

***** CAPITAL CASE *****

No. _____

**In The
Supreme Court of the United States**

JEFFERY LEE,

PETITIONER,

v.

GREG LOVELACE, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
AND TERRY RAYBON, WARDEN, HOLMAN CORRECTIONAL FACILITY,

RESPONDENTS.

**EXECUTION SCHEDULED FOR SEPTEMBER 17, 2026
AT 12 A.M. CDT TO SEPTEMBER 18, 2026 AT 6 A.M. CDT**

PETITION FOR A WRIT OF CERTIORARI

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***** CAPITAL CASE *****

QUESTION PRESENTED

The State of Alabama secured a dismissal of Petitioner Jeffery Lee's challenge to lethal injection by representing that, if he were executed, it would be by nitrogen hypoxia—not lethal injection. The State knew that Mr. Lee had expressly reserved his right to challenge any future nitrogen hypoxia protocol. After he successfully challenged the protocol the State developed, the State invoked the resulting injunction as changed circumstances permitting it to execute him by lethal injection after all.

The question presented is: whether judicial and equitable estoppel permit the State to repudiate an unqualified representation to a federal court through which it obtained dismissal of an action by invoking a later development arising from a known contingency that the State itself controlled.

PARTIES TO THE PROCEEDING

Petitioner is Jeffery Lee. Respondents are Greg Lovelace, in his capacity as Commissioner of the Alabama Department of Corrections (“ADOC”), and Terry Raybon, in his capacity as the Warden of the Holman Correctional Facility (“Holman”).¹ Because the petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

State Proceedings

State v. Lee, No. CC-99-21 (Ala. Cir. Ct., Dallas Cnty. Oct. 11, 2000)

Lee v. State, No. CR-00-0084, 898 So. 2d 790 (Ala. Crim. App. 2001)

Ex parte Lee, No. 1021971, 898 So. 2d 874 (Ala. 2004)

Lee v. Alabama, 543 U.S. 924 (2004)

Lee v. State, No. CC-99-21.60 (Ala. Cir. Ct., Dallas Cnty.)

Lee v. State, No. CR-07-0054, 44 So. 3d 1145 (Ala. Crim. App. 2009)

Ex parte Lee, No. 1090383 (Ala.)

Lee v. State, No. CC-99-21.61 (Ala. Cir. Ct., Dallas Cnty. Aug. 5, 2016)

Lee v. State, No. CR-15-1415, 2017 WL 543171 (Ala. Crim. App. Feb. 10, 2017)

Ex parte Lee, No. 1160675 (Ala.)

Ex parte Lee, No. 1021971 (Ala. Apr. 2, 2026)

Ex parte Lee, No. 1021971 (Ala. July 22, 2026)

Lee v. Lovelace, No. 03-CV-2026-901393 (Cir. Ct. Montgomery Cnty. Sept. 7, 2026)

Ex parte Lee, No. SC-2026-0745 (Ala.)

¹ Through the time of trial, the Commissioner of ADOC was John Hamm. Commissioner Hamm subsequently retired and was replaced by Greg Lovelace, who was substituted as a defendant in this case. At all relevant times, the Warden of Holman has been Terry Raybon. Because Respondents are state officials sued in their official capacities, this Petition will refer to them as “the State.”

Federal Proceedings

Lee v. Allen, No. 1:10-cv-00587-WS-M, 2012 WL 3137901 (S.D. Ala., May 30, 2012)

Lee v. Comm’r, Ala. Dep’t of Corr., 726 F.3d 1172 (11th Cir. 2013)

Lee v. Thomas, 572 U.S. 1015 (2014) (mem.)

Lee v. Dunn, No. 1:16-cv-00473-WS-B (S.D. Ala.)

Lee v. Comm’r, Ala. Dep’t of Corr., No. 17-12271 (11th Cir.)

Lee v. Alabama, No. 17-775 (U.S.)

Lee v. Lovelace, No. 2:25-cv-680-ECM, 2026 WL 1493098 (M.D. Ala. May 28, 2026)

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

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

Lee v. Lovelace, No. 2:25-cv-680-ECM, 2026 WL 1678986 (M.D. Ala. June 10, 2026)

Lee v. Comm’r, Ala. Dep’t of Corr., No. 26-12027, 2026 WL 1741802 (11th Cir. June 10, 2026)

Lovelace v. Lee, No. 25A1381, 2026 WL 1694504 (U.S. June 11, 2026) (mem.)

Lee v. Comm’r, Ala. Dep’t of Corr., No. 26-12027 (11th Cir. June 23, 2026)

Lee v. Lovelace, No. 2:25-cv-680-ECM, 2026 WL 2111728 (M.D. Ala. July 22, 2026)

Lee v. Comm’r, Ala. Dep’t of Corr., No. 26-12710 (11th Cir. Sept. 9, 2026)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeffery Lee respectfully petitions this Court for a writ of certiorari before judgment to review a case pending in the U.S. Court of Appeals for the Eleventh Circuit. That appeal challenges an order from the U.S. District Court for the Middle District of Alabama, which denied Mr. Lee's post-judgment motion to alter or amend the judgment. On September 9, 2026, the Eleventh Circuit denied Mr. Lee's motion to stay his execution, while expressly stating that it was addressing only the stay motion. The merits appeal remains pending, and no judgment has yet issued.

OPINIONS BELOW

The Eleventh Circuit's order denying Mr. Lee's motion to stay the execution is unreported and is reproduced at App. 1a–14a.

The district court's order denying Mr. Lee's motion to amend the judgment is unreported but is available at 2026 WL 2111728 (M.D. Ala. July 22, 2026), and is reproduced at App. 15a–30a.

The district court's Memorandum Opinion and Order on remand, which declared Alabama's nitrogen hypoxia protocol unconstitutional under the Eighth Amendment and permanently enjoined its use, is unreported but is available at 2026 WL 1664095 (M.D. Ala. June 9, 2026), and is reproduced at App. 31a–56a.

The Eleventh Circuit's opinion reversing the district court's initial judgment for the State on Mr. Lee's Eighth Amendment claim and remanding for further findings is unreported but is available at 2026 WL 1651147 (11th Cir. June 8, 2026) (per curiam), and is reproduced at App. 57a–77a.

The district court’s initial Memorandum Opinion and Order, which entered judgment for the State after concluding that Mr. Lee had not satisfied the first prong of *Glossip v. Gross*, 576 U.S. 863 (2015), is unreported but is available at 2026 WL 1493098 (M.D. Ala. May 28, 2026), and is reproduced at App. 78a–135a.

Related orders denying the State’s requests to stay or vacate the permanent injunction are unreported but are available at 2026 WL 1678986 (M.D. Ala. June 10, 2026), 2026 WL 1741802 (11th Cir. June 10, 2026), and 2026 WL 1694504 (U.S. June 11, 2026) (mem.). Those orders are reproduced at App. 136a–138a, App. 139a–167a, and App. 168a, respectively.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a). The Eleventh Circuit has jurisdiction under 28 U.S.C. § 1291.

On September 9, 2026, the Eleventh Circuit denied Mr. Lee’s emergency motion to stay his execution, while expressly stating that it was addressing only the stay motion. App. 1a. The appeal remains pending, and the Eleventh Circuit has not entered judgment. This Petition therefore seeks certiorari before judgment. Sup. Ct. R. 11. This Court has jurisdiction under 28 U.S.C. § 1254(1), and the Petition is timely under 28 U.S.C. § 2101(e).

INTRODUCTION

The State obtained dismissal of Mr. Lee’s lethal-injection action by telling a federal court that, if he were executed, it would be by nitrogen hypoxia—not lethal injection. The State then developed the nitrogen hypoxia protocol (“Protocol”) that the district court ultimately found unconstitutional. The State now invokes the invalidation of its own Protocol as the basis to execute Mr. Lee by lethal injection after all. That maneuver is incompatible with the principle underlying

judicial estoppel: a party may not obtain a judicial benefit through a representation and then repudiate it when doing so becomes advantageous.

In 2016, Mr. Lee timely challenged the lethal injection protocol before the State sought an execution date for him. Two years later, the Legislature authorized nitrogen hypoxia—a method that State officials have repeatedly described as the “most painless and humane method of execution known to man.”¹ Mr. Lee elected nitrogen hypoxia while expressly reserving his right to challenge the future protocol. The State then obtained dismissal of the lethal-injection suit by telling the court, without qualification, that “if [he] is to be executed, Defendants will carry out that execution by nitrogen hypoxia.”

After the State released a protocol for nitrogen hypoxia, and multiple executions confirmed its constitutional shortcomings, Mr. Lee filed the underlying lawsuit. After a three-day trial and on remand from the Eleventh Circuit, the district court held that the Protocol violates the Eighth Amendment, and that execution by firing squad—the alternative Mr. Lee proposed—is a feasible and readily implemented alternative. The court permanently enjoined the State from executing him under the Protocol.

Rather than revise the Protocol or proceed by firing squad, the State announced that it would execute Mr. Lee by lethal injection—the very method it told a federal court it would not use. The State then obtained a September 17, 2026 execution date, effectively foreclosing Mr. Lee

¹ Oral Arg. at 45:18–45:37 (LaCour, Ala. Solic. Gen.), *Smith v. Comm’r, Ala. Dep’t of Corr.*, No. 24-10095 (11th Cir. Jan. 19, 2024), available at www.call.uscourts.gov/oral-argument-recordings [search “10095” in case number]. In sponsoring the bill for nitrogen hypoxia, then-Alabama Senator Trip Pittman also stated that the method “is very effective” and “[i]nhaling nitrogen leads to instantaneous unconsciousness and, in a moment or so, death.” Andrew J. Yawn, *Death Penalty: Firing Squad Out, Nitrogen Gas In* (Apr. 5, 2017), www.montgomeryadvertiser.com/story/news/2017/04/05/death-penalty-firing-squad-out-nitrogen-gas/100082290/.

from reopening his lethal injection challenge with sufficient time to litigate on the merits. Mr. Lee asked the district court to hold the State to its earlier representation under the doctrines of judicial and equitable estoppel. The district court refused. Mr. Lee immediately appealed and moved for a stay of his execution. The Eleventh Circuit denied the stay without deciding the merits of the appeal.

The case presents an important and recurring question: when may courts and litigants rely on a State's representation about its future conduct? Government representations often lead courts to dismiss cases and litigants to abandon claims or accept narrower relief. The question is particularly consequential in Alabama, where dozens of death-row inmates have elected nitrogen hypoxia and the State has invoked those elections to argue that any challenge to lethal injection is moot, unripe, or otherwise unavailable. If the State may invoke an election to foreclose a lethal-injection challenge and later disregard that same election when it becomes inconvenient, neither courts nor inmates can know whether the State's representations impose a genuine constraint or merely preserve a temporary litigation advantage.

Nor can the Eleventh Circuit's rationale in denying the stay be reconciled with how the Federal Circuit and Eighth Circuit have applied *New Hampshire's* changed-circumstances principle: neither a party's changed interests nor a later development resting on facts the party already possessed excuses an inconsistent position. See *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001); *Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1355 (Fed. Cir. 2010); *Spencer v. Annett Holdings, Inc.*, 757 F.3d 790, 797–98 (8th Cir. 2014). This case is the ideal vehicle to resolve that conflict, because the relevant estoppel facts are undisputed and the issue fully briefed below.

Immediate review is essential. Mr. Lee is scheduled to be executed on September 17, 2026. Because the Eleventh Circuit stated that it was addressing only the stay motion, ordinary appellate review cannot occur before the execution. This Court should grant certiorari before judgment.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Mr. Lee’s Prior Lethal-Injection Challenge and Election of Nitrogen Hypoxia

In 2016, Mr. Lee filed suit in the U.S. District Court for the Southern District of Alabama (“Southern District”) challenging the State’s three-drug lethal-injection protocol under the Eighth Amendment. *See Lee v. Dunn*, No. 1:16-cv-473-WS-B (S.D. Ala.). While that suit was pending, the Legislature authorized a new method of execution—nitrogen hypoxia—and gave condemned prisoners thirty days to elect it or be executed by lethal injection as the default method. Ala. Code § 15-18-82.1. On June 26, 2018, Mr. Lee timely elected nitrogen hypoxia—but predicated that election on the State’s obligation to develop a constitutionally valid protocol for nitrogen hypoxia. Mr. Lee expressly reserved in his written election “the right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia.” App. 169a–170a (SDE 37-1).²

Based on Mr. Lee’s election of nitrogen hypoxia, the parties jointly moved to dismiss his lethal-injection lawsuit as moot, representing to the Southern District that “if he is to be executed, Defendants will carry out that execution by nitrogen hypoxia,” not lethal injection. App. 171a–

² References to docket entries in the Southern District are designated as “SDE.” References to docket entries in the district court are designated as “DE.” References to docket entries in the Eleventh Circuit (No. 26-11864) are designated as “First Appeal Doc.” to the extent they are not provided separately as exhibits. References to docket entries in the Eleventh Circuit (No. 26-12027) are designated as “Second Appeal Doc.” to the extent they are not provided separately as exhibits. References to docket entries in the Eleventh Circuit (No. 26-12710) are designated as “Third Appeal Doc.” to the extent they are not provided separately as exhibits.

173a (SDE 37 at 2–3). In dismissing the lawsuit, the Southern District accepted that representation:

The parties agree that Lee timely availed himself of that option by submitting paperwork to the Warden of Holman Correctional Facility prior to June 30, 2018, confirming his election to be executed by nitrogen hypoxia. In light of these developments, the parties jointly represent that “Plaintiff’s claims and causes of action are now moot because *if he is to be executed, Defendants will carry out that execution by nitrogen hypoxia,” not the three-drug lethal injection protocol at issue in this litigation.*

App. 174a (SDE 38) (emphasis added).

B. Alabama’s Development of the Nitrogen Hypoxia Protocol

In August 2023, the State released a protocol for executions by nitrogen hypoxia. *See* DE 138 at 3. Lawyers in the Office of the Attorney General with no medical or scientific background drafted that Protocol. *See* DE 119-2 at 10, 20, Nos. 10, 19; DE 119-3 at 56–59, Nos. 243, 244–252, 255–257; DE 146 (4/27/2026 Tr. at 217:6–8). They did not consult with medical professionals, scientists, or engineers in the drafting process. *See* DE 119-2 at 10, No. 10; DE 119-3 at 27–29, Nos. 92–104; DE 146 (4/27/2026 Tr. at 218:3–23; 246:14–17).

Nor did the State take any steps—before or after prisoners started to challenge the execution method—to confirm whether nitrogen hypoxia causes pain or suffering. *See* DE 146 (4/27/2026 Tr. at 218:24–219:18). The Protocol, for example, does not include the administration of any sedatives or analgesics that could reduce or eliminate suffering. *See* DE 138 at 3. None of the State’s testing of the nitrogen delivery system was intended to answer these questions either. None involved volunteers inhaling nitrogen gas (as opposed to breathing air). 4/28/2026 Tr. at 138:22–25, 152:21–24, 155:17–19.³ None sought to determine when a prisoner would lose

³ James Houts, a former attorney with the Attorney General’s Office, testified that ADOC took precautions to ensure that no human volunteers were exposed to nitrogen. DE 148 (4/28/2026 Tr. at 138:22–139:8). Mr. Houts did briefly breathe the nitrogen gas once; however, he never

consciousness. DE 148 (4/28/2026 Tr. at 152:25–153:6). And none assessed whether the prisoner would suffer air hunger or pain. *Id.* (4/28/2026 Tr. at 154:15–155:16, 156:14–16). Nonetheless, in January 2024, the State began using the Protocol to execute prisoners.

II. PROCEDURAL HISTORY

A. Mr. Lee’s Conviction and Appeals

On April 12, 2000, Mr. Lee was convicted of murder and attempted murder. *See Lee v. State*, 898 So. 2d 790, 807 (Ala. Crim. App. 2001). The jury recommended, by a 7-5 vote, to sentence Mr. Lee to life without the possibility of parole, but the judge overrode the recommendation and sentenced him to death. *Id.* at 807–08. His sentence was affirmed on direct appeal. *Id.* at 874; *Lee v. Alabama*, 543 U.S. 924 (2004) (mem.). All conventional appeals have been exhausted. *Lee v. State*, 44 So. 3d 1145 (Ala. Crim. App. 2009); *Lee v. Thomas*, 572 U.S. 1015 (2014) (mem.).

B. Mr. Lee’s Successful Challenge to the Nitrogen Hypoxia Protocol

On August 22, 2025, Mr. Lee filed his lawsuit challenging the Protocol under the Eighth Amendment. DE 1. In his “Prayer for Relief,” Mr. Lee requested “an order declaring the Protocol unconstitutional . . . and enjoining Defendants [] from executing [him] via nitrogen hypoxia,” and “an order enjoining Defendants [] from executing [him] using any method other than [his proposed] alternatives.” DE 1 at 27; *see also* DE 40 at 23 (same). Mr. Lee identified execution by firing squad as that alternative. DE 40 at 20–22 ¶¶ 70–72.

From April 27 to 29, 2026, the district court presided over a bench trial—the first merits trial concerning Alabama’s nitrogen hypoxia Protocol. *See App.* 78a. On May 28, 2026, the

fully secured the mask to his face and then “quickly” removed it. *Id.* (4/28/2026 Tr. at 158:5–23).

district court entered judgment for the State. App. 135a. The Eleventh Circuit reversed, App. 72a, but because the district court failed to address Mr. Lee’s proposed alternative—execution by firing squad—the court remanded the case for additional findings. App. 76a.

On remand, the district court concluded that Mr. Lee had established that the Protocol creates a substantial risk of serious harm and that execution by firing squad is a feasible, readily implemented alternative that would significantly reduce that risk. App. 54a. The district court permanently enjoined the State from executing him under the Protocol. App. 55a. The district court declined, however, to grant Mr. Lee’s request to enjoin the State from executing him by any method other than firing squad. App. 54a. It reasoned that he had challenged only the nitrogen hypoxia Protocol—not lethal injection or electrocution. *Id.*

The State sought appellate relief, but the district court, the Eleventh Circuit, and this Court declined to stay or vacate the permanent injunction. *See* App. 136a; App. 139a; App. 168a. The State then sought to dismiss its appeal with prejudice,⁴ which the Eleventh Circuit granted.

C. The State’s Reversion to Lethal Injection

Rather than revise the Protocol or proceed by firing squad, the State reversed course. On June 12, 2026—the day after Mr. Lee’s scheduled execution by nitrogen hypoxia—the State moved the Alabama Supreme Court for a new execution warrant, representing that it intended to execute Mr. Lee by lethal injection. DE 204-1 at 3.

III. THE DISTRICT COURT’S ORDER AND JUDGMENT

On July 7, 2026, Mr. Lee timely moved under Federal Rules of Civil Procedure 52(b) and 59(e) to amend the district court’s opinion and judgment to declare that the State is judicially and

⁴ After Mr. Lee agreed to the State’s request, the State filed a stipulation to dismiss the appeal with prejudice on June 15, 2026, which the Eleventh Circuit granted on June 23, 2026. *See* Second Appeal Doc. 19; Second Appeal Doc. 20.

equitably estopped from executing him by lethal injection, and to remove language from the court’s opinion suggesting that lethal injection or electrocution remained available to the State under Alabama law. DE 204. On July 22, 2026, the district court denied the motion. App. 29a. That same day, the Alabama Supreme Court granted the State’s motion, DE 207-1, and the Governor subsequently set Mr. Lee’s execution for September 17, 2026.

In denying Mr. Lee’s motion to amend, the district court assumed, without deciding, that he had satisfied the factors for both judicial estoppel under *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001), and equitable estoppel under *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1326 (11th Cir. 2008). App. 23a. Nevertheless, exercising its equitable discretion, the court declined to estop the State from executing Mr. Lee by lethal injection. *Id.* The court reasoned that the State’s change in position resulted from a “change in essential facts”—namely, that Mr. Lee had obtained a permanent injunction against the State’s only means of carrying out execution by nitrogen hypoxia. *Id.* (quoting *New Hampshire*, 532 U.S. at 756).

The court further reasoned that Mr. Lee’s own litigation history—his election of nitrogen hypoxia, which delayed his execution until the State developed the Protocol, and his successful challenge to that Protocol—counseled against further delaying his execution. App. 24a. In weighing the equities, the court considered the State’s interest, and the interests of crime victims, in the timely enforcement of Mr. Lee’s sentence. *Id.*

The court separately expressed doubt as to Mr. Lee’s equitable estoppel theory, questioning whether the State had actually misrepresented a material fact, or was aware in 2018 that it would later seek to execute him by lethal injection. App. 23a at n.8.⁵

⁵ The district court declined to reach Mr. Lee’s argument that Alabama Code § 15-18-82.1 forecloses his execution by lethal injection or electrocution once he timely elected nitrogen hypoxia, holding that the Eleventh Amendment under *Pennhurst State School & Hospital v.*

IV. THE ELEVENTH CIRCUIT’S STAY ORDER

Mr. Lee timely appealed to the Eleventh Circuit and moved for an emergency stay of execution. Third Appeal Doc. 1. On September 9, 2026, the Eleventh Circuit denied the requested stay. App. 14a. The court expressly stated that it was addressing “only the stay motion.” App. 6a.

In denying the stay, the court concluded that Mr. Lee had not shown a substantial likelihood of success on the merits. It reasoned that he had challenged only the nitrogen-hypoxia Protocol, not lethal injection, and that his post-judgment motion improperly sought to re-litigate the scope of the requested injunction. App. 8a–10a. It further reasoned that, even assuming a party may seek post-judgment estoppel relief untethered to facts established at trial, the district court did not likely abuse its discretion by treating the State’s development and Mr. Lee’s successful challenge to the Protocol as changed circumstances. App. 10a–13a.

Finally, the court concluded that the district court was not required to give controlling weight to its finding that firing squad is a feasible, readily implemented alternative, because the State is not presently prepared to use that method. App. 12a–13a. Balancing those conclusions against the State’s and victims’ interests in timely enforcement of the sentence, the court denied the stay. App. 13a–14a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE WARRANTS CERTIORARI BEFORE JUDGMENT

This case requires immediate review because ordinary appellate proceedings cannot provide meaningful relief before Mr. Lee’s September 17, 2026 execution. A petition for certiorari

Halderman, 465 U.S. 89, 106 (1984), barred a federal court from granting the relief he sought—a declaration and injunction requiring the State to comply with state law. App. 27a–29a. Mr. Lee does not seek review of that ruling here; he has instead filed a declaratory judgment action raising that state law question in state court, which remains pending. *Ex parte Lee*, No. SC-2026-0745 (Ala.).

before judgment is authorized under § 28 U.S.C. 1254(1) and warranted when a case is “of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.” Sup. Ct. R. 11. This case meets that standard. First, the question of whether a State should be bound by the representations it makes is of paramount public importance. Second, proceeding with normal appellate practice means Mr. Lee will be executed long before this question is addressed.

This Court has granted certiorari before judgment in a capital case where a court of appeals denied a stay but did not formally dispose of the pending appeal. In *Barefoot v. Estelle*, the Fifth Circuit expedited briefing and oral argument on the prisoner’s request for a stay, issued an opinion addressing and rejecting each of his claims, and denied the stay. 463 U.S. 880, 886–87 (1983). Although the Fifth Circuit did not formally affirm the district court’s denial of habeas relief, this Court concluded that it had effectively decided the merits and treated the prisoner’s stay application as a petition for certiorari before judgment. *Id.* at 887–92. The Court then reviewed both the propriety of the stay denial and the issues pending on appeal. *Id.* at 887–905.

Here, although the Eleventh Circuit expressly addressed only the stay motion, its order explains why it concluded that Mr. Lee lacks a substantial likelihood of success on the fully briefed estoppel issues. App. 8a–13a. As in *Barefoot*, the absence of a formal appellate merits judgment should not require Mr. Lee to await ordinary review when his execution will otherwise preclude resolution of those issues. This Court should treat the Eleventh Circuit’s stay order as presenting the merits question for immediate review. Otherwise, his execution will preclude meaningful review of whether the State may repudiate the representation through which it obtained dismissal of his prior lethal-injection action.

II. THE COURT SHOULD GRANT REVIEW TO RESOLVE AN IMPORTANT AND RECURRING QUESTION

This case presents an important and recurring question surrounding when courts and litigants can rely on a State's representation about its future conduct. Judicial and equitable estoppel serve complementary functions in answering that question. Judicial estoppel protects the integrity of the judicial process by preventing a party from obtaining a judicial benefit through a representation it later repudiates. *New Hampshire*, 532 U.S. at 749–51. Equitable estoppel protects the other party who acted in reliance on that representation. *Busby*, 513 F.3d at 1326. Together, the doctrines permit courts to treat litigants' representations as real commitments rather than provisional litigation positions that may be withdrawn once they have served their purpose.

First, the question is important well beyond the execution context. Governments regularly obtain dismissal, a stay, or other judicial relief by representing that they will rescind a challenged policy, refrain from specified conduct, or take a particular future course. Courts and opposing litigants necessarily make consequential decisions in reliance on those representations: whether to dismiss a case, abandon a claim, forgo discovery, or accept a narrower form of relief. If a government may retain the judicial benefit of its representation while treating that representation as optional when a foreseeable contingency occurs, neither courts nor litigants can reliably act on the government's word.

This Court's precedents reflect the same institutional concern in other settings. A government defendant ordinarily cannot moot a case by discontinuing challenged conduct while remaining free to resume it. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.11 (1982) (holding that a city's repeal of a challenged ordinance did not moot the case because the city remained free—and had announced its intent—to reenact the provision if the judgment were vacated). A prosecutor must honor a promise that induced a defendant to forgo trial and enter

a plea. *See Santobello v. New York*, 404 U.S. 257, 262 (1971) (“[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”). And a governmental party ordinarily may not modify a consent decree based on circumstances it anticipated when accepting the decree. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 385 (1992) (“If it is clear that a party anticipated changing conditions . . . but nevertheless agreed to the decree, that party would have to satisfy a heavy burden to . . . be relieved of the undertaking”). Although the doctrines and facts differ, these cases reflect a concern that a governmental litigant should not obtain a judicial advantage by renouncing or promising to forgo a course of conduct, yet retain the benefit while preserving the option to resume that course when a foreseeable contingency arises.

The concern is especially acute when the government itself controls the contingency it later invokes. The State obtained a dismissal by representing that it would execute Mr. Lee by nitrogen hypoxia, not lethal injection. It then developed the Protocol that would govern that execution. The State now invokes the invalidation of its own Protocol—an outcome it knew Mr. Lee had expressly reserved the right to seek—as a basis to resume the lethal injection course it had disclaimed.

Second, the question is recurring in the administration of capital punishment. The Alabama Legislature gave death-row inmates a single, time-limited opportunity to elect nitrogen hypoxia, and dozens did so. Ala. Code § 15-18-82.1; *Dunn v. Price*, 587 U.S. 929, 929 (2019) (noting that 48 death-row inmates elected nitrogen hypoxia).⁶ The State has invoked those elections to argue

⁶ Method-election statutes also exist outside Alabama. Florida permits a condemned prisoner to elect electrocution rather than lethal injection. *See* Fla. Stat. § 922.105(1). South Carolina permits a condemned prisoner to elect firing squad or lethal injection rather than the statutory default method. *See* S.C. Code § 24-3-530(A). And Tennessee preserves an election of electrocution for certain prisoners. *See* Tenn. Code § 40-23-114(b). Although those execution statutes are not identical to Alabama’s, they confirm that prisoner elections among execution methods—and government representations about the effect of those elections—are not unique to Alabama.

that inmates cannot challenge lethal injection. For example, in a separate, currently pending case, an inmate pleaded a lethal injection challenge in her Rule 32 petition to preserve the claim should the nitrogen hypoxia Protocol become unavailable. After the district court in *Lee* enjoined the Protocol, she responded to the State’s motion to dismiss by noting that the injunction confirmed the contingency she had anticipated. App. 249a (*Gobble* Reply ¶ 191). The State nevertheless argued that there was “no live controversy,” because Ms. Gobble had elected nitrogen hypoxia. Lethal injection, it contended, was “a method not designated for her,” and the possibility that the State might later seek execution by another method was merely a contingency that had not occurred. App. 282a (State’s Reply ¶ 41).

Yet the State takes the opposite position here.⁷ Although Mr. Lee made the same nitrogen hypoxia election, the State contends that it may execute him by lethal injection because it cannot execute him under its enjoined Protocol. DE 206 at 14. The State’s position creates a litigation trap. An inmate who elected nitrogen hypoxia and challenges lethal injection may be told that the claim is moot or unripe because the State will use nitrogen hypoxia. But if the inmate challenges the nitrogen hypoxia Protocol and succeeds, the State then asserts that it can use lethal injection

⁷ The State’s current position in this case is also inconsistent with its past practice. Previously, the State’s position was that it would “honor” an inmate’s timely election even if a protocol was unavailable. For example, in 2019—before the State developed the Protocol—it moved for an execution date for another death-sentenced inmate, Jarrod Taylor. *See* App. 287a ¶ 1. When the State learned that he had timely elected nitrogen hypoxia, rather than proceed by lethal injection, the State withdrew its motion because it “intend[ed] to honor that election.” App. 288a ¶¶ 4–5; *see also Woods v. Dunn*, 2020 WL 1015763, at *7 (M.D. Ala. Mar. 2, 2020), *aff’d*, 951 F.3d 1288 (11th Cir. 2020) (describing the State’s practice of not seeking execution dates for inmates who elected nitrogen hypoxia while it lacked a finalized protocol for carrying out that method). A similar issue came up in 2022. At a hearing, a federal court asked the State whether it would honor an inmate’s timely election form. The State’s counsel responded: “Absolutely we would. Yes, Your Honor. Same situation with Mr. Taylor, we would honor that.” App. 291a–292a (Hr’g Tr. at 147–48, *Miller v. Hamm*, No. 2:22-cv-506-RAH (M.D. Ala. Sept. 15, 2022) (ECF No. 58)).

after all. On the State's theory, neither the inmate nor the court can know which method the State's representations actually foreclose.

The Court should grant review to establish when a State's representation about its future conduct is sufficiently reliable for courts and litigants to act on it.

III. THE ELEVENTH CIRCUIT'S CHANGED-CIRCUMSTANCES RATIONALE CONFLICTS WITH *NEW HAMPSHIRE*

Review is warranted because the Eleventh Circuit's rationale conflicts with this Court's decision in *New Hampshire*, 532 U.S. at 749–51, 756. *See* Sup. Ct. R. 10(c). Although the panel stated that it was addressing only Mr. Lee's stay motion, it explained why it believed he was unlikely to succeed on the merits of his estoppel claims. App. 8a–13a. That court's reasoning treated the invalidation of the Protocol as a “change in facts essential to the prior judgment” sufficient to permit the State to repudiate the representation through which it obtained dismissal of Mr. Lee's lethal-injection action. App. 10a–13a. That result cannot be reconciled with *New Hampshire*.

Judicial estoppel protects the integrity of the judicial process by preventing a party from obtaining a judicial benefit through a position it later repudiates. *New Hampshire*, 532 U.S. at 749–51. This Court recognized that estoppel may be inappropriate when a party's later position results from “a change in facts essential to the prior judgment.” *Id.* at 756. But a known contingency, particularly one the party itself controls, is not such a change. The State knew in 2018 that it had not yet developed a nitrogen hypoxia protocol; that Mr. Lee expressly reserved the right to challenge any future protocol; and that it could not execute Mr. Lee by nitrogen hypoxia unless it developed a constitutional protocol. Yet the State obtained dismissal of Mr. Lee's lethal-injection action through an unqualified representation that, if he were executed, it would be by nitrogen hypoxia rather than lethal injection. The Protocol's later invalidation was thus the

realization of a known and expressly reserved contingency—not a change in the essential facts on which the State’s representation rested.

The Eleventh Circuit nevertheless concluded that the State’s later development of, and Mr. Lee’s successful challenge to, the Protocol could qualify as changed circumstances because the Protocol’s particulars were unknown in 2018 and the State could have expected to develop a constitutional Protocol. App. 11a–12a. That conclusion permits a party to obtain a judicial benefit while aware of a contingency, retain control over the conduct that will determine whether the contingency occurs, and then invoke its occurrence as a basis to abandon the representation. That is incompatible with *New Hampshire*’s concern that a litigant not derive an advantage from “an improper use of judicial machinery.” 532 U.S. at 750.

The Federal and Eighth Circuits have applied that principle differently. In *Trustees in Bankruptcy of North American Rubber Thread Co. v. United States*, NART—a domestic producer—successfully persuaded the Department of Commerce to make the revocation date of an antidumping-duty order effective in 2003 rather than 1995, as the foreign producer had urged. 593 F.3d at 1350, 1354–55. After NART settled related litigation with that producer regarding the proper revocation date, it reversed its position and joined the producer in asking Commerce to adopt the 1995 date. *Id.* at 1353, 1357. The Federal Circuit concluded that NART was judicially estopped: although the settlement had altered its interests, there was no factual change that justified abandoning the position through which it had prevailed. *Id.* at 1354–57.

Similarly, in *Spencer v. Annett Holdings, Inc.*, 757 F.3d 790 (8th Cir. 2014), the Eighth Circuit held that an employer could not invoke changed circumstances to abandon an earlier admission after receiving what it characterized as confirmation that the employee’s claim was fraudulent. *Id.* at 797–98. The court concluded that the confirmation was not a significant change

in facts because the employer possessed the material information when it maintained its earlier position: “[t]he company simply changed its position without a significant change in the facts.” *Id.* (internal quotations omitted). Although *Spencer* applied Iowa law, the court expressly concluded that federal estoppel law would lead to the same result. *Id.* at 798 (citing *New Hampshire*, 532 U.S. at 750–51).

The same is true here. The State acknowledged below that the asserted change was its “*calculus* as to which method of execution it should use.” Third Appeal Doc. 24 at 29–30 (emphasis added). That is a change in litigation preference, not a change in essential facts. The Court should grant review to resolve the conflict between the Eleventh Circuit’s rationale and *New Hampshire*’s settled principles, as applied by the Federal and Eighth Circuits.

The Eleventh Circuit’s changed circumstances rationale, moreover, is difficult to square with this Court’s recent affirmation that equitable inquiries require consideration of “all relevant facts and circumstances.” *Keathley v. Buddy Ayers Constr., Inc.*, 608 U.S. ___, 146 S. Ct. 1532, 1539 (2026). In *Keathley*, this Court held that a Fifth Circuit test governing an exception to judicial estoppel in the bankruptcy context was “simultaneously too rigid and too broad.” *Id.* The test was too *rigid* because it permitted courts to consider only two circumstances—whether a debtor knew the underlying facts and whether the debtor had a potential motive to conceal the claim—without permitting courts to weigh any other evidence bearing on the estoppel question. *Id.* That rigidity, this Court explained, is “out of step with equity,” which “eschews mechanical rules” and requires a court to consider “all relevant facts and circumstances” on a case-by-case basis. *Id.* at 1539–40. (citations omitted). But the same test was also too *broad*, because it treated circumstances that will “almost always” be present—some knowledge of the facts, some hypothetical motive to conceal—as sufficient by themselves to defeat the exception, regardless of the individual case. *Id.*

at 1540. A test built on facts present in nearly every case does no real equitable work: it makes the outcome automatic rather than the product of genuine, case-specific judgment.

Keathley's holdings are two sides of the same coin: an equitable exception collapses if courts either exclude facts that bear on the real question, or import considerations that are automatically present regardless of any individualized showing. The decision below manages to do both. On the one hand, neither the district court nor the Eleventh Circuit grappled with the relevant facts: not only the State's unqualified representation, its knowledge that Mr. Lee reserved the right to challenge a future protocol, and the district court's prior finding that firing squad is a feasible and readily implemented alternative, but also the State's role in creating the purported changed circumstance. The State—not Mr. Lee—developed the unconstitutional Protocol that resulted in the injunction. On the other hand, the district court's refusal to apply estoppel rested on considerations—execution delay and the interests of crime victims—that are present in every case in which a State reverses position. App. 24a. Those considerations therefore supply no individualized basis for excusing this State's reversal. Collectively, these circumstances do not permit the State to retain the benefit of its representation while treating it as optional once its chosen Protocol proves unconstitutional.

IV. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THESE QUESTIONS

The record in this case makes it an ideal vehicle for resolving these important questions involving the estoppel doctrine. The estoppel issue was fully briefed and decided by the district court below on an undisputed record: the State previously represented it would execute Mr. Lee by nitrogen hypoxia, obtained a dismissal of his lethal injection lawsuit as a result, and now intends to use lethal injection anyway. The Eleventh Circuit addressed the issue in explaining its denial of a stay.

The Eleventh Circuit suggested that Mr. Lee’s post-judgment motion to amend sought to relitigate the scope of his injunction. App. 8a–10a. It did not. The State did not announce its change of position until June 12, 2026—*after* judgment entered, so the estoppel question could *not* have been raised earlier. In any event, the district court assumed relief was available and decided the estoppel question on the merits, App. 23a, so that question is squarely presented.

CONCLUSION

For the reasons stated herein, this Court should grant the petition for a writ of certiorari before judgment.

Respectfully submitted,

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