No. 25A1381

In the Supreme Court of the United States

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

Applicants,

v.

JEFFERY LEE.

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

BRIEF OF STEPHEN I. VLADECK AS *AMICUS CURIAE* IN OPPOSITION TO THE APPLICATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Alabama Is Seeking Permanent, Not Interim, Relief 3

II. A Permanent Injunction Entered After Trial Cannot Be Treated Like a Last-Minute Preliminary Stay 5

III. Plenary Review Is the Proper Avenue for Permanent Relief 8

IV. This Court Likely Lacks The Authority To Grant The Relief Alabama Seeks 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases Page(s)

Abbott v. League of United Latin Am. Citizens,
No. 25-845, 2026 WL 1127246 (U.S. Apr. 27, 2026) 2, 9

Barefoot v. Estelle,
463 U.S. 880 (1983) 3

Barr v. Lee,
591 U.S. 979 (2020) 2, 5, 7, 8, 10, 12

Clinton v. Goldsmith,
526 U.S. 529 (1999) 4

Dep't of Educ. v. California,
604 U.S. 650, 652 (2025) 5, 6

Dep't of Homeland Sec. v. Texas,
144 S. Ct. 715 (2024) 5

Does 1–3 v. Mills,
142 S. Ct. 17 (2021) 8, 11

eBay Inc. v. MercExchange, L.L.C.,
547 U.S. 388 (2006) 6

Garland v. Vanderstok,
144 S. Ct. 338 (2023) 5

Guerrero v. Busby,
146 S. Ct. 1192 (2026) 2

Hamm v. Miller,
143 S. Ct. 50 (2022) 5

Hamm v. Reeves,
142 S. Ct. 743 (2022) 5

Hill v. McDonough,
547 U.S. 573, 584 (2006) 7

Hollingsworth v. Perry,
558 U.S. 183 (2010) 11

Lee v. Comm'r, Ala. Dep't of Corr.,
No. 26-11864, 2026 WL 1651147 (11th Cir. June 8, 2026) 6, 7

Lee v. Lovelace,
No. 2:25-cv-680, 2026 WL 1664095 (M.D. Ala. June 9, 2026) 6

M'Intire v. Wood,
11 U.S. (7 Cranch) 504 (1813) 11

McClellan v. Carland,
217 U.S. 268 (1910) 12

McClung v. Silliman,
19 U.S. (6 Wheat.) 598 (1821) 11

Nken v. Holder,
556 U.S. 418 (2009) 1, 2, 3

Noem v. Abrego Garcia,
145 S. Ct. 1017 (2025) 5

Noem v. Vasquez Perdomo,
146 S. Ct. 1 (2025) 5

Ohio Citizens for Resp. Energy, Inc. v. Nuclear Regul. Comm'n,
479 U.S. 1312 (1986) 4

Pa. Bureau of Corr. v. U.S. Marshals Serv.,
474 U.S. 34 (1985) 11

Trump v. Boyle,
145 S. Ct. 2653 (2025) 6

Trump v. CASA, Inc.,
606 U.S. 831 (2025) 9

Trump v. Slaughter,
146 S. Ct. 18 (2025) 6

Trump v. Wilcox,
145 S. Ct. 1415 (2025) 6

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 7

Wolf v. Cook Cnty.,
589 U.S. 1190 (2020) 10

Statutes and Rules

28 U.S.C. § 1253 9

All Writs Act,
28 U.S.C. § 1651 .... 3, 4, 10, 11, 12, 13

28 U.S.C. § 2101(f) 3

Sup. Ct. R.
10 .... 9, 13
11 .... 10, 13

Other Authorities

William Baude, *Supreme Court Stays to State Courts*, SCOTUSblog, Mar. 6, 2026, https://www.scotusblog.com/interim-docket-blog/supreme-court-stays-to-state-courts/ 12

William Baude, *The Interim Docket*, 74 U. Chi. L. Rev. (forthcoming 2027), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6741778 .... 3, 8, 10, 13

Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. Cin. L. Rev. 1159 (2008) 3, 4

Note, *The Role of Certiorari in Emergency Relief*, 137 Harv. L. Rev. 1951 (2024) 4

Tr. of Oral Arg., *Ohio v. EPA*, No. 23A349 (U.S. Feb. 21, 2024) 8, 9

Stephen Vladeck, *The Shadow Docket* (2023) 1

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Stephen I. Vladeck is the Agnes Williams Sesquicentennial Professor of Federal Courts at Georgetown University Law Center, who studies the federal courts and, in particular, the Supreme Court's docket of interim and emergency relief—the body of orders, often unsigned and unexplained, through which the Court increasingly resolves matters of national consequence. *See, e.g.*, Stephen Vladeck, *The Shadow Docket* (2023). *Amicus* takes no position on the ultimate merits of Respondent's claims. He submits this brief for a single, narrow purpose: to bring to the Court's attention a procedural distinction that Alabama's application does not acknowledge but that should be dispositive. Unlike the typical "state-on-top" application in a capital case, Alabama does not ask this Court to vacate a *temporary* stay of execution entered by a lower court. It asks the Court to "stay" or "vacate" a *permanent* injunction entered by a federal district court after full proceedings in a context in which such relief would necessarily preclude appellate review of the district court's ultimate merits judgment. The difference between those two requests reflects materially different forms of relief, governed by different standards, justified by different sources of authority, and entitled to different degrees of deference. *See Nken* v. *Holder*, 556 U.S. 418, 428–29 (2009). And those distinctions should be fatal to granting Alabama's application here.

[1] Pursuant to Supreme Court Rule 37.4, amicus curiae submits this brief in connection with Applicants' emergency application under Rule 22. No counsel for a party authored this brief in whole or in part, and no person other than amicus or his counsel made a monetary contribution to its preparation or submission. This brief has been transmitted electronically to counsel for all parties pursuant to Rule 29.3.

SUMMARY OF ARGUMENT

Emergency relief in this Court takes distinct forms, and they are not freely interchangeable. A stay "operates upon the judicial proceeding itself" by temporarily suspending the enforceability of an order, while an injunction "directs the conduct of a party," *see Nken*, 556 U.S. at 428; the two differ both in mechanics and in the justification each demands. Alabama's application wears the familiar costume of a "state-on-top" death penalty application—where a State asks this Court to vacate a lower court's temporary stay so that an execution may proceed. *See, e.g.*, *Guerrero* v. *Busby*, 146 S. Ct. 1192 (2026) (mem.). But the relief it actually seeks is far more extraordinary—the evisceration of a federal court's final equitable judgment. *See Nken*, 556 U.S. at 428.

That difference matters here in several related ways. The order Alabama attacks is not a preliminary, equities-balancing, probability-based injunction of the sort this Court has vacated in prior death penalty cases like *Barr* v. *Lee*, 591 U.S. 979 (2020) (per curiam), but a permanent injunction entered after a three-day bench trial and sustained on appeal, in its core findings, against clear-error review. Thus, the showing required to dissolve such a judgment is correspondingly greater. The question is not whether the district court misbalanced the equities; it is whether this Court should use the emergency docket to conduct what is effectively summary *merits* review.

Indeed, there is nothing formally or practically "interim" about the relief sought: Alabama asks this Court to effectively set aside a final judgment on the merits and clear the way for an execution. That is tantamount to a request for summary reversal, which—outside the Court's mandatory appellate jurisdiction, *see, e.g.*, *Abbott* v. *League of United*

Latin Am. Citizens, No. 25-845, 2026 WL 1127246 (U.S. Apr. 27, 2026) (mem.)—properly belongs on the certiorari docket, not the emergency docket. The capital-stay jurisprudence descending from *Barefoot* v. *Estelle*, 463 U.S. 880 (1983)—calibrated to prisoner-initiated, last-minute stay requests—does not supply the standard when the State seeks to annul an injunction the prisoner won after full trial-court proceedings. And staying *or* vacating a permanent injunction that is the sole order preserving this Court's jurisdiction would not be "in aid of" that jurisdiction within the meaning of the All Writs Act, 28 U.S.C. § 1651; it would destroy it. *See* William Baude, *The Interim Docket*, 74 U. CHI. L. REV. (forthcoming 2027), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6741778. After all, allowing Alabama to execute Mr. Lee through a grant of emergency relief would necessarily frustrate this Court's ability to conduct plenary review of the district court's final, permanent injunction.

For these reasons, among others, the Court should decline Alabama's unusual (if not unprecedented) request to use an emergency application to effectively (if not formally) vacate a *permanent* injunction.

ARGUMENT

I. ALABAMA IS SEEKING PERMANENT, NOT INTERIM, RELIEF

A threshold point frames everything that follows. A stay and an injunction are analytically different remedies: a stay works "upon the judicial proceeding itself," "temporarily suspending the source of authority to act," whereas an injunction "directs the conduct of a party." *Nken*, 556 U.S. at 428–29. And this Court's power to award the two remedies stems from different sources of authority. A stay of a final judgment is authorized

by 28 U.S.C. § 2101(f), which exists "only for the limited purpose of preserving the Supreme Court's ability to rule on the petition for certiorari." Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159, 1167 (2008); *see Ohio Citizens for Resp. Energy, Inc.* v. *Nuclear Regul. Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers).

This Court's power to formally or practically vacate a lower court's injunction instead necessarily comes from the All Writs Act, 28 U.S.C. § 1651(a)—an authority this Court has described as "essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." *Clinton* v. *Goldsmith*, 526 U.S. 529, 537 (1999). What's more, unlike a temporary stay, vacatur "*permanently* saps that order's binding force." Note, *The Role of Certiorari in Emergency Relief*, 137 HARV. L. REV. 1951, 1966 (2024).

This distinction is critical here because Alabama's application purports to seek only to clear away a *temporary* obstacle to an execution. It *notes* that the district court entered a permanent injunction, but does not even pause to consider whether and/or how that alters the posture of its request. But the order below is a permanent injunction—a final equitable judgment on a developed record—and the relief Alabama seeks is tantamount to asking this Court to dissolve it for good. Keeping this distinction in view is essential, because, as explained below, the considerations that govern a request to erase a final injunction are meaningfully and materially different from those that govern a request to lift a temporary stay—even in a capital case.

II. A PERMANENT INJUNCTION ENTERED AFTER TRIAL CANNOT BE TREATED LIKE A LAST-MINUTE PRELIMINARY STAY

This Court *has* "vacated" injunctions blocking executions before, including, most notably, in *Barr* v. *Lee*, 591 U.S. 979 (2020) (per curiam). Alabama's application specifically invokes *Barr* v. *Lee* for the proposition that "the Court may stay or summarily vacate a lower court's injunction." App. 15. But that decision vacated a *preliminary* injunction, not a permanent one. *See id*. at 979 (per curiam) (vacating "[t]he District Court's . . . order granting a *preliminary* injunction" (emphasis added)). The per curiam opinion turned on the conclusion that the plaintiffs had "not established that they are *likely* to succeed on the merits"—the probabilistic language of preliminary relief. *Id*. at 980 (emphasis added). And the principal dissent's central objection was that the Court had resolved "grave, fact-heavy" questions that "no factfinder ha[d] adjudicated," on a record of "conflicting expert" evidence assembled in a matter of days—usurping the role of the trial court, not reversing it on the merits. *Id*. at 985–87 (Sotomayor, J., dissenting).

Each of this Court's recent "vacaturs" of injunctions on the emergency docket arose in the same posture—where the district court (or, in one case, the court of appeals) had entered *preliminary* relief at the onset of the litigation, not a permanent injunction at the conclusion of proceedings. *See Noem* v. *Vasquez Perdomo*, 146 S. Ct. 1 (2025) (mem.); *Noem* v. *Abrego Garcia*, 145 S. Ct. 1017 (2025) (mem.); *Dep't of Homeland Sec.* v. *Texas*, 144 S. Ct. 715 (2024) (mem.); *Garland* v. *Vanderstok*, 144 S. Ct. 338 (2023) (mem.); *Hamm* v. *Miller*, 143 S. Ct. 50 (2022) (mem.); *Hamm* v. *Reeves*, 142 S. Ct. 743 (2022) (mem.); *cf. Dep't of Educ.*

v. *California*, 604 U.S. 650, 652 (2025) (per curiam) (treating an application to vacate a temporary restraining order as a request for a stay pending appeal, and granting it).[2]

The order Alabama asks this Court to dissolve is of an entirely different character. After a three-day bench trial featuring eleven witnesses and thousands of pages of exhibits, the district court entered final judgment and a permanent injunction under the demanding four-factor framework this Court reaffirmed in *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006), not the more flexible framework that governs preliminary injunctive relief. *See Lee* v. *Lovelace*, No. 2:25-cv-680, 2026 WL 1664095 (M.D. Ala. June 9, 2026), *stay denied*, No. 26-12027 (11th Cir. June 10, 2026) (mem.). The district court made detailed findings of fact: that Alabama's nitrogen-hypoxia protocol inflicts one to three minutes of "severe air hunger," *id.* at *7; that execution by firing squad is "feasible, readily implemented," and produces "a quick and painless death," *id.* at *4–5; and that the State offered "no admissible evidence to the contrary" and "failed to articulate a legitimate penological reason" for refusing the alternative. *Id.* at *7, 10. The Eleventh Circuit, reviewing for clear error, had already "discern[ed] *no* error" in those findings of fact, not

[2] This Court has also issued a handful of rulings on the emergency docket that "stayed" permanent injunctions—especially in the context of temporarily vindicating the President's (claimed) constitutional power to remove agency heads without cause. *See, e.g.*, *Trump* v. *Slaughter*, 146 S. Ct. 18 (2025) (mem.); *Trump* v. *Boyle*, 145 S. Ct. 2653 (2025) (mem.); *Trump* v. *Wilcox*, 145 S. Ct. 1415 (2025) (mem.). But as *Boyle* itself stressed, these were "interim orders" that were "not conclusive as to the merits." 145 S. Ct. at 2654. Rather, the stays in those cases were meant to, and did, *preserve* this Court's jurisdiction while facilitating this Court's ability to conduct plenary review—review that it will shortly complete. Whatever terminology Alabama uses to describe the relief it is seeking here, that relief is clearly distinguishable from those cases, for Alabama is asking this Court to *conclusively* defeat the district court's injunction in a context that will *preempt* plenary appellate review of that decision. That Alabama's application does not point to a prior example in which this Court granted such a request is revealing.

just no "clear" error. *Lee* v. *Comm'r, Ala. Dep't of Corr.*, No. 26-11864, 2026 WL 1651147, at *6 (11th Cir. June 8, 2026) (per curiam) (emphasis added).

That difference is—and should be—dispositive. A permanent injunction rests not on a forecast of likely success but on a completed merits adjudication, and the factual findings underlying it are reviewable only for clear error, with the trial court's firsthand credibility determinations entitled to particular deference. *See Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). To be sure, the Court has emphasized that equity "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill* v. *McDonough*, 547 U.S. 573, 584 (2006). But that same tradition cuts decisively *against* an appellate court's substituting a hurried, cold-record judgment for the considered findings of the tribunal that actually heard the witnesses—particularly where, as here, the trial court resolved sharply "conflicting expert evidence" only after observing those witnesses firsthand. *Cf. Barr* v. *Lee*, 591 U.S. at 986 (Sotomayor, J., dissenting). This is exactly the kind of case in which the difference between preliminary and permanent injunctive relief ought to matter.

The upshot is that the showing required of Alabama bears no resemblance to the showing at issue in *Barr* v. *Lee* or the other vacaturs of TROs and preliminary injunctions cited above. In those cases, the question was whether a plaintiff had demonstrated a likelihood of success sufficient to support last-minute *preliminary* relief. Here, the State must establish that a final judgment—resting on findings already sustained against clear-error review—should be erased *without* plenary consideration. Nothing in *Barr* v. *Lee* or

any other case Alabama's application cites authorizes so much greater an "interim" intrusion on so much more complete of a lower-court record.

III. PLENARY REVIEW IS THE PROPER AVENUE FOR PERMANENT RELIEF

Styled as an emergency application, the State's request is in substance a petition for summary reversal on the merits. The district court has entered a final equitable judgment, and the permanent injunction is the last word we would expect from the trial court. An application asking this Court to undo that judgment and authorize an execution is not "interim" in any logical respect. As Professor Baude has explained in a forthcoming article, the interim nature of the emergency docket "is supposed to be ancillary to the Court's ultimate jurisdiction over the merits," and on it "the Court does not engage in routine error correction." Baude, *supra*. A request to summarily wipe away a final merits judgment that will necessarily moot a subsequent appeal is neither ancillary to this Court's ultimate jurisdiction over the merits nor, on these facts, anything *but* error correction.

Members of this Court have voiced analogous concerns. Justice Barrett has explained that, where the Court grants extraordinary relief, the likelihood-of-success inquiry "encompass[es] not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case," lest "applicants . . . use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument." *Does 1–3* v. *Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in denial of application for injunctive relief). Justice Kavanaugh has agreed that the success-on-the-merits prong "accounts for certworthiness." Tr. of Oral Arg. 74, *Ohio* v. *EPA*, No. 23A349

(U.S. Feb. 21, 2024) (Kavanaugh, J.). And Justice Kavanaugh has also defended this Court's more energetic use of its emergency docket in recent years as necessary to "determin[e] the nationally uniform *interim* legal status for several years" of key state or federal statutes or policies. *See Trump* v. *CASA, Inc.*, 606 U.S. 831, 877 (2025) (Kavanaugh, J., concurring). Again, there is nothing "interim" about the relief Alabama is seeking here—not only because, if successful, it would frustrate this Court's plenary review, but because, unlike the typical eleventh-hour emergency litigation in a capital case, there's nothing more for the *district court* to do in this case.

To be sure, this Court sometimes resolves the merits of plenary appeals summarily. But those dispositions come either through the device of "summary reversal" at the certiorari stage or in cases in which this Court exercises mandatory appellate jurisdiction—most prominently on direct appeal from three-judge district courts under 28 U.S.C. § 1253, where this Court's review is obligatory rather than discretionary. The Court's recent intervention in the Texas congressional-redistricting litigation is emblematic: there, months *after* granting a stay of a preliminary injunction, the Court acted summarily to reverse a three-judge district court's order in a posture in which this Court's appellate jurisdiction was not a matter of grace. *See Abbott*, 2026 WL 1127246. This case is the opposite. Review of the judgment below would (and should) come, if at all, through a discretionary writ of certiorari—and a fact-bound Eighth Amendment dispute resolved on a fully developed trial record is an unlikely candidate for such review in the first place. *See* Sup. Ct. R. 10.

The orderly course is therefore the ordinary one. If Alabama believes the district court's final equitable judgment is wrong, its remedy is to seek review in the normal course: by petitioning for a writ of certiorari once the court of appeals has acted or, if it genuinely contends the question is of such imperative importance as to justify departing from normal practice, by seeking certiorari before judgment. *See* Sup. Ct. R. 11. What the State may not do is convert the interim docket into an instrument for what is effectively summary reversal of a permanent injunction, bypassing the briefing, argument, and deliberation that a capital case of this gravity demands. *See Barr* v. *Lee*, 591 U.S. at 984 (Sotomayor, J., dissenting) (warning against accepting an "artificial claim of urgency to truncate ordinary procedures of judicial review"). Resolving "grave, fact-heavy" challenges "on abbreviated timetables and without oral argument" is exactly the practice this Court has been urged to avoid. *Id.* at 985–86 (quoting *Wolf* v. *Cook Cnty.*, 589 U.S. 1190, 1194 (2020) (Sotomayor, J., dissenting)).

IV. THIS COURT LIKELY LACKS THE AUTHORITY TO GRANT THE RELIEF ALABAMA SEEKS

Finally, even if this Court were otherwise inclined to break new ground by vacating a permanent injunction on the emergency docket, whether formally or effectively, it is not at all clear that it has the statutory authority to do so. The All Writs Act authorizes relief only when it is "necessary or appropriate in aid of [the Court's] jurisdiction" and "agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Both of the structural principles described above and in Professor Baude's article—that interim relief must remain ancillary to the Court's merits jurisdiction, and that it is not appropriately deployed for routine error

correction, *see* Baude, *supra*—are rooted in that text. And those principles (and that text) foreclose the relief Alabama seeks for two independent reasons.

First, an emergency writ can be "in aid of" this Court's jurisdiction only when the Court actually has the capacity to *exercise* that jurisdiction. The Court's early "in aid of jurisdiction" cases under the All Writs Act "confined it to filling the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pa. Bureau of Corr.* v. *U.S. Marshals Serv.*, 474 U.S. 34, 41 (1985) (citing *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598 (1821); *M'Intire v. Wood*, 11 U.S. (7 Cranch) 504 (1813)). As Justice Barrett reasoned in *Does 1–3*, where the Court is not likely to grant review, the writ "would be in aid of nothing"—there would be no jurisdiction to aid. *See Does 1–3*, 142 S. Ct. at 18 (Barrett, J., concurring). The same principle applies with even more force when the Court would be *unable* to grant such review. The Solicitor General has adopted this position, arguing in multiple briefs that applicants seeking to vacate even a *preliminary* injunction must show, among other things, "a reasonable probability that [the] Court would eventually grant review." Note, *supra*, at 1966–67 & nn.165–66 (citing examples). It necessarily follows that there must also be a reasonable probability that the Court *could* "eventually grant review."

Alabama has not shown, and on this fact-bound record could not show, "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). As noted above, the cert.-worthiness question here is a substantial one, since the district court's permanent injunction rests on a highly fact-bound application of this Court's settled precedents.

Second, and even if this Court disagrees as to the *substantive* likelihood of certiorari, the *procedural* logic runs squarely against the State. In the capital context, the event that threatens this Court's ability to exercise its jurisdiction is the execution—because carrying out the sentence moots the case and forever forecloses review. Professor Baude has made exactly this point: where a prisoner faces execution and a stay is pending, "the Court can surely act to stay the execution and preserve its own jurisdiction over the case," because the Court "will (potentially) eventually have jurisdiction . . . to review the final order" and thus "has the power under Section 1651 to preserve that jurisdiction as the litigation progresses." William Baude, *Supreme Court Stays to State Courts*, SCOTUSblog, Mar. 6, 2026, https://www.scotusblog.com/interim-docket-blog/supreme-court-stays-to-state-courts/.

The corollary should be fatal to Alabama. An order preserving the injunction keeps the controversy alive for orderly review; an order effectively dissolving it clears the way for an execution that would extinguish the Court's jurisdiction altogether. Staying (or vacating) this injunction would not aid the Court's jurisdiction; it would destroy it. Whatever the All Writs Act permits in the context of *preliminary* relief from lower courts, it surely cannot authorize a writ that defeats, rather than preserves, this Court's ultimate capacity to decide the case *after* a final judgment below. *See McClellan* v. *Carland*, 217 U.S. 268 (1910); Baude, *supra*.

* * *

In the guise of "staying" or "vacating" a permanent injunction, Alabama asks this Court to do something it has rarely done (and never in an opinion that specifically considered the

issue): to effectively dissolve a federal district court's final, fully adjudicated equitable judgment, on an emergency timetable, in a capital case, with no merits-stage briefing and no oral argument. The order below is a permanent injunction entered after a three-day trial—not a preliminary injunction of the sort vacated in *Barr* v. *Lee*—and the findings underlying it have already withstood clear-error review from the Eleventh Circuit.

There is nothing "interim" about such a request to "stay" or "vacate" that judgment on the merits; the proper course is, instead, a petition for certiorari—or, if truly warranted, certiorari before judgment—not summary reversal on the emergency docket. *See* Sup. Ct. R. 10, 11. And staying or vacating an injunction that alone preserves the Court's jurisdiction would not be "in aid of" that jurisdiction; it would defeat it. *See* 28 U.S.C. § 1651(a); Baude, *supra*. This Court has numerous options at its disposal if it wishes to take up Alabama's appeal on the merits; staying or vacating a permanent injunction on the emergency docket isn't—and shouldn't be—one of them.

CONCLUSION

The Court should deny the Application.

Respectfully submitted,

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