No. 25A____

Supreme Court of the United States

GREG LOVELACE,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,
APPLICANTS,

v.

JEFFERY LEE,
RESPONDENT.

EMERGENCY APPLICATION FOR A STAY OR VACATUR OF THE INJUNCTION ISSUED BY THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

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

Steve Marshall
Attorney General

A. Barrett Bowdre
Solicitor General
Counsel of Record

Robert M. Overing
Principal Deputy Solicitor General

Lauren A. Simpson
Deputy Attorney General

Polly S. Kenny
Brenton L. Thompson
Talmadge Butts
Assistant Attorneys General

State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130-0152
Tel: (334) 242-7300
Barrett.Bowdre@AlabamaAG.gov

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EXECUTION SCHEDULED THURSDAY, JUNE 11, 2026, 6:00 P.M. CDT

PARTIES AND PROCEEDINGS

The parties to the proceedings below are as follows:

Applicants Greg Lovelace, in his official capacity as Commissioner of the Alabama Department of Corrections, and Terry Raybon, in his official capacity as warden of Holman Correctional Facility, were defendants in the district court and appellants in the court of appeals.

Respondent Jeffery Lee was the plaintiff in the district court and the appellee in the court of appeals.

The relevant orders, reproduced in the appendix, in chronological order are:

Lee v. Lovelace, No. 2:25-680 (M.D. Ala. May 28, 2026), Doc. 178 (entering judgment for State on "severe pain" prong).

Lee v. Lovelace, No. 26-11864 (11th Cir. June 8, 2026), Doc. 41-1 (order reversing "severe pain" holding and remanding for evaluation of alternative method).

Lee v. Lovelace, No. 2:25-680 (M.D. Ala. June 9, 2026), Doc. 187 (issuing permanent injunction; holding Lee satisfied alternative-method burden).

Lee v. Lovelace, No. 2:25-680 (M.D. Ala. June 10, 2026), Doc. 194 (denying stay).

Lovelace v. Lee, No. 26-12027 (11th Cir. June 10, 2026), Doc. 17-1 (denying stay).

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TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Jeffery Lee is scheduled to be executed at 6:00 p.m. CDT on June 11, 2026, for the robbery-murder of Jimmy Ellis and Elaine Thompson. Not until last August did he challenge the constitutionality of the method of execution he elected in June 2018: nitrogen hypoxia. On May 28, the district court entered judgment for the State after trial. It found that "[w]hile Lee has shown that execution under the Protocol involves some suffering, on this record he has failed to prove that the Protocol causes more than 'the necessary suffering involved in any method employed to extinguish life humanely.'" App.2 (quotation omitted). On June 8, the Eleventh Circuit reversed and remanded, and on June 9, the district court considered Lee's proposed alternative—firing squad—and permanently enjoined Lee's execution by nitrogen hypoxia. This Court should vacate the injunction and permit the execution to proceed as scheduled.

Lee's would be the ninth nitrogen-hypoxia execution in the nation (eighth in Alabama), and seven have been litigated. The facts haven't changed: As the district court found—and the Eleventh Circuit affirmed—hypoxia is not "physically painful like a broken bone," and "Lee does not argue" that it is. App.2. But the law apparently *has* changed: In just a few paragraphs with two days to go, the Eleventh Circuit held that a risk of "emotional distress, anxiety, physiological stress, and physical discomfort" now satisfies the Eighth Amendment test. App.74.

If that ruling stands, it would be unprecedented in American history. Not only does it portend the first-ever permanent ban on a legislatively enacted method, but it would expand the concept of cruelty well beyond the bounds of the Eighth

Amendment. While a risk of emotional distress might be *relevant*, the notion that a generally *physically painless* method nonetheless involves a level of "severe pain" akin to barbaric torture is outlandish. As the district court recognized, if hanging—which also often causes distress associated with air hunger—is constitutional (as it is), then there can be no question that "the physiological discomfort caused by [nitrogen hypoxia] does not violate the Constitution" either. App.52.

Before today, both the Fifth Circuit and Eleventh Circuit had sustained nitrogen hypoxia against prisoners pleading the same theory of emotional distress and the same alternative method. The difference? In those prior cases, courts found that "nitrogen hypoxia was painless and [ ] firing squad was not," but here the courts found almost the opposite: "firing squad [is] painless" and nitrogen hypoxia presents "a substantial risk of serious harm." App.94 & n.11. The courts below waved off these utterly inconsistent results as "inapplicable" and "inapposite" on the ground that different cases have different records. *Id.*

Even accepting the premise (which is doubtful because this case has much the same record as last year's nitrogen cases), the Eighth Amendment outcome cannot change on a dime because the ultimate question is whether the method presents "an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless[.]'" *Glossip v. Gross*, 576 U.S. 863, 877 (2015). So it is relevant that *just last year* multiple federal trial and appellate courts agreed with officials in Alabama and Louisiana that nitrogen hypoxia was painless and firing squad was painful. Absent some drastic change in circumstances, officials cannot be

blamed for instituting a method that prisoners and jurists alike championed *for years* as "quick," "humane," "simple and painless." *Bucklew v. Precythe*, 587 U.S. 119, 164 (2019) (Breyer, J., dissenting).

The change in circumstances is purportedly that Lee had two new experts. So instead of Dr. Philip Bickler (*Miller*, *Hoffman*, *Boyd*) and Dr. Brian McAlary (*Grayson*, *Frazier*) saying that hypoxia is painless but emotionally distressing, he had Dr. Richard Schwartzstein and Dr. Julie Bastarache saying the same thing. And his other expert, Dr. Williams, changed his testimony from *Boyd* and *Hoffman*, now opining that firing squad is painless. App.123. But "public policy on the death penalty … cannot be dictated by the testimony of an expert or two or by judicial findings of fact based on such testimony." *Baze v. Rees*, 553 U.S. 35, 69 (2008) (Alito, J., concurring). If it worked that way, method-of-execution litigation would never end. All a prisoner would need to do is find one expert to use new words or demonstratives to convince one district judge that what was true six months or two weeks ago may not be true today. *See, e.g.*, App.28 n.26 (observing expert agreement in *Boyd* that "people can lose consciousness before they feel any distress" but "assum[ing] without deciding" the opposite in this case); App.24 (citing "inevitable risks" of firing squad).

The State is not asking the Court to end nitrogen-hypoxia litigation now. Pending in the Middle District of Alabama is a consolidated case of eight other challenges to the method, *In re: Alabama Nitrogen Hypoxia Protocol Litigation,* 2:24-cv-111 (M.D. Ala.), set for trial in June 2027. The State is suggesting that to the extent there is some sudden *judicial* uncertainty about the method, there is certainly

not now a "well-established scientific consensus" against the method that renders it objectively cruel and unusual. *Baze*, 553 U.S. at 67 (Alito, J., concurring) (recounting scientific debate over three-drug lethal-injection protocols); *id.* at 51 & n.2 (plurality). To the contrary, a wealth of scientific literature supporting the State dates back to the 1960s. *E.g.*, DE173-141:9 (Dr. Antognini's report); *see Bucklew*, 587 U.S. at 164 (Breyer, J., dissenting). Unless and until a contrary consensus is proven, state officials are not doing something barbaric when they propose to use the method sustained in *Boyd*, *Hoffman*, *Grayson*, and *Smith*, rather than agree with the panel majority's "intuition" that some emotional discomfort is "just categorically cruel." *Bucklew*, 587 U.S. at 137.

The Court should vacate the injunction.

STATEMENT

A. Lee commits a double murder and loses all appeals.

Two weeks before Christmas 1998, Lee, his brother, and their cousin decided to rob Jimmy's Pawn Shop in Orrville, Alabama. Lee went in and pretended he was looking for wedding rings for his girlfriend, and employee Helen King assisted him. He said he would return with money, bought a pint of liquor, and left. The conspirators parked up the street, and Lee drank the liquor and smoked a marijuana cigarette laced with cocaine. He returned to the store a few minutes later, armed with a sawed-off shotgun, announced, "What's up, motherfucker?" and began firing. He

fatally shot the owner, Jimmy Ellis, in the chest, and one of the employees, Elaine Thompson, in the face.[1] King, who was also shot, survived by playing dead.

When Lee found himself unable to steal the bolted-down cash register, he stepped out of the store, leaving the shotgun on the counter. King seized her chance, called 911, and secured the doors before Lee returned to find himself locked out. He fled to Georgia, where he was caught the next day. Lee signed a written confession, video footage from the store was shown to the jury, and King testified. "Multiple Alabama courts … characterized the evidence against Lee in the guilt phase of the trial to be 'overwhelming.'"[2]

In April 2000, the jury found Lee guilty of three counts of capital murder and the attempted murder of King. Concluding that the aggravating circumstances outweighed the mitigating, the trial court sentenced Lee to death.[3] The state and federal courts denied Lee's claims of error at every stage. Lee's appeals concluded in 2014 when this Court denied certiorari. *Lee v. Thomas*, 572 U.S. 1015 (2014) (mem.).

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1. The habeas record, which is not in PACER, contains additional details about the extent of damage and disfigurement to Lee's victims, their prolonged suffering, and the trauma felt by the survivor, who had to move away because she no longer felt safe. *See* Blue Brief 8 n.4, No. 26-12027 (11th Cir.).
2. *Lee v. Thomas*, 1:10-cv-00587, 2012 WL 1965608, at *1-2 & n.2 (S.D. Ala. May 30, 2012).
3. *Lee v. State*, 898 So. 2d 790, 856 (Ala. Crim. App. 2001) (on return to remand) ("The Defendant, with cold precision and premeditation, using a weapon designed for the sole purpose of extinguishing human life, mercilessly gunned down 3 people who were doing nothing more than trying to earn a living. As vividly shown by the surveillance video, he opened fire upon entering the door. He emptied his weapon, firing as quickly as he could, shot after shot. Miraculously, Helen King was spared and he only snuffed out the lives of two yet, in those few seconds of mayhem, he destroyed the lives of many. He planned his crime. He went to the store earlier in the day and pretended to shop for a ring. Instead, he was looking it over with an eye to return to commit his crime. When he returned, he fired immediately upon entering, with no warning and no questions asked. His intent was obvious; to take out the victims and steal what he could.").

B. Lee challenges lethal injection and elects nitrogen hypoxia.

Lee pursued two more actions prior to the one before the Court. In April 2016, he filed a successive state postconviction petition, arguing that Alabama's capital sentencing scheme was unconstitutional after *Hurst v. Florida*, 577 U.S. 92 (2016). The state courts denied relief, and this Court denied certiorari. *Lee v. State*, 244 So. 3d 998, 1004 (Ala. Crim. App. 2017); *cert. denied*, No. 1160675 (Ala. Aug. 25, 2017); *cert. denied*, 584 U.S. 915 (2018) (mem.).

Five months after initiating that action, Lee filed a 42 U.S.C. §1983 complaint in the Southern District of Alabama, arguing that the three-drug lethal injection cocktail with midazolam used by the Alabama Department of Corrections (ADOC) was unconstitutional. The complaint was dismissed on the parties' joint motion after Lee elected nitrogen hypoxia. *Lee v. Dunn*, 1:16-cv-00473 (S.D. Ala. July 20, 2018).

C. Alabama and Louisiana successfully use nitrogen hypoxia to conduct eight executions.

Alabama authorized nitrogen hypoxia in 2018 after nationwide advocacy campaigns threatened to make lethal-injection drugs unavailable to death-penalty States. *See Glossip*, 576 U.S. at 870-71. At the same time, Alabama inmates had pleaded nitrogen hypoxia as a constitutional alternative in consolidated litigation. Am. Compl. ¶163, *In re Lethal Injection Protocol Litig.*, No. 2:12-cv-316 (M.D. Ala. Nov. 29, 2017), DE348. And jurists on this Court and the Eleventh Circuit continued to express support for the method—at least as a satisfactory alternative under *Glossip*, but sometimes touting it as humane, painless, effective, and reliable too. S*ee, e.g.*, *Johnson v. Precythe*, 141 S. Ct. 1622, 1623-26 (2021) (Sotomayor, J., dissenting);

Dunn v. Price, 587 U.S. 929, 930-31 (2019) (Breyer, J., dissenting); *Bucklew*, 587 U.S. at 164 (Breyer, J., dissenting).

On August 25, 2023, ADOC adopted a protocol for nitrogen hypoxia. The crux of the protocol is that it administers "pure nitrogen gas … through an industrial-use respirator mask" until the inmate dies. *Grayson v. Comm'r, Ala. Dep't of Corr.*, 121 F.4th 894, 896 (11th Cir. 2024). EKG machines and pulse oximeters are used to monitor that nitrogen is flowing to the inmate. *Id.* Alabama used nitrogen hypoxia to carry out the sentences of Kenneth Smith (this Court denied stay),[4] Alan Miller (settled),[5] Carey Grayson (this Court denied stay),[6] Demetrius Frazier (did not appeal denial of injunctive relief),[7] Gregory Hunt (did not challenge method; this Court denied stay),[8] Geoffrey West (did not challenge method), and Anthony Boyd (this Court denied stay).[9] Louisiana employed a similar protocol to execute Jessie Hoffman (this Court denied stay after Fifth Circuit vacated preliminary injunction).[10]

D. Lee challenges nitrogen hypoxia, and the State wins after trial.

Lee filed this lawsuit on August 22, 2025, three days before the statute of limitations as to his challenge to ADOC's protocol ran. He named as defendants the ADOC commissioner (then John Hamm), the warden of Holman Correctional Facility

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4. *Smith v. Hamm*, 2:23-cv-00656, 2024 WL 116303 (M.D. Ala. Jan. 10, 2024); *aff'd*, 24-10095, 24-10095, 2024 WL 266027 (11th Cir. Jan. 24, 2024); *cert. denied*, 144 S. Ct. 414 (2024) (mem.).
5. Joint Stipulation of Dismissal, *Miller v. Marshall*, 2:24-cv-00197 (M.D. Ala. Aug. 5, 2024), ECF79.
6. *Grayson v. Hamm*, 2:24-cv-00376, 2024 WL 4701875 (M.D. Ala. Nov. 6, 2024); *aff'd*, 121 F.4th 894 (11th Cir. 2024); *cert. denied*, 145 S. Ct. 586 (2024) (mem.).
7. *Frazier v. Hamm*, 2:24-cv-00732, 2025 WL 361172 (M.D. Ala. Jan. 31, 2025).
8. *Hunt v. Alabama*, 145 S. Ct. 2790 (2025) (mem.).
9. *Boyd v. Hamm*, 2:25-cv-00529, 2025 WL 2884410 (M.D. Ala. Oct. 9, 2025); *aff'd*, 25-13545, 2025 WL 2970017 (11th Cir. Oct. 20, 2025); *cert. denied*, 146 S. Ct. 40 (2025) (mem.).
10. *Hoffman v. Westcott*, 3:25-cv-00169, 2025 WL 763945 (M.D. La. Mar. 11, 2025); *vacated*, 131 F.4th 332 (5th Cir. 2025); *cert. denied*, 145 S. Ct. 797 (2025) (mem.).

(Terry Raybon), and one hundred John Does "employed by, or contracted with, ADOC" for execution matters. DE1:3-5. He raised four claims: (1) a facial challenge to the hypoxia protocol under the Eighth Amendment, naming MAID as his alternative, (2) a state constitutional challenge to the protocol, (3) a state constitutional challenge under the non-delegation doctrine, and (4) a claim of statutory vagueness in violation of the federal and state constitutions. *Id.* at 18-27. After a hearing on January 14, 2026, the district court consolidated Lee's case with seven similar cases, dismissed the Doe defendants, and dismissed all claims in Lee's complaint but the Eighth Amendment claim. DE33.

As noted above, Lee's conventional appeals concluded in 2014. Due to various factors, primarily Lee's election of nitrogen hypoxia in 2018, the State did not move for his execution until February 9, 2026. The State gave notice to the district court (and Lee) in January 2026 that an execution motion would be forthcoming. *E.g.*, DE176:8. The district court deconsolidated Lee's case and put it on an expedited schedule. *Id.* Lee amended his complaint, naming MAID and firing squad as his alternatives. DE40:20-22.

The parties engaged in expedited discovery, including depositions. The State provided an expert report from Dr. Joseph Antognini, while Lee provided expert reports from Dr. Philip Bickler, Dr. James Williams, Dr. Julie Bastarache, and Dr. Richard Schwartzstein. The parties stipulated to the prior testimony of Dr. Brian McAlary and Dr. Shante Hill. DE176:10 n.13, 33 n.29.

The matter went to trial on April 27-30; by then, Lee had abandoned MAID and argued only for firing squad. On May 28, the district court issued a memorandum opinion and order entering judgment for the State Defendants. As it had in past nitrogen-hypoxia cases, the court determined that the emotional distress that prisoners allege could accompany a nitrogen-hypoxia execution did not amount to a severe pain "well beyond what's needed to effectuate a death sentence." App.2 (quoting *Bucklew*, 587 U.S. at 136-37). The court resolved (or did not resolve) specific factual disputes as follows:

1. The district court found that the protocol rapidly causes death.

While 6.2% oxygen is "just sufficient to maintain consciousness," the oxygen concentration in the mask falls below 6% about twenty-five seconds after the nitrogen is turned on, below 3% by thirty-three seconds, and below 2% by forty seconds. "An oxygen concentration of 2.1% would rapidly cause death." App. 12, 53-54. The court rejected Lee's expert's opinion that "an oxygen concentration of 2% [versus 0%] would prolong the time to unconsciousness … significantly." App.46.

2. The district court found that the protocol causes a discomfort sensation that is not physical pain.

The district court found that an inmate executed via hypoxia likely experiences dyspnea, which means "breathing difficulty or breathing discomfort." App.54. It is "not physical pain like a broken bone" but rather a "'more holistic discomfort sensation' without a specific source." *Id.* The court found that this sensation comes with "emotional distress, anxiety, physiological stress, and physical discomfort" and would last "one to three minutes." App.56. The reason breathing discomfort causes

emotional distress "[f]or many people,"[11] according to the district court, is that "breathing is essential to human life," so this feeling is "associated with the fear of dying." App.54. The court found the psychological drive to breathe (and associated discomfort) may begin when atmospheric oxygen dips below 15% or when the body's blood-oxygen saturation is less than 90%. App.54-56.

Hypercapnia (a buildup of carbon dioxide) can exacerbate dyspnea, App.16, 44, but the State's expert explained that the protocol prevents this "via a one-way valve" in the mask. App.18, App.2829. Physical obstructions or restrictions on breathing can exacerbate dyspnea, which was "a significant factor" for Lee's expert Dr. Schwartzstein, App.30, but the district court found that the chest straps ADOC uses on the gurney are not an impediment to breathing. App.55. The court found that hypoxia alone can cause dyspnea. *Id.*

Dyspnea can be alleviated in the clinical setting by reducing anxiety and having the patient take larger breaths. Reassurance that the patient is not dying can help, but this is not possible in an execution. *Id.*

3. The district court found that the time to unconsciousness and response to hypoxia are variable.

The district court partially credited Lee's expert's opinion that "many factors" can affect the time to unconsciousness and the body's response to a hypoxic environment. App.44. "Each [person] is going to have a different experience in time

11. While the district court sometimes wrote in general or even universal terms, Dr. Schwartzstein's testimony relied primarily on anecdotal self-reports of hospitalized patients who "often had multiple diseases" and experienced prolonged shortness of breath for days at a time. DE146:17-20. Until his study, Dr. Schwartzstein testified that this phenomenon "was going unnoticed and unappreciated in the hospital." *Id.*; *see* DE173-142 (Dr. Antognini calculating that these patients had breathing problems for an average of 2.6 days at a time). This is very different from the execution setting.

to loss of consciousness. People vary in their sensitivity to hypoxia, their sensitivity to hypercarbia, and the time it takes for them to pass out after getting hypoxic. So there's a lot of individual variability. There's a wide variability in people's response to hypoxia." App.44 (citation modified); *see* App.45 (citing "the inherent variability among individuals"), 46 (citing expert agreement that "different people respond to hypoxia differently").

4. The district court assumed without deciding that the severity of breathing discomfort would be "the same throughout."

Lee's expert testified that the protocol causes "extreme air hunger that lasts up to minutes, during minutes of unconsciousness, from which one could infer that air hunger persists at the same severity until the inmate becomes unconscious." App. 28 n.26. But the district court did not accept that opinion. Instead, "because it [did] not alter the [c]ourt's conclusion" in its initial memorandum opinion, the court "assume[d] without deciding that the level of air hunger is the same throughout." *Id.* The court would later readopt these findings in its remand order, identifying an Eighth Amendment violation on the apparent *assumption* that the protocol would cause "extreme" or severe air hunger "throughout" the entire execution.

*

The district court then applied the law to the facts, deciding that the degree of discomfort caused by the protocol did not rise to a level that would cause an Eighth Amendment problem. After all, "executions presume a risk of some pain." App.50. And the kind of emotional distress at issue here is "associated with the fear of death," which is inevitable and inescapable in an execution. *Id.* "For Eighth Amendment

purposes, the anxiety evoked by air hunger—lasting not significantly more than one to three minutes—is more an 'inescapable consequence of death,' *Baze*, 553 U.S. at 50, than '"superadd[ed]" pain well beyond what's needed to effectuate a death sentence,' *Bucklew*, 587 U.S. at 136-37." App.51. The protocol causes "physiological discomfort," but "even" if that discomfort "may feel" akin to suffocation for some, this is insufficient to prove an Eighth Amendment violation because it would be no more uncomfortable than risks "associated with hanging." App.52. Again, the court reminded, what Lee alleges is not "physical pain like a broken bone." *Id.*

The district court concluded that nitrogen hypoxia is not like the punishments considered cruel and unusual at the time of the founding. *Id.* "Instead, it is like hanging, firing squad, electrocution, and lethal injection, involving only the 'necessary suffering involved in any method employed to extinguish life humanely.'" *Id.* at 52-53 (quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947)).

E. The Eleventh Circuit reverses and remands.

Following expedited briefing and oral argument, the Eleventh Circuit reversed and remanded on June 8. Though it credited the district court's findings of fact, the court of appeals disagreed with its conclusion and held that Lee had satisfied the first prong of the Eighth Amendment test, writing:

> The district court found that an inmate executed under the protocol suffers one to three minutes of "severe air hunger and corresponding emotional distress, anxiety, physiological stress, and physical discomfort." *Lee*, 2026 WL 1493098, at *25. This mental distress, physiological suffering, and physical discomfort, the district court found, will likely take place. There is, in other words, a substantial risk of serious harm. The risk is not conjectural, speculative, or doubtful.

> The Eighth Amendment does not "guarantee a prisoner a painless death." *Bucklew*, 587 U.S. at 132. Yet at the Founding, "cruel" was "often defined to mean…'[d]isposed to give pain to others, in body or mind[.]'" *Id.* at 130 (quoting 1 Noah Webster, An American Dictionary of the English Language (1828) (first set of brackets in original)).
>
> In our view, the overall suffering described by the district court, which lasts for one to three minutes, presents a substantial risk of serious harm over and above death itself. Counting to 60 or 180 seconds is not a quick exercise, and constitutionally speaking, that timeframe is intolerable given the suffering that would likely take place under Alabama's nitrogen hypoxia protocol. Such suffering, we believe, is over and above the mental distress that typically accompanies the knowledge of impending death by execution.

App.74-75. As the district court did not analyze Lee's proposed alternative method of execution, the Eleventh Circuit ordered the lower court to do so "immediately." App.78.

F. The district court enters judgment for Lee on remand and permanently enjoins his execution by nitrogen hypoxia.

The district court entered a second memorandum order on June 9 in light of "the Eleventh Circuit's legal conclusion that the Protocol poses an unconstitutional risk of pain." App.81. Finding that "the firing squad produces a painless death," the court determined it was a safer alternative. App.94. This finding directly contradicted the district court's recognition in its first opinion in this case that "unfortunate but inevitable risks attend execution by firing squad," App.24, and its finding in *Boyd* based on the same expert's testimony.[12]

[12]. In *Boyd,* the Eleventh Circuit affirmed the finding "that the protocol would not cause the physical pain that one of Mr. Boyd's proposed alternatives—a firing squad—would. … The court determined that nitrogen hypoxia induces fear and stress, but the firing squad subjects the inmate to intense, albeit brief, physical pain." 2025 WL 2970017, at *3-4.

The State moved for a stay (DE193), arguing that the district court erred in ignoring the risk of physical pain inherent in firing-squad executions, the risk of error in firing-squad executions (which is a penological reason to reject them), and the State's interest in avoiding a method that requires *five skilled executioners*. The State also pointed out that the district court still never made a finding about the degree of air hunger "throughout" a hypoxia execution. It was improper to identify an Eighth Amendment violation on remand based on a fact the court had "assume[d] without deciding." App.28 n.26. The court denied a stay, App.106-08, and the State appealed.

G. The Eleventh Circuit denies the State's stay request.

The Eleventh Circuit ordered expedited and limited merits briefing (the State's brief was due at 7:00 a.m. EDT on June 10 with no reply allowed), and the State also moved the Eleventh Circuit for a stay of the district court's injunction. On the evening of June 10, four hours from the start of the execution window, a divided panel of the Eleventh Circuit denied the State's stay request. It found that the State was unlikely to succeed on the merits because of the district court's finding that death by firing-squad is painless. App.121-23. The majority again contrasted *Hoffman*, where the plaintiff used the same expert, on the ground that "the record in this case [is] unlike the record in *Hoffman*" because there, Dr. Williams had "agreed that death by firing squad can cause pain." App.123. And now he doesn't. The majority thus did not compare the findings about nitrogen hypoxia to the risk of physical pain from firing squad. Nor did it consider the risk of error—missing the left ventricle—and seemingly accepted the district court's rationale that the very recent "botched" execution in South Carolina has no relevance. App.119. And the panel majority discarded

Alabama's penological objection that requiring five skilled executioners makes the method less reliable by accepting contested testimony that Alabama simply "would be able to staff a firing squad." App.124-25.

Judge Luck dissented on three grounds. First, the State cannot "readily implement[ ]" firing squad because it would need to build a new facility from scratch and find five willing and skilled marksmen, which is more than "incidental delay." App.130-31. Second, firing squad would not "significantly reduce[ ] the risk of harm," given the inherent risk of physical harm in the method, which the Eleventh Circuit (and the Fifth Circuit) had previously agreed is real. App.132-34. Third, the State has at least one "legitimate" and "very good reason" for not adopting a firing squad—the error rate—and "Lee presented no evidence of how that figure compared to the frequency of mishaps with the nitrogen hypoxia protocol." App.134-35.

REASONS TO GRANT THE APPLICATION

Under Supreme Court Rule 23 and the All Writs Act, 28 U.S.C. §1651, the Court may stay or summarily vacate a lower court's injunction. *See, e.g.*, *Barr v. Lee*, 591 U.S. 979 (2020) (granting application for stay or vacatur). In considering this relief, the Court should "try to predict whether the Court would [ ] set the order aside" and then balance the equities. *See, e.g.*, *San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers). The State has a high likelihood of success and the equities favor vacating an injunction entered within forty-eight hours of execution due to the inmate's delay.

I. The risk of "breathing difficulty or breathing discomfort" (App.14) from nitrogen hypoxia does not rise to the level of a severe pain that violates the Eighth

Amendment. *First*, the district court found that this "holistic discomfort sensation" is not "pain," *id.*, and at most would occur for one to three minutes. It bears no resemblance to prolonged suffering of pre-founding tortures, App.52-53, and it is less serious than the risks of other constitutional methods. *Second*, this kind of discomfort is "associated with the fear of death," which the district court was right to discount because the fear of death may well be inevitable in any execution setting. App.50. *Third*, the district court also assumed without deciding that the level of discomfort would be *severe* through the entire execution, which made sense when the court determined that—even with the assumption in Lee's favor—the method was constitutional. App.28 n.26, 29. But that *assumption* about a fact in dispute—a fact that was critical to the Eleventh Circuit's opinion—cannot now form the basis for a constitutional violation.

II. The district court erred in finding that firing squad is literally painless, App.94, and thus in concluding that it significantly reduces overall risk. The Constitution does not require the State to impose a brief period of physical pain over a slightly longer period of emotional distress.

The State has two strong penological interests in resisting the adoption of firing squad as its fourth method of execution. First, Alabama has one executioner: the Warden of Holman Correctional Facility, Terry Raybon. To use firing squad, the State would need five executioners—i.e., five individuals willing to kill another person. They would need to be highly skilled and trained. They would not be replaceable at a moment's notice. If one goes on vacation, becomes ill, or faces

harassment or pressure—personal or political—the State's ability to carry out sentences would be jeopardized. Nitrogen hypoxia, by contrast, requires no special skill or talent. If the Warden became unavailable, the State could authorize another executioner to take his place without delay. This is a valid penological reason to prefer nitrogen hypoxia to firing squad.

As Judge Luck explained, another valid reason is exemplified by the recent experience of South Carolina: the condemned inmate, Mikal Mahdi, was not shot in the left ventricle as planned, and he seemed to remain conscious for some time. Even Lee's firearms expert said South Carolina's protocol is "skirting on the edge of failing." DE147:68. The courts below held that this "purportedly botched" execution does not render firing squad unconstitutional—and the State agrees—but that's not the point. The State is allowed to prefer a method that reduces the risk of a "botched" execution; even a "purportedly botched" one would inevitably generate more litigation and more plausible-sounding Eighth Amendment claims. In the State's view, the risk of a mishap is far lower with nitrogen hypoxia, and that's good cause to prefer it. *Accord* App.134-35 (Luck, J., dissenting).

III. The State's legislatively authorized method of execution should not have been enjoined at this late hour. Though "Lee had two constitutionally approved default methods of execution—electrocution and lethal injection," in 2018, "[h]e selected nitrogen hypoxia, instead." App.136 (Luck, J., dissenting). Then he waited until the end of the limitations period to sue, which caused the courts to expedite a trial and heavily expedite two appeals. That should count against him. The State, the

public, and victims have powerful interests in the timely enforcement of sentences, and Lee has been on death row for more than a quarter-century. Method-of-execution litigation delayed Lee's execution a decade ago and should not do so yet again.

I. The Eleventh Circuit erred in deciding that nitrogen hypoxia presents a substantial risk of serious harm.

Lee failed to clear the "exceedingly high bar" of proving that a State's chosen method of execution is unconstitutional. *Lee*, 591 U.S. at 980. He had the burden to prove at least "a substantial risk of severe pain," *Bucklew*, 587 U.S. at 134, and the district court's post-trial order was correct to hold that he did not.

First, the "holistic discomfort sensation" that the district court found—"breathing difficulty or breathing discomfort," App.14—is the same risk that inmates have alleged unsuccessfully in most of the nitrogen cases. *See, e.g.*, *Grayson*, 121 F.4th at 897 ("He claimed that the protocol creates an unnecessary risk of superadded pain through conscious suffocation and survivable hypoxia-induced injury."); *Boyd*, 2025 WL 2970017, at *1 ("He claimed, for example, that the protocol creates an unnecessary risk of superadded pain through conscious suffocation, which creates severe psychological and physiological distress."); *Hoffman*, 131 F.4th at 336 ("The district court justifies its contrary holding by focusing on psychological terror."); *id.* at 337 (Haynes, J., dissenting) ("[C]onscious terror and a sense of suffocation endures for 35 to 40 seconds … [or] for 3 to 5 minutes if an [ ] inmate holds his breath." (citation modified)). What was "upheld … last year" in "challenges similar to the one presented here" is highly unlikely to be cruel and unusual. *Lee*, 591 U.S. at 981.

Here, the State marshaled essentially the same expert testimony and the same fact testimony as in those past cases, and there was no warrant for the Eleventh Circuit to reach a different conclusion now. The State is highly likely to succeed because the record contains (1) evidence of suicides by inert-gas asphyxiation that were both quick (under one minute) and evidently painless; (2) evidence of accidental deaths in the workplace and warnings from federal regulators about how "unconsciousness can occur in about 12 seconds and death in a matter of minutes," DE173-86; and (3) older studies demonstrating how profound and rapid hypoxia can cause unconsciousness in seconds and without pain, let alone terror. These are the closest analogies we have to the execution context.[13]

For his part, Lee relied on colorful descriptions from hospital patients who "often had multiple diseases" and experienced prolonged shortness of breath for days at a time. DE146:17-20; *see* DE173-142 (Dr. Antognini calculating that these patients had breathing problems for an average of 2.6 days at a time). This phenomenon is so *unlike torture* that it "was going unnoticed and unappreciated in the hospital." DE146:18. What these patients experienced is drastically different from the execution protocol, which reduces oxygen to a level that the district court found would "result in unconsciousness very quickly" and "rapidly cause death." App.11-13. And to the

13. The district court thought it notable that the studies and case reports apparently "did not consider whether and to what extent the subjects experienced dyspnea," App.30 n.27, but it should have drawn an inference for the State: If no author of a hypoxia or suicide study thought to mention a degree of psychological discomfort so severe it would violate the Eighth Amendment if done to an inmate, it probably did not happen. Likewise for the workplace fatalities: If workers who hook up their respirators to the wrong gas felt torturous discomfort for up to three minutes, presumably they would have taken off their masks before perishing. Unfortunately, that's not the case, and inert gases kill without warning.

extent there is variability—each person will have "a different experience in time to loss of consciousness" and in "sensitivity to hypoxia," App.44-46—that cuts in the State's favor because Lee had the burden to prove a "*sure or very likely*" risk of severe pain. *Glossip*, 576 U.S. at 877.

At most, Lee has proven that there exist one or two experts who will describe the risks of hypoxia in even more hyperbolic terms than experts in previous cases. This does not make for a constitutional violation. State officials are not objectively blameworthy just because they disagree with the late-breaking view of one or two experts, *see Baze*, 553 U.S. at 69 (Alito, J., concurring), especially after multiple courts across multiple cases have agreed with the State. The court below would not blame Lee for *his delay* because some "physicians" are now saying things about hypoxia that they weren't saying "eight years" ago when Lee elected the method. App.127. But if that's true, their testimony is a novelty, perhaps a "scientific controvers[y]," *Glossip*, 576 U.S. at 882, that does not reflect an objective consensus against nitrogen hypoxia. *Cf. Lee*, 591 U.S. at 981 (vacating lower court's "last-minute intervention" based on "new expert declarations"). Application of the Eighth Amendment should not be so "capricious[ ]." *Cf. Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (plurality).

Even if Lee's experts were fully credited—and they were not, *see* App.46 (district court "certainly" did not believe that an inmate would remain conscious for "five, six, or seven minutes")—the risks would amount to no more discomfort than that caused by other constitutional methods of execution. This was the district court's rationale. App.51-52 (comparing hanging; citing *In re Ohio Execution Protocol Litig.*,

946 F.3d at 290; *Bucklew,* 587 U.S. at 132); App.23-24 & n.24 (describing hanging, firing squad, and cyanide gas—the latter causing "more than seven minutes of physical pain" (citing *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983)). The Eleventh Circuit did not address this argument. It did not compare the discomfort it believed to satisfy the first prong of *Glossip* with any risk of any other constitutional method. This was error. The risks of nitrogen hypoxia are less than those of hanging, *see Bucklew*, 587 U.S. at 132-33; *Campbell v. Wood*, 114 S. Ct. 2125, 2127 (1994) (Blackmun, J., dissenting); electrocution, *see Glass v. Louisiana*, 471 U.S. 1080, 1091-92 (1985) (Brennan, J., dissenting from denial of certiorari); or cyanide gas, *see Arthur v. Dunn*, 137 S. Ct. 725, 732 (2017) (mem.) (Sotomayor, J., dissenting from denial of certiorari) (quoting *Fierro v. Gomez*, 77 F.3d 301, 308 (9th Cir. 1996)). Those methods have long been recognized to be constitutional, so nitrogen hypoxia must be.

Second, the district court was right to discount the risks Lee's experts believe will occur with nitrogen hypoxia because they are "associated with the fear of death," App.50, which is more an "inescapable consequence" of execution than a pain super-added by the State, App.56. Specifically, the court found that "the anxiety evoked by air hunger remains inextricably intertwined with the fear of dying," which is an inherent risk because the inmate "*is* dying." App.50. The court stated:

> For Eighth Amendment purposes, the anxiety evoked by air hunger—lasting not significantly more than one to three minutes—is more an "inescapable consequence of death," *Baze*, 553 U.S. at 50, than "'superadd[ed]' pain well beyond what's needed to effectuate a death sentence," *Bucklew*, 587 U.S. at 136–37. As the Court stated previously:
>
> > Every person condemned to die likely experiences feelings of angst, anxiety, stress, or panic. For hundreds of years,

> condemned inmates—regardless of the execution method—have been placed in the unenviable position of confronting their final moments. On death row, a condemned inmate arguably endures psychological pain from the date his sentence is imposed until the moment of his execution. Every method of execution also inevitably includes several steps signaling that death is imminent. The condemned inmate eats a last meal, says goodbye to loved ones, is escorted to the execution chamber, and utters his final words. It is no accident that the Protocol refers to these actions as "last" and "final." The condemned inmate's psychological and emotional pain likely increase as each step is complete. …
>
> Psychological and emotional pain are thus unavoidable consequences of capital punishment under any method of execution, past or present. Walking to the gallows, feeling the electric chair's straps tighten, having a target affixed to one's chest, or being secured to a gurney each evokes strong feelings that death is imminent and results in corresponding psychological and emotional pain.

Boyd, 2025 WL 2884410, at *20-21 (citations omitted).

App.51 (citation modified). Contrary to the district court's findings on this factual issue, the Eleventh Circuit asserted its "belie[f]" that hypoxia adds something "over and above the mental distress that typically accompanies the knowledge of impending death." App.75. But even if that were true in some cases, it is not the goal of the method, and even Lee's experts acknowledged the inherent variability in a person's response to hypoxia. App.44-46.

To the extent the Eleventh Circuit meant to say that the risk of dyspnea is *unique* to nitrogen hypoxia, that fact does not make it cruel. The risk of a "mechanical malfunction" that attends electrocution "may result in pain" but not "intolerable" "cruelty." *Baze*, 553 U.S. at 50; *see also Glass*, 471 U.S. at 1091-92 (Brennan, J., dissenting from denial of certiorari). An IV could slip during a lethal injection, as in

the infamous Clayton Lockett execution, *Glossip*, 576 U.S. at 872, or a firing squad can miss.[14] An inmate being hanged could slowly asphyxiate or be decapitated instead of having his neck snapped. *Bucklew*, 587 U.S. at 132-33. These risks are inherent in the nature of the given method, but that does not render them unconstitutional—either as a matter of original meaning or contemporary doctrine.

Here, where the method of death is *the deprivation of oxygen*, it could be anticipated that an inmate might experience some breathlessness in the brief period before he fully loses consciousness. As the videos before the district court demonstrated, within twenty-five seconds of nitrogen being turned on during an execution, the concentration of oxygen within the mask is insufficient to maintain consciousness. App.10-12, 53. Within forty seconds, it is insufficient to maintain life. *Id.* The State maintains that Dr. Antognini's estimate of sixty to seventy-five seconds to unconsciousness is valid under these conditions, *contra* App.38, but even if the district court's "one to three minutes" were accurate, that does not make hypoxia violative of the Eighth Amendment.

Third, the district court erred when it "assume[d] without deciding that the level of air hunger is the same throughout." App.28 n.26. Combining that premise with its finding that inmates would at some point "experience severe air hunger," App.29, the district court thus assumed without deciding that inmates experience *severe* air hunger for the entire duration of a nitrogen-hypoxia execution. This move

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14. *E.g.*, Chiara Eisner, *A Firing Squad Tried to Shoot a Prisoner in the Heart. They Missed, Autopsy Indicates*, NPR (May 8, 2025, 2:41 PM), www.npr.org/2025/05/08/nx-s1-5389846/firing-squad-south-carolina-death-penalty-execution.

was permissible in the district court's original opinion entering judgment for the State because it "d[id] not alter the Court's conclusion." App.28 n.26. But on remand, when it determined that the protocol violates the Constitution, the court could not assume a disputed fact in Lee's favor.

This fact is obviously critical to the permanent injunction. The Eleventh Circuit relied on the assumption (without acknowledging it) repeatedly:

- "The district court found that an inmate who is executed under the nitrogen hypoxia protocol 'conscious' experiences 'severe air hunger and corresponding emotional distress … for 'one to three minutes[.]'" App.61.

- "Ultimately, … the district court found that an inmate who is executed under the protocol 'experiences severe air hunger and corresponding emotional distress … for 'one to three minutes.'" App.68.

- "[T]he protocol 'likely causes severe air hunger—the most severe form of breathing discomfort—for one to three minutes[.]'" App.69.

- "The district court found that the nitrogen hypoxia protocol causes one to three minutes of 'severe air hunger and corresponding emotional distress[.]'" App.72.

- "The Commissioner, for his part, attacks the district court's finding that the protocol causes an inmate to experience air hunger and associated distress for … one to three minutes. We discern no clear error in any of the district court's factual findings." App.73 (citations omitted).

- "The district court found that an inmate executed under the protocol suffers one to three minutes of 'severe air hunger and corresponding emotional distress[.]'" App.74.

- "In our view, the overall suffering described by the district court, which lasts for one to three minutes, presents a substantial risk of serious harm[.]" App.75.

It should be apparent that if the level of "air hunger" is *not* the same throughout, the Eleventh Circuit's opinion does not stand. At a minimum, it is an open question whether it would violate the Eighth Amendment if only a fraction of the district

court's estimated one-to-three minutes of consciousness involved "severe" air hunger. Because the district court did not revisit its assumption on remand—accepting the Eleventh Circuit's opinion that it would satisfy *Glossip*'s first prong *if there were* three minutes of severe pain—it premised the permanent injunction on a hypothetical finding it never made.

Worse, it premised the injunction on a *disputed* assumption because the State has consistently maintained that any "air hunger" or "dyspnea" and corresponding emotional effects would *not* be the same throughout the entire execution. *See* Oral Arg. 38:48-39:48, No. 26-11864 (11th Cir. June 5, 2026) (noting that the degree of any dyspnea would be variable and alerting the panel to the district court's assuming without finding that the degree would be the same). Indeed, Dr. Antognini opined that "a person subjected to profound hypoxia, if they did develop shortness of breath, would have symptoms (albeit *for a brief period*) akin to someone who is exercising," DE173-141 ¶ 33 (emphasis added); that any "distress" would be "very, very brief if at all present," DE148:61; and that the body responds differently "when you get to very low concentrations of oxygen," *id.* at 44:3.[15] And the district court credited a study in which subjects reported "mild" or "moderate" symptoms at higher oxygen levels. *See, e.g.*, App.32. That finding directly undermines its assumption that "the level of air hunger is the same throughout." App.28 n.26.

[15] For their part, Lee's experts did not support the assumption there would be severe air hunger from start to end of the execution. They observed gradations of breathing discomfort in clinical settings. DE146:12, 18 (dyspnea "can be mild" and "unnoticed"); DE146:173 ("wide variability").

In sum, the district court made a favorable assumption for Lee when it believed that it did not matter how much "severe air hunger" takes place in the time before unconsciousness. But according to the Eleventh Circuit's opinion, that question was pivotal. The district court erred because it could not permanently enjoin the State's method by assuming the truth of a key fact for Lee's claim.

II. The Constitution does not require the State to inflict the physical pain of firing squad instead.

Even if the Eleventh Circuit were right that nitrogen hypoxia presents a substantial risk of harm, it was wrong to find that Lee had identified "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*, 587 U.S. at 134. First, Lee did not show that firing squad significantly reduces the risk of harm compared to nitrogen hypoxia. Its advantages are not "clear and considerable." *Id.* at 143. Second, firing squad cannot be "readily implemented" in Alabama, which also has legitimate penological reasons for not adopting it. *Accord* App.129-35 (Luck, J., dissenting).

A. Firing squad does not significantly reduce the overall risk of harm compared to nitrogen hypoxia.

The Eleventh Circuit previously described a firing-squad execution: When four or five "bullets strike the heart, they tear the heart muscles to pieces and blow apart the tissue. Moreover, the inmate would not lose consciousness for three to six seconds, during which time he or she would feel pain and suffering." *Boyd*, 2025 WL 2970017, *4 (citation modified); *accord, e.g.*, *Owens v. Stirling*, 904 S.E.2d 580, 600 (S.C. 2024) (finding that "an inmate executed via the firing squad is likely to feel pain, perhaps

excruciating pain[, for] … ten to fifteen seconds" "unless there is a massive botch" like "miss[ing] the inmate's heart").

The district court reached a contrary finding based solely on the testimony of Dr. Williams, who testified that "getting shot multiple times in the heart causes a painless death." App.94. But "there was evidence contradicting Dr. Williams's opinion, supplied by Dr. Williams himself," who previously testified that "[b]efore falling unconscious, the inmate feels the physical pain of the bullets' impact." App. 132 (Luck, J., dissenting); *accord Hoffman*, 131 F.4th at 336 ("[E]xperts for both parties [which included Dr. Williams] agreed that death by firing squad can cause pain[.]"); *see also, e.g.*, DE147:20 (Dr. Williams) (describing the ballistic impact of a .30 caliber bullet as "equivalent to being struck by … a three-quarter-ton truck"); DE149:63 (Dr. Antognini) ("I certainly have experience with patients who have had gunshot wounds, and they are painful."); DE173-142 ¶ 19 (Dr. Antognini) ("[T]he shattering of bone and tissue destruction is, by its very nature, going to be painful."); DE173-203:30-31 (Lee) (describing witnessing gunshot wounds, hearing victims "scream or moan," and it seeming "[p]retty painful"); DE148:47-48 (collecting cases recognizing that firing squad is not painless).

Indeed, it was based on Dr. Williams's prior testimony in *Boyd* that the Eleventh Circuit explained that "the firing squad subjects the inmate to intense, albeit brief, physical pain" and "would very likely carry both intense physical pain as well as the psychological and emotional harm to the inmate." App.133 (quoting *Boyd*, 2025 WL 2970017, at *4). The district court erred by disregarding that long-

recognized and common-sense understanding to find that firing-squad executions are *painless* based solely on "the testimony of [one] expert." *Baze*, 553 U.S. at 69 (Alito, J., concurring).

Firing squad also presents a risk of error or mishap, which can cause even more pain. For instance, if shooters miss the targeted left ventricle—and hit instead the "right ventricle, which does not pump blood to the brain," DE147:104 (Dr. Williams)—then the physical pain would be even greater, DE149:64-65 (Dr. Antognini).[16] And this risk is not theoretical: Not only does the recent execution in South Carolina of Mikal Mahdi provide an example, but "Dr. Williams testified that, since 1860, there have been forty-three firing squad executions in Utah and six in South Carolina; of those forty-nine, he said four had been 'botched.'" App.135. "In other words, a little over eight percent of those firing squad executions went wrong." *Id.* And while "Lee presented no evidence of how that figure compared to the frequency of mishaps with the nitrogen hypoxia protocol," "the state did, and the evidence showed that there had been no mishaps since Alabama and Louisiana began using their protocols." *Id.*

There are also psychological risks associated with firing squad. The district court found that "[e]very method of execution … inevitably includes several steps signaling that death is imminent," such as "having a target affixed to one's chest." App.51.[17] Lee's expert agreed: He discussed an inmate executed by firing squad in

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[16]. Dr. Williams did not dispute that physical pain would result if firing squad shooters missed the left ventricle of the condemned's heart. *See* DE147:102-03.

17. *See also Boyd*, 2025 WL 2884410 at *21 ("And Utah's firing squad protocol also carries with it a risk of psychological and emotional pain, most acutely from the time the inmate is escorted into the execution chamber and restrained in a chair, and continuing when the target is affixed over his heart

Utah in 1938 whose "heartbeat jumped from 72 to 180" because of "fear and anxiety." DE147:44. Notably, that inmate's heart did not stop beating until "15.6 seconds after the bullets struck." *Id.* at 47.

Because the district court erred in finding that death by firing squad is completely painless, it also erred in failing to compare the combined physical and psychological risks of firing squad with the risks of nitrogen hypoxia. Perhaps some might prefer the risk of brief physical pain to the risk of "air hunger," or vice versa, but in any event, when the risks are just "slightly or marginally" different, not clearly and considerably so, there is no constitutional violation. *Baze*, 552 U.S. at 51.

B. Firing squad is not feasible or readily implemented, and the State has valid penological interests in opposing firing squad.

Lee's alternative method of firing squad is also not "readily implemented" by Alabama, which has valid penological reasons to reject it. *Glossip*, 576 U.S. at 877.

First, Alabama currently lacks a structure or facility that would be safe and appropriate for firing squad executions and would thus have to build the program "from scratch." App.131 (Luck, J., dissenting). It would then need to "test the new elements before they could become operational"—a process that "took five years to implement" "when the state adopted nitrogen hypoxia as a method of execution." *Id.* "At best," then, as Judge Luck found, "the evidence shows that a firing squad

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and the hood is placed over his head. All the while, the inmate knows that four bullets will soon strike his heart, killing him. Much of the psychological and emotional pain caused by either nitrogen hypoxia or the firing squad is pain which the inmate would inevitably experience because he knows he will soon die—an experience which attends every execution and cannot be avoided.").

execution would eventually be done," "[b]ut there's no evidence that it would be relatively easy or reasonably quick to do so." *Id.*

Second, and more significantly, ADOC would need to find sufficient volunteers among its personnel willing and capable of serving in a firing squad. DE146:8 (Commissioner Hamm testifying that he could not compel ADOC employees to participate in executions). This is a problem for the feasibility of the method. A firing squad execution under Utah's protocol would require five state personnel willing and able to serve as executioner. Lee has not proven there are readily available personnel to serve this function, and neither Warden Raybon (DE147:163-164) nor former Commissioner Hamm (DE146:235) could identify five ADOC employees they believe would be skilled and willing to carry out a firing-squad execution. This would make it difficult to use the method "quickly." *Bucklew*, 587 U.S. at 141; *see also id.* at 134 (personnel and staffing concerns are among the "many legitimate reasons why a State might choose, consistent with the Eighth Amendment, not to adopt a prisoner's preferred method of execution"); *cf. Glossip*, 576 U.S. at 878-79 (rejecting alternative where plaintiffs had "not identified any available drug or drugs that could be used"); *Boyd*, 2025 WL 2970017, at *5 (rejecting MAID on ground that obtaining drugs could be "difficult" and "finding the necessary personnel to administer them would be problematic").

But more than that: even if officials could identify five employees willing and able to shoot an inmate exactly in the left ventricle, the State would have penological reason to reject a method so dependent on particular personnel. Conducting an

execution by nitrogen hypoxia involves training, to be sure, but not five executioners with expert marksmanship. *See McGehee v. Hutchinson*, 854 F.3d 488, 493-94 (8th Cir. 2017) ("[Firing squad] requires trained marksmen who are willing to participate and is allegedly painless only if volleys are targeted precisely. The record comes short of establishing a significant possibility that use of a firing squad is readily implemented and would *significantly reduce* a substantial risk of severe pain.").

A method that rests on the availability of five trained executioners would risk a reliability problem like the one that led the State to adopt nitrogen hypoxia in the first place. *See Price*, 920 F.3d at 1327 (noting that nitrogen hypoxia would address the "supply concerns" that have made lethal-injection drugs unreliable); *Frazier*, 2025 WL 361172, at *13 (crediting State's penological reason that it "turned to nitrogen hypoxia in part to 'implement[ ] a method that does not depend so heavily on external variables'"); U.S. Dep't of Just. Office of Legal Policy, Restoring and Strengthening the Federal Death Penalty 28-30 (2026), www.justice.gov/ag/media/1437806/dl?inline (citing supply chain challenges among reasons to explore other methods, such as nitrogen hypoxia). If opponents of capital punishment can pressure major "pharmaceutical companies to refuse to supply the drugs" for lethal injection, *Glossip*, 576 U.S. at 870, it's no stretch of the imagination to think they could pressure individuals not to participate in firing-squad executions.[18]

18. *Cf.* Tr. 58:1-9, *Boyd*, 2:25-cv-00529 (M.D. Ala. Sept. 4, 2025), DE83 (testimony acknowledging that journalist purported to acquire fourteen names of execution team members); Brendan Kirby, *'Thou Shalt Not Suffocate'—Billboard Near Holman Prison Targets Corrections Workers*, FOX10 NEWS (June 5, 2026, 6:38 PM), www.fox10tv.com/2026/06/05/thou-shalt-not-suffocate-billboard-near-holman-prison-targets-corrections-workers.

Finding, training, and maintaining at all times at least *five* executioners—practically speaking, ADOC would need more in case of illness or absence—would add new variables to the process beyond the State's control, which it has ample penological reason to reject. That exactly one other State is currently conducting firing-squad executions does not defeat Alabama's "legitimate reason[s] for declining to adopt the protocol of another." *Bucklew*, 587 U.S. at 140; *accord McGehee*, 854 F.3d at 494 (rejecting alternative method argument in part because *only* one state was using firing squad at the time of plaintiff's claim).

III. The equities favor the State because Lee challenged the method he elected in 2018, and he could have sued years ago.

The district court entered an eleventh-hour injunction that will force the State to reschedule Lee's long-delayed execution using a different method. And it abused its equitable discretion when it did so without *any* consideration of the countervailing equities. App.101 (citing *eBay* factors without applying them). But this Court has repeatedly held that "the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). For this reason, "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.*

Lee has been on death row since 2000. The families of his victims have waited more than a quarter-century for justice. Lee avoided execution once in the 2010s by electing nitrogen hypoxia, which gave him a de facto five-year moratorium while ADOC developed the method. Now he challenges hypoxia as "conscious suffocation" because it deprives an inmate of oxygen. But he knew that hypoxia deprives an

inmate of oxygen when he elected it in 2018—that is, after all, in the name of the method. He knew it when the State announced its protocol in August 2023. *Contra* App.127 (speculating that Lee did not know "he would suffer … air hunger for approximately one to three minutes"). Yet he waited to sue until almost the day the limitations period ran in 2025 (after six hypoxia executions in Alabama and Louisiana), pleaded alternatives that are not authorized by state law (or even modifications of ones authorized by state law), and then failed to move for interim relief until just last week. His actions, especially that he challenges the very method he elected, suggest he is "more interested in delaying [his] execution[ ] than in avoiding unnecessary pain." *See Middlebrooks v. Parker*, 22 F.4th 621, 628 (6th Cir. 2022) (Thapar, J., statement) (citing *Bucklew*, 587 U.S. at 140) (suggesting estoppel); *Price v. Dunn*, 139 S. Ct. 1533, 1539 (2019) (Thomas, J., concurring in denial of certiorari) ("[I]t is difficult to see his litigation strategy as anything other than an attempt to delay his execution."). Enjoining Lee's execution at this late stage was an abuse of equitable discretion.

The consequences of rushed proceedings caused by tactical delays are severe. Not only did the courts below reach the wrong results after expediting every stage of proceedings, but they made serious mistakes along the way. For one, the State could not violate the Eighth Amendment based on a fact that the district court "assume[d] without deciding." App. 28 n.26. That was erroneous. Second, the Eleventh Circuit reversed based on its belief that the district court found "air hunger can be worse than pain," App.8, but as the district court then clarified, it "did not find that air

hunger is 'worse than pain' but instead recounted patients' descriptions in a clinical setting," App.23 n.17. Third, the State objected to firing squad repeatedly on the ground that it would need five skilled executioners at any time, calling this a potential "labor supply" problem analogous to drug shortages. DE148:31-32, DE186:3, 12-13; DE193:4-5. The district court misunderstood the State to mean it could not "procure" "rifles" or "ammunition," App.99, which was never the argument. Each of these errors could have and likely would have been corrected in the State's favor had Lee not waited to sue, waited to seek expedited relief, and forced the courts into an eleventh-hour fire drill. This is one of the many downsides to prisoner "manipulation," which is supposed to be "the extreme exception, not the norm." *Bucklew*, 587 U.S. at 150.

The district court addressed the balance of equities in one sentence only after the State moved for a stay pending appeal, seemingly blaming *the State* for "requiring the Court to set Lee's case on an 'expedited schedule.'" App.108. The Eleventh Circuit agreed. App.126. But that's backward. If Lee had not elected hypoxia or had sued at any earlier time, we wouldn't be here within hours of his scheduled execution. It's not the State's duty to wait to set an execution until an inmate has exhausted whatever §1983 litigation he wants; it's the judiciary's duty to "police carefully against … unjustified delay," especially when a case "'could have been brought' earlier." *Bucklew*, 587 U.S. at 150 (quoting *Hill*, 547 U.S. at 584). That the district court had to rush to trial, rush briefing, and rush out two orders and that the Eleventh Circuit had to rush briefing and decisions in two appeals should have indicated that something had gone wrong. That something was Lee's decision—after suing to stop

his execution by lethal injection nearly a decade ago—to use the courts as "tools" once again. *Id.* Everyone "deserve[s] better," *id.*, not least Lee's victims and their families still waiting for justice.

CONCLUSION

The Court should vacate the district court's permanent injunction.

Respectfully submitted,

Steve Marshall
Attorney General

A. Barrett Bowdre
Solicitor General
Counsel of Record

Robert M. Overing
Principal Deputy Solicitor General

Lauren A. Simpson
Deputy Attorney General

Polly S. Kenny
Brenton L. Thompson
Talmadge Butts
Assistant Attorneys General

State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130-0152
Tel: (334) 242-7300
Barrett.Bowdre@AlabamaAG.gov

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