No. 25A1381

Supreme Court of the United States

GREG LOVELACE,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,
APPLICANTS,
v.
JEFFERY LEE,
RESPONDENT.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR A STAY OR VACATUR

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

June 11, 2026

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

REPLY BRIEF

1. Lee's claim fails because even on the most generous version of the facts, nitrogen hypoxia (1) does not cause the kind of severe pain that characterized cruel punishments before the founding and (2) does not even rise to the level of pain inherent in other constitutional methods, such as hanging or cyanide gas. App.52-53. Lee's theory thus depends on the Court adopting an evolving-standards approach to methods of execution (which it has firmly rejected) and holding that the standards have evolved since *the 1990s*, when hanging and cyanide gas were last used. Opp.26-28. There is no point in further appellate review just to have the Court restate what it said about "the Constitution's original understanding" in *Bucklew v. Precythe*, 587 U.S. 119, 129-35 (2019).

The district court found (on this record) that death by nitrogen hypoxia likely involves "air hunger" or "dyspnea," which means "breathing difficulty or breathing discomfort." App.14. The court found this could be "severe," evoking anxiety and fear, and then assumed without deciding it would be severe "throughout" the execution. App.28-29. Even so, the court was right to find that this risk compares favorably to hanging. App.52. And it was right to find that because any fear of death is inescapable in the execution context, whatever emotional distress is unique to nitrogen hypoxia does not go "well beyond what's needed to effectuate a death sentence." App.49-51.

Lee should not have won. His odds were so slim that his primary appellate argument was denial of his *Daubert* motion. The Eleventh Circuit's reasoning—just four short paragraphs, App.74-75—did not grapple with *Bucklew*, the history, or the

comparison with other constitutional methods. It did not cite any precedent except for the Eighth Amendment standard. The result can be explained only by the panel's "intuition," which state officials are not constitutionally required to share. *Bucklew*, 587 U.S. at 137. Especially because there is no "scientific consensus." *Contra* Opp.24. Lee cites a few op-eds by a handful of doctors in the past *two years* who never raised alarm about inert-gas suicides, who "vehemently oppose the death penalty," and who badly misrepresent the scientific literature.[1] For just one example, Bailey et al. (2025) say there is "wide variation … in the time to unconsciousness," but the study they cite, Ogden et al. (2010), is a defense exhibit in this case because the authors found a range of time to unconsciousness of "36 to 55 s[econds]" in four inert-gas suicides.[2] This is not a wide variation or a prolonged time by any stretch.[3]

The Eleventh Circuit's opinion also rested on the hypothetical that any inmate would "suffer[ ] one to three minutes of 'severe air hunger[,]'" App.74, which the district court had assumed without deciding, App.28 n.26. Lee proceeds from the same assumption—repeating "one to three minutes of severe, conscious air hunger akin to suffocation," Opp.3; *id.* at 16, 17, 23, 24, *which no court ever found*. Lee now says for the first time that one can trim "24 seconds" from the length of alleged air hunger, *id.* at 28, but that figure is his own, not a fact finding. Lee cannot backfill the

[1] DE173-46:3 (Bailey et al.); *see* Br. of Appellees 37, *Lee v. Lovelace*, No. 26-11864 (11th Cir. June 3, 2026), DE29.
[2] DE173-47:2 (Bailey et al.); DE173-167:5 (Ogden et al.).
[3] *Contra also* Br. Am. Thoracic Soc'y 17, *Lee v. Lovelace*, No. 26-11864 (11th Cir. June 2, 2026), DE28 (asserting that "[n]umerous studies and accounts confirm … extended periods of consciousness and profound suffering").

district court's injunction with findings it didn't make, and the State cannot be enjoined based on a hypothetical set of facts.[4]

2. As for Lee's proposed alternative, being shot in the heart is not painless, and the State is not required to believe that it is. The district court's painlessness finding allowed it to avoid comparing the risks altogether: in its view, *there are no risks* in firing-squad executions. For this move, the courts below cited caselaw that some risks are constitutionally tolerable, which is, of course, true. App.98, 119. But that doesn't mean those risks don't exist or that the State can't take what happened in South Carolina (for example) as a valid reason to prefer nitrogen hypoxia. App.134-35 (Luck, J., dissenting). Courts are not "boards of inquiry" that can reject the State's constitutionally permissible penological views at will. *Bucklew*, 587 U.S. at 134.

Lee believes the State can staff a firing squad that meets Utah's standards. Two state officials expressed doubt. DE146:236 (former Commissioner Hamm); DE147:163-64 (Warden Raybon). But even if the State could, it can validly prefer nitrogen hypoxia, which requires one executioner with no special set of skills, to a method that requires *five* executioners with exquisite aim. This requirement makes firing squad more fragile, and it likely exposes more employees to harassment because political actors will know that the shooters are less easily replaced. Again,

[4] Lee suggests the State "did not challenge … the substantial risk of serious harm." Opp.22 n.14. Of course it did. App.73 ("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 not significantly more than one to three minutes.").

courts cannot infer *cruelty* from rejection of a method that does not equally satisfy the State's interests.

3. Nothing about this injunction, issued two days before execution, makes it any different from other last-minute injunctions the Court has vacated. Every step of the proceedings had to be rushed, even though Lee has been "on notice" of his method since he elected nitrogen hypoxia eight years ago. *Cf. Bucklew*, 587 U.S. at 150 n.5. The State's interests in enforcement are at their apex here, after Lee strategically delayed his execution by lethal injection for years, only to reverse course once the State was ready to use his choice of method. *See Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) ("By declaring his method of execution, picking lethal gas over the State's default form of execution—lethal injection—Walter LaGrand has waived any objection he might have to it."); App.135-36 (Luck, J., dissenting).

Lee and his amicus Professor Vladeck are wrong to say that this Court is powerless to act if a district court enters a permanent rather than preliminary injunction on the eve of execution. Yes, practically speaking, an order vacating a stay of execution is not "interim" if the case becomes moot. Vladeck Br. 3-4. But that's true of every application to vacate a stay of execution. There is no "plenary appellate review" when the State executes an inmate after a preliminary injunction either. *Id.* at 6 n.2. This is just the nature of execution litigation (and other forms of emergency litigation, too), not a defect in the State's application. If the Court agrees that the State is likely to succeed, the question—as in any capital case—is whether relief should issue now or later. And the equities—as in many capital cases—favor now.

Barr v. Lee, 591 U.S. 979, 981 (2020). Endorsing the professor's view would explode federal intervention in executions because lower courts would know that any injunction made permanent would be unreviewable before the execution date. This upside-down view of the federal judiciary would make last-minute stays even more "the norm" than they are now. *Contra id.* And it is not the law: the Supreme Court does not have less authority to act on a short fuse than does a federal district court.

CONCLUSION

The Court should grant the application and vacate or stay the injunction so that the execution may proceed as planned.

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

JUNE 11, 2026