandamus relief and secured an administrative stay on the basis that this was an improper exercise of Rule 60(b)(6) authority. *See In re Westcott*, No. 25-30088 (5th Cir.).

D. Once Plaintiff realized that he would be unable to use his old case as a subterfuge for challenging Louisiana's new method of execution, he filed this lawsuit (on February 25) and sought (on February 26) to enjoin his execution. App.1–61 (Complaint); App.62–102 (preliminary-injunction motion). In the ensuing two weeks, the parties engaged in expedited discovery, motions practice, and an evidentiary hearing on Friday, March 7, followed by proposed findings and conclusions filed at 9am on Sunday, March 9.

This case has substantially narrowed in the meantime because the district court partially granted the State's motion to dismiss certain claims from the bench (App.522–24), and the court held (App.942–44) in its injunctive order that Plaintiff was unlikely to succeed on certain other claims. As things stand, therefore, the only live claim presented to the Fifth Circuit (and thus this Court) is Plaintiff's Eighth Amendment challenge to nitrogen hypoxia.

Here are a few key facts that inform that challenge. To begin, as the district court recognized, both Plaintiff's and the State's experts "agree that nitrogen hypoxia does not produce physical pain." App.934. Plaintiff's case thus depends on alleged psychological pain. To that end, he testified that he is Buddhist and engages in meditative breathing twice a day, which requires concentrated "deep breaths"—both inhaling and exhaling. App.455 ¶ 42. He also testified that he plans to use his breathing techniques during his execution. App.455 ¶ 44. He put on a PTSD expert, Dr. Sautter, who agreed that Plaintiff has mastered his breathing techniques to control any PTSD issues—and so long as "he can practice the breathing, then he will be able to decrease his distress." App.491 ¶ 166. Plaintiff also put on another expert, Dr. Bickler, who testified that—with normal breathing, and especially with deep breaths as Plaintiff intends—unconsciousness will occur in less than a minute after pure nitrogen begins to flow into the mask. App.481 ¶ 138; App.783. Dr. Bickler also testified that, at least in the assisted-suicide context, "allowing the free flow of a gas into the lungs but with no oxygen causes a gentle hypoxic death." App.803. His only excuse for taking the opposite position with respect to the use of nitrogen here was "that's a very different context than forced asphyxiation with nitrogen in a death chamber." App.804.

The State's expert, Dr. Antognini (whom the Alabama courts have uniformly credited), agreed on the key facts: "His opinion is that Louisiana's system will cause unconsciousness within 35 to 40 seconds (or perhaps sooner) once Plaintiff begins to inhale pure nitrogen—and he expects death to follow 'rapidly,' within 10 to 15

minutes." App.480 ¶ 137; *see* App.832. "I do not believe the inmate would suffer any pain ... with that system." App.832.

For his part, Plaintiff proposed the firing squad and a drug cocktail known as DDMAPh as alternative methods of execution that render nitrogen hypoxia unconstitutional. In granting Plaintiff's motion for preliminary injunction on March 11, the district court rejected DDMAPh (because the State cannot use drugs for execution purposes, App.941), but agreed that the firing squad is a suitable alternative. App.938–40.

On March 14, the Fifth Circuit (Ho and Oldham, JJ.) vacated that injunction as "not just wrong" but "[c]onstitutional[ly] backwards." Pet.App.2a. Specifically, the Fifth Circuit rejected the idea "that the Eighth Amendment somehow requires Louisiana to use an admittedly *more* painful method of execution—namely, execution by firing squad rather than nitrogen hypoxia." *Id.* The Fifth Circuit recognized that both sides' experts testified about pain from the firing squad while also agreeing that nitrogen hypoxia is physically painless. Pet.App.7a. The Fifth Circuit thus held that, as a matter of law, Plaintiff could not carry his burden under *Bucklew* and related cases to show that execution by firing squad would significantly reduce a substantial risk of severe pain from nitrogen hypoxia. *Id.* On top of that, the Fifth Circuit emphasized that, although he invoked "superadded terror," Plaintiff "presented no such evidence of superadded terror to the court—let alone evidence of how execution by a firing squad would substantially mitigate that terror." Pet.App.8a.

"In sum, the district court didn't just get the legal analysis wrong—it turned the Constitution on its head by relying on an indisputably more painful method of execution" than nitrogen hypoxia. *Id.* "Reasonable minds can differ on the proper understanding of the Eighth Amendment in certain cases, but surely we can all agree that it does not require State officials to favor more painful methods of execution over less painful ones." *Id.*

Judge Haynes dissented on the ground that "there are issues that need more time to be resolved and decided." Pet.App.9a. She also believed that "the majority opinion does not adequately address the facts as properly found by the district court." Pet.App.10a.

ARGUMENT

I. ON THE EQUITIES, PLAINTIFF'S DELAYS ALONE WARRANT THE DENIAL OF A STAY.

The Court need address nothing more than Plaintiff's litigation conduct to deny a stay of execution and his petition for writ of certiorari. The Court has long held that "late-breaking changes in position, last-minute claims arising from long-known facts, and other 'attempt[s] at manipulation' can provide a sound basis for denying equitable relief in capital cases." *Ramirez v. Collier*, 595 U.S. 411, 434 (2022) (citation omitted). Accordingly, "[c]ourts should police carefully against attempts to use such challenges as tools to interpose unjustified delay." *Bucklew*, 587 U.S. at 150. "Last-minute stays should be the extreme exception, not the norm, and 'the last-minute nature of an application' that 'could have been brought' earlier, or 'an applicant's

attempt at manipulation,' 'may be grounds for denial of a stay.'" *Id.* (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)).

That is this case—at least twice over. *First*, there is no good reason why Plaintiff waited to file his stay application and cert petition until midnight last night, leaving the State just a few hours to prepare this response and this Court little more than a day to adjudicate these filings. The Fifth Circuit's decision came out *on Friday*, March 14. This is a quintessential "[l]ast-minute stay" request that "should be the extreme exception"—and Plaintiff has identified no reason why this case is exceptional. *Id.*

Second, Plaintiff told the Fifth Circuit two weeks ago that he has had a live controversy for eight months. *See* Pls' Opp. to Request for Admin. Stay at 9, *In re Westcott*, No. 25-30088 (5th Cir. Feb. 27, 2025) ("Plaintiffs diligently moved to reopen the proceedings [in July 2024] prior to the change in the law, as soon as a justiciable controversy re-emerged."). Yet he refused to file this lawsuit eight months ago. Instead, he put all his eggs in a "procedurally dubious" (Pet.App.3a) basket of hope that the district court would reopen his long-dismissed suit and allow him to skip the hassle of filing a new lawsuit. That strategy is inexplicable—and also an undisputed fact.

Now, Plaintiff tries to turn his delay on the State by protesting the denial of some grievances from nearly a year ago (and also the State's opposition to Plaintiff's abuse of Rule 60(b)(6)). Appl.8. That is misdirection. His own timeline (*id.*) makes clear that he sat on his hands from July 2024 until February 2025, refusing to file

this lawsuit until three weeks ago. It is thus remarkable to read his representation that he "has been diligently pursuing his rights in state and federal courts alike." Appl.9. He, the State, and the Court are in this eleventh-hour time crunch solely because he refused to file *this* lawsuit eight months ago when he says he had a justiciable controversy. And to drive this point home, there is nothing in the district court's analysis or the Fifth Circuit's decision that could not have been written months ago. Whether the Court deems that delay or manipulation, it is a fact that tilts the equities in the State's favor.

The State (and therefore also the public because the factors merge) has an unquestionably compelling interest in Plaintiff's execution. *See Bucklew*, 587 U.S. at 150 ("Under our Constitution, the question of capital punishment belongs to the people and their representatives ...."); *Nelson v. Campbell*, 541 U.S. 637, 644 (2004) ("[A] State retains a significant interest in meting out a sentence of death in a timely fashion."); *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) ("To unsettle these expectations [of finality] is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and the victims of crime alike." (quotation omitted)); *In re Blodgett*, 502 U.S. 236, 239 (1992) (The State's "sovereign power to enforce [its] criminal law" carries "great weight."); *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (recognizing "society's compelling interest in finding, convicting, and punishing those who violate the law"). On the equities factors alone, therefore, the Court should deny Plaintiff's application and petition.

II. IF THE COURT REACHES THE MERITS, THERE IS NO REASONABLE PROBABILITY THAT THE COURT WILL GRANT CERTIORARI OR FAIR PROSPECT THAT PLAINTIFF WILL SUCCEED ON THE MERITS.

A. Plaintiff's Eighth Amendment Question Is Not Cert-Worthy and Has No Merit.

Plaintiff's first question presented asks

> [w]hether a method of execution that superadds psychological suffering—including terror and mental anguish—compared to an available alternative method violates the Eighth Amendment's bar on cruel and unusual punishment.

Pet.i. That is puzzling because the Fifth Circuit did not answer no—and Plaintiff would not benefit from this Court's answering yes. That is because the Fifth Circuit held that Plaintiff failed to substantiate the premise of this question: that execution by nitrogen hypoxia, in fact, superadds "psychological suffering" compared to execution by firing squad. By failing to appeal that fact-bound and split-less question, Plaintiff has effectively conceded that both cert and reversal are exceedingly unlikely.

1. Plaintiff's question presented mischaracterizes the decision below—and Plaintiff would receive no effectual relief from the Court answering it.

Plaintiff's Eighth Amendment question presented rests on a straw man. He claims that the Fifth Circuit rejected his Eighth Amendment claim on the ground that so-called "psychological terror" "was not relevant" to the Eighth Amendment analysis—that only "physical pain" is relevant. Pet.19, 21. He then concocts a circuit split based off of the Fifth Circuit's supposed "physical-pain-only approach." Pet.21.[1] That blatantly mischaracterizes the Fifth Circuit's decision below.

[1] "Concocts" because there is no circuit split. No court of appeals holds that

The Fifth Circuit determined that Plaintiff's Eighth Amendment claim "fails *on multiple levels*." Pet.App.7a (emphasis added). The *first* level, as Plaintiff recognizes, is that "the district court heard expert testimony from both parties that nitrogen hypoxia is painless." *Id.*; *see* App.934 (district court finding that "[b]oth experts agree that nitrogen hypoxia does not produce physical pain"). By contrast, "experts for both parties agreed that death by firing squad can cause pain—and would therefore necessarily be *more* painful than execution by nitrogen hypoxia." Pet.App.7a; *compare* App. 494 (citing App.877) (only the State's expert making this comparison), *with* App.932–34 (district court ignoring this fact). The Fifth Circuit thus correctly recognized that Plaintiff "cannot possibly" satisfy this Court's *Bucklew* standard, which required (among other things) Plaintiff to identify a feasible alternative "that would significantly reduce a substantial risk of severe pain." 587 U.S. at 134.

The *second* level on which Plaintiff's Eighth Amendment claim fails comes from "the fact that the Supreme Court has previously 'upheld a sentence of death by firing

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terror categorically is irrelevant to the Eighth Amendment analysis. All Plaintiff can muster for that view is that the Sixth Circuit "appears" to hold it. Pet.21 (citing *In re Ohio Execution Protocol Litig.*, 881 F.3d 447, 450 (6th Cir. 2018)). The cited Sixth Circuit decision, however, simply says that ordinary psychological pain and suffering that "is a likely result of being sentenced to death and anticipating the execution" does not alone violate the Eighth Amendment. *In re Ohio Execution Protocol Litig.*, 881 F.3d at 450 (citation omitted). And the Eleventh Circuit—which Plaintiff characterizes as splitting with the Sixth Circuit, Pet.21–22—agrees. *See Grayson v. Comm'r, Ala. Dep't of Corr.*, 121 F.4th 894, 900 n.3 (11th Cir. 2024) (acknowledging that "[t]here may exist a form of execution that induces psychological terror or pain that is severe enough to support an Eighth Amendment claim," but affirming as not clearly erroneous the district court's finding "that the likely psychological pain [in *Grayson*] is 'a type of pain that would exist regardless of the method of execution'").

squad.'" Pet.App.7a (citation omitted). "So Hoffman has the impossible task of challenging a method of execution that he admits is less painful than other established methods of execution that the Supreme Court has already blessed." *Id.* (It bears noting, moreover, that Plaintiff does not dispute any of this.)

At this point, Plaintiff claims that the Fifth Circuit ended its analysis and "categorical[ly] reject[ed] [] psychological suffering as a constitutional consideration." Pet.3; *see* Pet.21 ("constitutionally irrelevant"), 23 ("discarded in the Eighth Amendment analysis"). *That is unequivocally false.* The Fifth Circuit expressly noted that the *third* level on which Plaintiff's claim fails is his and the district court's "focus[] on psychological terror." Pet.App.7a. The Fifth Circuit emphasized that "the Constitution only forbids the 'superaddition' of terror that is greater than an alternative method of execution." Pet.App.7a–8a. (Which is exactly what the other circuits recognize, too. *See supra* n.1.) And the fatal defect here, said the Fifth Circuit, is that Plaintiff "presented no such evidence of superadded terror to the court—let alone evidence of how execution by a firing squad would substantially mitigate that terror." Pet.App.8a. Instead, Plaintiff and the district court pointed to no more than the usual "measure of psychological terror" that accompanies every execution, which does not make out an Eighth Amendment violation (again, as the circuits recognize). *Id.*

Plaintiff's question presented thus whistles past the key defect below. He asks this Court to answer whether "a method of execution that superadds psychological suffering" violates the Eighth Amendment. Pet.i. But he failed to prove that execution

by nitrogen hypoxia is such a method in the first place. Whether the Court answers yes or no to the question presented, therefore, would give Plaintiff no effectual relief because that ruling would leave undisturbed the Fifth Circuit's holding that Plaintiff "presented no such evidence of superadded terror to the court—let alone evidence of how execution by a firing squad would substantially mitigate that terror." Pet.App.8a. The Court is thus exceedingly unlikely to grant cert on this question, much less reverse.

2. Plaintiff's real question presented is fact-bound, satisfies none of this Court's cert criteria, and identifies no error.

Indeed, the best evidence of this is that Plaintiff's "circuit-split" argument fades into a complaint that the Fifth Circuit improperly conducted its own abuse-of-discretion and clear-error review. Pet.24–27. Of course, that complaint implicates no circuit split and is, by definition, fact-bound and a plea for error correction—and the Court's analysis could stop there. But Plaintiff does not even identify an error. He says "[j]ust two examples suffice." Pet.26.

a. *First*, he complains that "the panel majority never acknowledged the district court's finding that conscious terror and a sense of suffocation endures for at least 35 to 40 seconds but can last up to three to five minutes." *Id.* (emphases omitted). He then accuses the Fifth Circuit of "ma[king] its own factual finding that '[b]reathing 100% pure nitrogen causes unconsciousness in less than a minute.'" *Id.* (quoting Pet.App.3a).

Plaintiff misrepresents the record. *The district court itself* credited *Plaintiff's expert*, Dr. Bickler, who "candidly concede[d] that a person who is administered 100%

pure nitrogen and is breathing normally will lose consciousness in less than one minute." App.934. The Fifth Circuit did not "make up its own factual findings."

Moreover, the Fifth Circuit did not reference the alleged "three to five minutes" of suffering because there is no valid basis for it. That number comes from the district court's assumption that Plaintiff might hold his breath, refuse to breathe nitrogen, and thus increase any alleged sense of terror. The court did so by invoking Plaintiff's expert, Dr. Bickler. *See* App.934 ("[I]f the condemned holds his breath, Dr. Bickler opines that it could take 3 to 5 minutes to lose consciousness."); *accord* App.935, 936. And Dr. Bickler himself acknowledged that he was inflating his opinion with the "expect[ation] that [Plaintiff] would hold his breath and then probably attempt to breathe shallowly and then only slowly get hypoxic, all the while experiencing the effects of the progressing hypoxia and buildup of carbon dioxide in his blood." App.758. This is misdirection.[2]

For one, as the district court acknowledged, "Plaintiff admits that he will have the ability to breathe in the nitrogen as it is administered." App.925. In fact, Plaintiff testified that he "plan[s] to use [his] meditative breathing techniques," which involve "deep breaths," when he is executed through nitrogen hypoxia. App.490 ¶ 164; *accord* App.925 (district court's conclusion that "there is no substantial burden to his

[2] The same goes for Plaintiff's characterization of Dr. Antognini as testifying that Plaintiff will endure "severe emotional suffering." Pet.11. He omits that the cited transcript reflects Dr. Antognini's answers to Plaintiff's counsel's questions about "hold[ing] your breath"—Dr. Antognini did not testify that Plaintiff would hold his breath. App.886–87.

exercise of rhythmic breathing"). There is thus no basis for the district court's and Dr. Bickler's speculation that Plaintiff might self-inflict harm by refusing to breathe.

For another, as just explained, this point matters because it directly impacts the amount of time between the initiation of pure nitrogen and Plaintiff's loss of consciousness. Again, Dr. Bickler "candidly conceded that a person who is administered 100% pure nitrogen and is breathing normally will lose consciousness in less than one minute." App.934. But the court omitted that Dr. Bickler also conceded that it is possible that "[a] person who is taking deep breaths"—as Plaintiff testified he intends to do—"will lose consciousness even quicker than that." App.481 ¶ 138; App.783. Because that window will be exceedingly narrow, the district court's trumpeting of "conscious psychological suffering" for several minutes is completely baseless. App.936.

For yet another, even if this record were to suggest that Plaintiff intended to hold his breath, that would bar him from obtaining a preliminary injunction or stay of his execution. For it is hornbook law that "a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted." *State v. Biden*, 10 F.4th 538, 558 (5th Cir. 2021) (alteration and citation omitted) (collecting authorities).

And on top of all this, remember that Dr. Bickler likewise testified that, at least in the assisted-suicide context, the administration of 100% nitrogen would cause a "gentle hypoxic death." App.804, 806. Why not here? Because "that's a very different context than forced asphyxiation with nitrogen in a death chamber." App.804. Dr. Bickler's tailor-made "death when the State does it is different" excuse does not work.

See, e.g., *Frazier*, 2025 WL 361172, at *12 (rejecting complaints about suffering that "is inherent in any execution"). For these reasons, Plaintiff identifies no cert-worthy issue regarding the Fifth Circuit's ignoring the alleged "three to five minutes" speculation from the district court and Dr. Bickler.

b. *Second*, Plaintiff complains that the Fifth Circuit "ignored the district court's finding that execution by firing squad would render Mr. Hoffman unconscious in three to four seconds." Pet.26. In his view, the Fifth Circuit refused to "engage with the district court's comparative assessment of conscious terror caused by [the firing squad and nitrogen hypoxia]," and instead "summarily concluded that Mr. Hoffman had presented 'no evidence of superadded terror.'" *Id.* (cleaned up).

Plaintiff has three problems. *One*, he submitted no evidence or testimony actually conducting a "comparative assessment of conscious terror" caused by the two methods—in fact, he did not submit any evidence or testimony describing the "conscious terror" presented by the firing squad *at all*. His firing-squad expert, Dr. Williams, expressly testified that he "offered no psychological evidence." App.634. The district court thus had no evidentiary basis to evaluate any alleged terror from the firing squad, much less to compare that terror against alleged terror from execution by nitrogen hypoxia.

Two, despite that evidentiary gap, the district court simply assumed that all terror is created equal and compared final potential moments of consciousness: the three to four seconds after being shot by the firing squad and the 30 to 40 seconds after 100% nitrogen begins to flow. *See* App.939. That makes zero sense. For one,

imagine the terror of being alive and conscious with a gaping hole in your chest. It is easy to suspect that such terror would far exceed any, for example, alleged terror from "short[ness] of breath" that may come as Plaintiff loses consciousness from nitrogen hypoxia. App.911 (Dr. Bickler's testimony). For another, common sense suggests that any firing squad-related terror would come long before shots ring out—think about being led to the execution chair, positioned in front of the firing squad or gun ports, restrained, and hooded, and then waiting for the shots that will end your life. The district court's blinkered focus on the three to four seconds *after* shots are fired makes no sense.

Three, and perhaps most damning, the district court left out that Plaintiff's PTSD expert, Dr. Sautter, testified that Plaintiff's traumatic history of being held at gunpoint is "one of the stimuli" that could trigger Plaintiff's PTSD—and he acknowledged that this would be a problem if Plaintiff were "placed in front of a firing squad." App.495–96 ¶ 179; App.589. It was thus preposterous for the district court to gerrymander the three to four seconds after a firing squad fires its shots and summarily proclaim that Plaintiff "has clearly demonstrated that he is substantially likely to prevail in his assertion that nitrogen hypoxia superadds pain and terror as compared to firing squad." App.939.

* * *

In short, Plaintiff's cursory and fact-bound Eighth Amendment arguments do not withstand scrutiny—and they certainly are not cert-worthy.

3. The Fifth Circuit's decision is independently correct because there are legitimate penological reasons to choose nitrogen hypoxia over the firing squad.

Although the Court need not reach this issue (and the Fifth Circuit did not need to reach it either), Plaintiff's Eighth Amendment claim independently fails because there are legitimate penological reasons to prefer nitrogen hypoxia over the firing squad.

As the Fifth Circuit explained, the undisputed evidence is that the firing squad is *more physically painful* than nitrogen. In its effort to efficiently and humanely carry out death sentences, therefore, Louisiana reasonably selected the least physically painful method vis-à-vis firing squad. *Cf. Bucklew*, 587 U.S. at 134 (even "traditionally accepted methods of execution—such as hanging, the firing squad, electrocution, and lethal injection—are [not] necessarily rendered unconstitutional as soon as an arguably more humane method like lethal injection becomes available").

Consider also the logistical and emotional costs of the firing squad—requiring multiple individuals (who will know whether they fired a live or blank round, App.496 ¶ 181; App.632) to pull the trigger; preparing to clean an execution chamber covered in blood, bones, and tissue; and handling the shattered body of the condemned post-execution. None of these serious issues are presented by nitrogen hypoxia, which is quick and clinical. *Cf. Bucklew*, 587 U.S. at 134 ("a State has a legitimate interest in selecting a method it regards as 'preserving the dignity of the procedure'").

And finally, it is worth noting that—after being unable to obtain lethal-injection drugs for years—Louisiana adopted nitrogen on the heels of Alabama's first successful execution by nitrogen hypoxia. Louisiana's gravitation toward a viable

method of execution (for which "'[n]o supply concerns exist'") is itself a "valid penological reason to decline to adopt [Plaintiff's] proposed alternative method." *Frazier*, 2025 WL 361172, at *13–14.

At bottom, therefore, Louisiana had legitimate penological reasons not to adopt the firing squad—and that independently dooms Plaintiff's Eighth Amendment claim.

B. Plaintiff's RLUIPA Question Is Not Cert-Worthy and Has No Merit.

Plaintiff also presents the question

> [w]hether execution by nitrogen gassing substantially burdens Mr. Hoffman's Buddhist faith, in violation of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA"), by denying him the opportunity to meditatively breathe during his final moments.

Pet.i. As an initial matter, this Court's decision in *Ramirez* makes clear that Plaintiff cannot use RLUIPA to stay his execution. But, even if that were not so, this question is not cert-worthy because it comes to this Court only under the deferential standard of review for the denial of a motion for reconsideration, and because it satisfies none of the Court's cert criteria. And finally, the district court did not abuse its discretion in resolving this fact-bound reconsideration issue against Plaintiff.

1. Plaintiff cannot use RLUIPA to stop his execution.

At the outset, by wielding RLUIPA to try to stop his execution, Plaintiff runs headlong into *Ramirez*. There, the Court emphasized that RLUIPA is an "accommodation" statute. 595 U.S. at 425. Thus, if "a court determines that relief is appropriate under RLUIPA, the proper remedy is an injunction ordering the

accommodation, not a stay of the execution." *Id.* at 436. Put otherwise, "a tailored injunction," "rather than a stay of execution," "will be the proper form of equitable relief when a prisoner raises a RLUIPA claim in the execution context." *Id.* at 433–34. That distinction is critical because, while prisoners "have a strong interest in avoiding substantial burdens on their religious exercises," the States and crime victims have a concomitant "interest in the timely enforcement of a sentence." *Id.* at 433 (citation omitted).

Here, however, Plaintiff avowedly wields RLUIPA to stop his execution—not to obtain a religious accommodation for his execution. His Complaint seeks a "declar[ation] that it violates RLUIPA for Defendants to execute Mr. Hoffman by nitrogen gas given Mr. Hoffman's sincerely held Buddhist religious practices" and an injunction against his execution on the same basis. App.49. Indeed, as the State explained below, Plaintiff's pre-litigation prison grievances never even mentioned RLUIPA, let alone requested a religious accommodation. App.116–17, 136; *see* App.152–59 (grievances). Instead, Plaintiff is doing precisely what the plaintiff in *Ramirez* was not: attempting to "delay[] or imped[e] his execution." 595 U.S. at 434.

To be sure, the Court in *Ramirez* entered a brief stay of execution so that it could consider the RLUIPA question, *see id.* at 420—but that was entirely proper given that, as the Court ultimately held, the *Ramirez* plaintiff "request[ed] a tailored injunction" rather than "an open-ended stay of execution." *Id.* at 433. Just the opposite here: Plaintiff seeks indefinitely to stop his execution. *Ramirez* bars that

attempt on the merits—and thus also bars his attempt to leverage the RLUIPA issue in service of a stay of execution.

2. Plaintiff's conceded inability to appeal the underlying merits ruling presents an obvious vehicle problem.

In all events, Plaintiff appears to recognize that he has a fatal vehicle problem on this issue. The district court dismissed his RLUIPA claim from the bench in a ruling that Plaintiff did not (and could not) appeal because that is not an appealable final order. *See* ROA.3119–22 (notice of appeal appealing only Friday, March 11, order); App.522–24 (March 7 dismissal of RLUIPA claim). For that reason, Plaintiff attempts to bring the RLUIPA issue to this Court by way of *the denial of his motion for reconsideration of the dismissal ruling*, since the district court also denied the motion for reconsideration in the March 11 injunctive order. Pet.15–16 n.1.

And there is the rub: This Court's review of the facts and law regarding the RLUIPA issue would be constrained by the steep abuse-of-discretion standard. *See, e.g.*, *Caribbean Mgmt. Grp., Inc. v. Erikon LLC*, 966 F.3d 35, 44 (1st Cir. 2020) ("We review the denial of a motion for reconsideration for abuse of discretion."); *SPV-LS, LLC v. Transamerica Life Ins. Co.*, 912 F.3d 1106, 1111 (8th Cir. 2019) ("A district court has wide discretion over whether to grant a motion for reconsideration of a prior order, and we will reverse a denial of a motion for reconsideration only for a clear abuse of discretion." (cleaned up)). This Court almost always declines this sort of defective vehicle in favor of a future case where the Court can directly review the underlying merits ruling itself. It should do the same here.

3. Plaintiff's RLUIPA question does not satisfy the cert criteria.

Further, as Plaintiff's silence (*see* Pet.27–31) suggests, this RLUIPA question does not implicate any division of authority that warrants this Court's intervention. And Plaintiff nowhere explains how this question is exceptionally important—it appears that no one has ever raised it, that it is not recurring, and that it is just a fact-bound issue intended to stop Plaintiff's execution altogether. This Court's Rule 10 criteria thus independently establish that cert is unlikely.

4. The district court did not abuse its discretion in declining to reconsider its dismissal of Plaintiff's fact-bound RLUIPA claim.

If the Court considers the merits, the district court did not abuse its discretion in its fact-bound denial of Plaintiff's motion for reconsideration. Under that deferential standard, "[a]n abuse of discretion will be found only if the district court's judgment was based on clearly erroneous factual findings or erroneous legal conclusions." *SPV-LS, LLC*, 912 F.3d at 1111 (citation omitted); *see Caribbean Mgmt. Grp., Inc.*, 966 F.3d at 44–45 ("To prevail on such a motion, 'a party normally must demonstrate either that new and important evidence, previously unavailable, has surfaced or that the original judgment was premised on a manifest error of law or fact.'" (citation omitted)). Plaintiff cannot meet that high standard here for at least three reasons.

a. *First*, he has waived any argument that he will be unable "to meditatively breathe during his final moments." Pet.i. As the district court recounted, Plaintiff's argument in the district court was that his "'sincerely held religious beliefs are substantially burdened **not** because he will be unable to breathe' but because he will

be forced to breath[e] nitrogen instead of air." App.925 (emphasis Plaintiff's). The district court then rejected that argument because, although "two Buddhist clerics testified that air (not nitrogen) is necessary for meditative breathing," "[t]hey cited no religious text or instruction by the historical Buddha in support of this proposition." *Id.*

Plaintiff now conspicuously foregoes his argument that he must breathe ambient air rather than nitrogen—but he cannot switch horses and claim that the problem is he is unable to breathe at all. He "admit[ted] [below] that he will have the ability to breathe in the nitrogen as it is administered." App.925. He testified that he is "planning to use [his] meditative breathing techniques" when he is executed. App.545. And so, the district court properly held that "there is no substantial burden to his exercise of rhythmic breathing." App.925. Plaintiff cannot now sandbag the courts below and the State by arguing that, in fact, he cannot breathe.

b. *Second*, Plaintiff complains that the district court's RLUIPA findings on reconsideration conflict with the Eighth Amendment findings. In support of that complaint, Plaintiff cites "[e]yewitness accounts of all four Alabama executions by nitrogen gassing [which] reveal that prisoners experienced 'conscious terror for several minutes, shaking, gasping, and other evidence of distress.'" Pet.29. Plaintiff's reliance is misplaced.

The Alabama courts have uniformly rejected attempts to use those media reports as evidence that (a) the eyewitnesses knew when nitrogen began flowing and (b) the prisoners were conscious during any movement. Those accounts are

"insufficiently reliable because [the eyewitnesses] d[id] not know"—and could not know—"when the nitrogen began to flow." *Frazier*, 2025 WL 361172, at *11 (footnote omitted). Because they did not know time zero, the witnesses could not "'reliably pinpoint'" how soon after the introduction of nitrogen "'an inmate los[t] consciousness.'" *Id.* On top of that, the courts have recognized that "unconscious individuals experience involuntary movements," such as "'muscle tremors and convulsion-like activity.'" *Id.* at *12. It is thus "not supris[ing]" that the condemned inmates exhibited "breaths and even convulsions[] after the introduction of an inert gas—when a person is unconscious and unable to feel pain." *Id.* For that reason, "the evidence of Smith's, Miller's, and Grayson's movements during their respective executions does not support a finding that any of them experienced severe psychological pain or distress over and above what is inherent in any execution." *Id.*; *see id.* at *11 (rejecting argument that these reports "are evidence that inmates remained conscious after the nitrogen began flowing and were distressed and in pain").[3] And that was one of the glaring problems in the district court's injunction

[3] To the extent this district court also invoked the Smith execution, the court ignored that his execution was principally complicated by his own "non-cooperation with the execution process," specifically his "breath-holding," which "would have increased the level of carbon dioxide in his body, acidifying his blood and increasing discomfort and distress." App.488 ¶ 158. As the Alabama courts recognized, the evidence from the Smith execution showed that Smith refused to inhale the nitrogen, which caused the reaction Plaintiff now highlights. *Frazier*, 2025 WL 361172, at *5 & nn.9–10, *11 n.20; *Grayson*, 2024 WL 4701875, at *21 ("Smith held his breath and struggled against the restraints while Miller did not."). On top of that, Smith's autopsy showed that he had "a synthetic cannabinoid" in his blood that "can cause hallucinations, vomiting, paranoia, and convulsions (seizures)"—which, in turn, may have made Smith's "convulsions more likely and pronounced." App.488 ¶ 158; *Grayson*, 2024 WL 4701875, at *17 n.18. None of this has anything to do with

order that Plaintiff does not now defend: Without acknowledging the Alabama decisions to the contrary, the district court said that those "[e]yewitness accounts from these executions are the most probative evidence of what death by forced inhalation of nitrogen looks like." App.931.

Perhaps because Plaintiff knows about this problem, he also cites Dr. Bickler's testimony as "consistent" with these accounts. Pet.29. But he omits that Dr. Bickler expressly *based* his opinions (and the only paper cited in his expert declaration—his own two-page opinion piece, ROA.139, 211) on those reports' suggestion that the Alabama executions "were prolonged, apparently agonizing, evidently painful and traumatic." ROA.3356; *accord* ROA.3384. Dr. Bickler's opinions thus suffer from the same unreliability that caused the Alabama courts to discount the media reports in the first place. Plaintiff also tries (Pet.29) to puff up Dr. Bickler based on his "human hypoxia" research. But he does not explain what that actually involves: "slowly dropping subjects' 'oxygen saturation level to about 70 percent and sometimes lower, down to 50 percent,'" and then holding them in that reduced-oxygen state for several minutes. App.488 ¶ 159; App.867–68; App.769–70. That, of course, is nothing like the facts here, which will involve rapid administration of pure nitrogen. As Dr. Antognini put it, "probably at the 30- or 40-second level in the nitrogen hypoxia system, you've already gone past the lower level of what Dr. Bickler ... would normally study. So

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nitrogen's constitutionality or efficacy as a method of execution—it has everything to do with Smith's own actions.

there isn't really a lot of time for somebody to develop symptoms before they become unconscious." App.868. The puffery thus gets Dr. Bickler nowhere.

In short, for all the reasons why the district court's and Dr. Bickler's reliance on the Alabama media reports was wrong as an Eighth Amendment matter, those reports do nothing to undercut the district court's holding that Plaintiff has no viable RLUIPA claim.

c. *Third*, even if the Court reached the merits, Plaintiff's RLUIPA claim would not get off the ground. RLUIPA generally provides that the State shall not "impose a substantial burden on the religious exercise" of a prisoner, unless the burden is "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a).

Here, as explained above, Plaintiff failed to identify a substantial burden on his religious exercise because he unquestionably can (and said he intends to) engage in his meditative breathing as he is executed. But, even setting that aside, the State would satisfy strict scrutiny.

There is no serious question that the State has a compelling interest in pursuing justice by carrying out executions. *Cf. Dunn v. Smith*, 141 S. Ct. 725, 726 (2021) (Kavanaugh, J., dissenting from denial of application to vacate injunction) (referencing "the State's compelling interests in ensuring the safety, security, and solemnity of the execution room"); *Ramirez*, 595 U.S. at 433 ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." (quoting *Hill*, 547 U.S. at 584)). Moreover, Defendants have no less restrictive means

of furthering that interest. There certainly is none under Louisiana law because nitrogen is the only currently available method of execution. App.945 (district court finding that "Louisiana has no readily available electric chair and cannot get the drugs needed for lethal injunction" (footnotes omitted)). And Plaintiff has never argued that there is a legally appreciable difference between his breathing as he fades into unconsciousness by nitrogen hypoxia and his breathing as he would fade into unconsciousness after being shot by a firing squad. Even on strict scrutiny, therefore, Plaintiff's RLUIPA claim would fail.

CONCLUSION

The Court should deny the Application to Stay Execution and the Petition for Writ of Certiorari.

Respectfully submitted,

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