

Nos. 26-5541 and 26A337
CAPITAL CASE

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

◆

JEFFERY LEE,
Petitioner,
v.
GREG LOVELACE,
Commissioner, Alabama Department of Corrections, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

**OPPOSITION TO APPLICATION FOR STAY OF EXECUTION
AND PETITION FOR WRIT OF CERTIORARI**

Steve Marshall
Alabama Attorney General

A. Barrett Bowdre
Solicitor General

Robert M. Overing
Principal Deputy Solicitor General

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

Lauren A. Simpson
*Deputy Attorney General
Counsel of Record*

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Lauren.Simpson@AlabamaAG.gov

September 15, 2026

EXECUTION SCHEDULED SEPTEMBER 17, 2026

CAPITAL CASE

QUESTIONS PRESENTED

(Restated)

Jeffery Lee, who was sentenced to death in 2000 for the robbery-murder of Jimmy Ellis and Elaine Thompson, elected nitrogen hypoxia as his preferred method of execution in 2018. Lee challenged Alabama’s hypoxia protocol in 2025, and the State won at trial. But the Eleventh Circuit reversed, and the district court entered a permanent injunction against the use of Alabama’s hypoxia protocol to execute him. This Court declined to stay that injunction, *Lovelace v. Lee*, No. 25A1381 (June 11, 2026), so the State announced it would execute Lee using lethal injection instead. For lethal injections, Alabama uses the same combination of drugs this Court approved in *Glossip v. Gross*, 576 U.S. 863 (2015).

This appeal arises from Lee’s motion to expand the district court’s hypoxia injunction to bar lethal injection and electrocution on the ground that Lee had elected hypoxia, and the State had intended to honor that election. Obviously, things have changed since 2018—namely, Lee procured an injunction against the State’s only hypoxia protocol—and this case contains no allegations or evidence on the lawfulness of lethal injection. Accordingly, the district court denied the motion.

A panel of the Eleventh Circuit unanimously denied Lee’s motion for an injunction pending appeal, finding that he had not shown a substantial likelihood that the district court abused its discretion. The questions presented are:

1. Whether this is the rare case in which certiorari before judgment is warranted.
2. Whether the district court abused its discretion in declining to enjoin Lee’s execution by lethal injection where Lee obtained a permanent injunction against the use of Alabama’s nitrogen hypoxia protocol.
3. Whether the equities favor Lee despite that his requested injunction would add further delay, that he now demands hypoxia despite challenging it and offering no alternative protocol, and that his belated insistence that hypoxia could be lawful directly contradicts his arguments in this case. *Cf. Stewart v. LaGrand*, 526 U.S. 115, 119 (1999).

TABLE OF CONTENTS

Questions Presented	i
Table of Authorities	iv
Introduction	1
Statement of the Case	4
A. Lee murders two people in cold blood and is sentenced to death.	4
B. Lee's first §1983 action challenging lethal injection.....	5
C. Lee's second §1983 action challenging nitrogen hypoxia.....	6
D. Lee's execution is reset, this time by lethal injection.	7
Standard of Review.....	9
Reasons Certiorari and a Stay of Execution Should be Denied.....	10
I. This case does not warrant certiorari before judgment.	10
II. The district court did not abuse its discretion in declining to expand its injunction.....	11
A. In this case about nitrogen hypoxia, the district court correctly entered an injunction only as to nitrogen hypoxia.	12
B. Estoppel cannot justify the injunction Lee requested.....	16
C. The district court did not abuse its discretion in applying the doctrines of judicial and equitable estoppel.	18
i. The State has not taken clearly inconsistent legal positions, nor did it mislead the Southern District of Alabama when it expected to execute Lee by nitrogen hypoxia.	20
ii. There is no unfairness in executing Lee by lethal injection.	24
iii. Even if Lee had shown the elements for estoppel,	

	the district court did not abuse its discretion by denying equitable relief in light of the totality of circumstances, the presumption against estopping a State, and Lee’s shifting positions.....	26
D.	There is no conflict with <i>New Hampshire</i> or judicial-estoppel decisions of other federal courts of appeals.	27
III.	Lee is not entitled to equitable relief.....	30
A.	Lee has unclean hands.	30
B.	Other equitable factors weigh against Lee.....	31
C.	Lee faces no threat of irreparable harm, and a stay would undermine the public interest in justice.....	32
Conclusion.....		33

TABLE OF AUTHORITIES

Cases

<i>Alley v. U.S. Dep’t of Health & Human Servs.</i> , 590 F.3d 1195 (11th Cir. 2009)	13
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)	9
<i>Baze v. Rees</i> , 553 U.S. 35 (2008).....	7, 31
<i>Brooks v. Warden</i> , 810 F.3d 812 (11th Cir. 2016).....	5, 24
<i>Bucklew v. Precythe</i> , 587 U.S. 119 (2019)	7, 10, 14
<i>Busby v. JRHBW Realty, Inc.</i> , 513 F.3d 1314 (11th Cir. 2008)	23, 25
<i>Calderon v. Thompson</i> , 523 U.S. 538 (1998).....	31, 32
<i>Califano v. Yamasaki</i> , 442 U.S. 682 (1979)	13
<i>Dames & Moore v. Regan</i> , 453 U.S. 654 (1981)	11
<i>Dow Jones & Co. v. Kaye</i> , 256 F.3d 1251 (11th Cir. 2001).....	21
<i>Ex parte Lee</i> , 898 So. 2d 874 (Ala. 2004).....	5
<i>Ex parte Lee</i> , No. 1090383 (Ala. Feb. 19, 2010)	5
<i>Gilmour v. Gates, McDonald & Co.</i> , 382 F.3d 1312 (11th Cir. 2004)	12
<i>Glossip v. Gross</i> , 576 U.S. 863 (2015)	i, 1, 7, 24
<i>Gomez v. U.S. Dist. Ct.</i> , 503 U.S. 653 (1992).....	14
<i>Gray v. City of Valley Park</i> , 567 F.3d 976 (8th Cir. 2009).....	23
<i>Hansen v. Harper Excavating, Inc.</i> , 641 F.3d 1216 (10th Cir. 2011).....	22
<i>Henry v. Nationwide Insurance Co.</i> , 1:06-cv-00612, 2007 WL 9717743 (S.D. Ala. Nov. 5, 2007).....	27
<i>Hill v. McDonough</i> , 547 U.S. 573 (2006).....	10, 14, 31, 32
<i>Hobby Lobby v. Sebelius</i> , 568 U.S. 1401 (2012).....	10
<i>In re Blodgett</i> , 502 U.S. 236 (1992)	14
<i>Kansas v. Colorado</i> , 206 U.S. 46 (1907).....	18

<i>Keathley v. Buddy Ayers Construction, Inc.</i> , 146 S. Ct. 1532 (2026)	18, 19, 26, 29
<i>Lee v. Alabama</i> , 543 U.S. 924 (2004)	5
<i>Lee v. Comm’r, Ala. Dep’t of Corr.</i> , 726 F.3d 1172 (11th Cir. 2013).....	5
<i>Lee v. State</i> , 44 So. 3d 1145 (Ala. Crim. App. 2009)	5
<i>Lee v. State</i> , 898 So. 2d 790 (Ala. Crim. App. 2001)	5
<i>Lee v. Thomas</i> , 1:10-cv-00587, 2012 WL 1965608 (S.D. Ala. May 30, 2012).....	4, 5
<i>Lee v. Thomas</i> , 572 U.S. 1015 (2014)	5
<i>Lewis v. Casey</i> , 518 U.S. 343 (1996).....	13
<i>Middlebrooks v. Parker</i> , 22 F.4th 621 (6th Cir. 2022).....	30
<i>Milliken v. Bradley</i> , 433 U.S. 267 (1977)	13
<i>Nance v. Comm’r</i> , 981 F.3d 1201 (11th Cir. 2020)	15
<i>Nance v. Ward</i> , 597 U.S. 159 (2022)	14, 15
<i>Nelson v. Campbell</i> , 541 U.S. 637 (2004).....	14
<i>New Hampshire v. Maine</i> , 532 U.S. 742 (2001).....	2, 17, 18, 19, 23, 26, 29
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	9
<i>O’Shea v. Littleton</i> , 414 U.S. 488 (1974)	17
<i>Ohio Citizens for Responsible Energy v. NRC</i> , 479 U.S. 1312 (1986)	10
<i>Prideaux v. Tyson Foods, Inc.</i> , 387 F. App’x 474 (5th Cir. 2010).....	22
<i>Ramirez v. Collier</i> , 595 U.S. 411 (2022).....	14
<i>Respect Maine PAC v. McKee</i> , 562 U.S. 996 (2010)	9
<i>S. Bay United Pentecostal Church v. Newsom</i> , 590 U.S. 965 (2020)	9
<i>Slater v. U.S. Steel Corp.</i> , 871 F.3d 1174 (11th Cir. 2017).....	18
<i>Spencer v. Annett Holdings, Inc.</i> , 757 F.3d 790 (8th Cir. 2014).....	28
<i>Stewart v. LaGrand</i> , 526 U.S. 115 (1999).....	i, 3, 30

<i>Trustees in Bankruptcy of North American Rubber Thread Co. v. United States</i> , 593 F.3d 1346 (Fed. Cir. 2010)	28, 29
<i>United States v. McCorkle</i> , 321 F.3d 1292 (11th Cir. 2003).....	26
<i>Whiting v. Krassner</i> , 391 F.3d 540 (3d Cir. 2004)	22
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	17
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952)	11

Statutes

18 U.S.C. §626.....	13
ALA. CODE §15-18-82.....	5
ALA. CODE §15-18-82.1.....	1, 5, 6, 21

Rules

FED. R. CIV. P. 52	13
FED. R. CIV. P. 65	13
SUP. CT. R. 10	2
SUP. CT. R. 11	2, 10

INTRODUCTION

Nearly twenty-eight years ago, Jeffery Lee walked into a pawn shop two weeks before Christmas, murdered two employees, and tried to kill a third. He was sentenced to death by electrocution in 2000. Two years later, the state legislature made lethal injection Alabama’s primary method of execution. *See* ALA. CODE §15-18-82.1(b)(1). After Lee’s conventional appeals ended in March 2014, he filed a method-of-execution challenge to Alabama’s midazolam protocol—the one approved in *Glossip v. Gross*, 576 U.S. 863 (2015)—just before the statute of limitations ran. The case was dismissed in 2018 because Lee elected nitrogen hypoxia, Alabama’s newest method of execution. *See* ALA. CODE §15-18-82.1(b)(2).

The Alabama Department of Corrections intended to execute Lee by hypoxia. The State did not move for his execution until January 2026, after ADOC promulgated its hypoxia protocol and after seven hypoxia executions. But by then, Lee had filed a second method-of-execution challenge, and he obtained a permanent injunction against ADOC’s hypoxia protocol in June 2026.

On June 12, the State moved the Alabama Supreme Court to authorize Lee’s execution by lethal injection. Lee objected in part on the ground that the State was judicially and equitably estopped from using lethal injection because the 2018 dismissal contemplated that he would be executed by hypoxia—the method he just fought to enjoin. The Alabama Supreme Court authorized Lee’s execution on July 22.

Lee returned to the district court with a Rule 52(b)/59(e) motion raising similar grounds and asked the court to expand its injunction to prohibit lethal injection and

electrocution as well. On July 22, the court denied the motion. Pet.App'x B. Rejecting his misplaced state-law claims, and assuming without deciding that Lee satisfied the *New Hampshire v. Maine*, 532 U.S. 742 (2001), test for judicial estoppel, the court denied Lee's motion. Pet.App'x 23a. The court pointed out that the State was pursuing lethal injection because Lee had made the use of the hypoxia protocol impossible. Pet.App'x 23-24a. Balancing the equities, and considering Lee's litigation history, the court in its discretion held that Lee was not entitled to an expanded injunction. Pet.App'x 25-26a. Lee appealed and moved for an injunction pending appeal. On September 9, the Eleventh Circuit denied interim relief without ruling on the merits. Pet.App'x A.

Lee has asked this Court to grant certiorari before judgment, which it rarely does. Not only that, but Lee has identified no circuit split or a decision of the lower courts in conflict with this Court's decisions. There is no reason for the Court to grant certiorari now, SUP. CT. R. 10, or to issue an injunction pending appeal.

I. Lee seeks certiorari before judgment but fails to show that his is the rare case of "imperative public importance," SUP. CT. R. 11.

II. As the Eleventh Circuit panel unanimously ruled, Lee is not likely to show that the district court abused its considerable discretion in declining to expand the scope of its permanent injunction. The court rightly doubted that Lee had satisfied the elements of estoppel, but even if he had, the State's change in position (i.e., that it would execute Lee by lethal injection rather than hypoxia) was "a result of a change in essential facts" created by Lee. Pet.App'x 23-24a. This change was not unfair to

Lee or deceptive to any court. Moreover, the district court recognized the State's strong interest in carrying out its criminal judgments, which would be thwarted if the State were forced to use a novel hypoxia protocol or an entirely novel method not authorized by the Legislature. Pet.App'x 24-26a.

The Eleventh Circuit correctly denied Lee's request for emergency relief. While Lee argued that the district court had misapplied *New Hampshire*, the circuit court noted that Lee's cited authority was non-binding and unpersuasive. Pet.App'x 11a.

III. Lee has unclean hands and has pursued contradictory forms of relief in this very case. He has now changed his mind twice after electing nitrogen hypoxia as his method of execution. *Cf. Stewart v. LaGrand*, 526 U.S. 115, 119 (1999). First, he challenged that method and demanded firing squad instead. "Now that the State has announced its intention to execute him by lethal injection, Lee claims that the State can *only* execute him by nitrogen hypoxia, just not using the existing protocol." Pet.App'x 26a (emphasis added). The State's hands cannot be tied because of the gamesmanship of an inmate. Other equitable factors favor the State, including the public interest in justice after close to three decades. Lee faces no irreparable harm where the State carries out a lawful and just sentence, especially where he has never alleged, claimed, or proven that lethal injection threatens any harm whatsoever.

STATEMENT OF THE CASE

A. Lee murders two people in cold blood and is sentenced to death.

The last things Jimmy Ellis, Elaine Thompson, and Helen King heard before they were hit with blasts from a sawed-off shotgun were the sounds of the shop door opening and Jeffery Lee announcing, “What’s up, motherfuckers?”

It was the afternoon of December 12, 1998, in Orrville, Alabama, and the employees of Jimmy’s Pawn Shop had just been discussing their lunch plans. Ellis, the owner, fell first. Thompson, shot in the face, died quickly. King, who was shot in the hand and arm, fell to the ground and held her breath. She listened as Lee tried to open the cash register. When Lee left the shop—and left the murder weapon—King crawled to the counter, grabbed the phone, and dialed 911, then ran around the building and locked the doors.

King recognized Lee, who had come to the shop earlier that morning, claiming he wanted to buy wedding rings. Using a false name, he had explained that he needed to get the money from his grandmother, but that he would return shortly. On the phone with 911, King spotted Lee running back toward the shop. When Lee saw that the door was closed, he fled.

Surveillance video captured the murders, and Lee wrote a confession when he was apprehended in Georgia the following day. King testified and identified Lee as the shooter. “Multiple Alabama courts, including the trial judge and the Alabama Court of Criminal Appeals, characterized the evidence against Lee in the guilt phase of the trial to be ‘overwhelming.’” *Lee v. Thomas*, 1:10-cv-00587, 2012 WL 1965608, at *1-2 & n.2 (S.D. Ala. May 30, 2012). During the sentencing hearing, King described

her lasting trauma, and the other victims' children testified about the loss of their parents. The trial court sentenced Lee to death, concluding that Lee acted "with cold precision and premeditation using a weapon designed for the sole purpose of extinguishing human life." *Lee v. State*, 898 So. 2d 790, 856 (Ala. Crim. App. 2001)**Error! Bookmark not defined.** (on return to remand); *see Lee*, 2012 WL 196508, at *1-2.¹

Lee's conviction and death sentence were affirmed. *Lee v. State*, 898 So. 2d at 874; *Ex parte Lee*, 898 So. 2d 874 (Ala. 2004); *cert. denied*, *Lee v. Alabama*, 543 U.S. 924 (2004) (mem.). Lee was unsuccessful in state postconviction, *Lee v. State*, 44 So. 3d 1145 (Ala. Crim. App. 2009); *cert. denied*, *Ex parte Lee*, No. 1090383 (Ala. Feb. 19, 2010), and in federal habeas, *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.).

B. Lee's first §1983 action challenging lethal injection.

ADOC amended its lethal injection protocol in September 2014, to use midazolam as the first of three drugs. *See Brooks v. Warden*, 810 F.3d 812, 816-17 (11th Cir. 2016). Two days before the statute of limitations ran in 2016, Lee filed a 42 U.S.C. §1983 complaint in the Southern District of Alabama raising an Eighth Amendment challenge to the protocol. While the matter was pending in the Eleventh Circuit, the Alabama legislature amended the execution statutes to add nitrogen hypoxia, maintaining lethal injection as the primary method. *See ALA. CODE* §§15-18-

¹ The habeas record is not available in PACER but can be transmitted to the Court if desired. The sentencing order is at C.121-27. Lee's confession is at C.186-87. King's guilt-phase testimony is at R.203-22. The victim-impact testimony from King and the families is at R.464-69.

82, 15-18-82.1(a)**Error! Bookmark not defined..** Inmates like Lee whose convictions and sentences became final prior to the act had a thirty-day period to elect hypoxia personally and in writing. *Id.* §15-18-82.1(b)(2).

On remand, the parties informed the district court that the new hypoxia legislation could affect the case—and it did, as Lee elected hypoxia on June 26, 2018. Pet.App’x 170a. The complaint was dismissed without prejudice on the parties’ joint motion in July 2018. Pet.App’x 174a. The district court noted:

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.

Id. ADOC fully intended to honor Lee’s election. Indeed, although Lee exhausted his conventional appeals in 2014, the State waited years for ADOC to develop its hypoxia protocol and moved for Lee’s execution only after the method was ready to be used.

C. Lee’s second §1983 action challenging nitrogen hypoxia.

ADOC announced its nitrogen hypoxia protocol in August 2023. Nearly two years later, Lee initiated a §1983 action in the Middle District of Alabama challenging its constitutionality. By that time, Alabama had successfully used its hypoxia protocol to execute seven inmates.

Lee was not alone in waiting until the last minute to file. Seven other hypoxia-electing inmates filed substantially similar complaints with him, which have since been consolidated with an eighth case in *In Re: Alabama Nitrogen Hypoxia Protocol*

Litigation, 2:24-cv-00111 (M.D. Ala.). As an inmate challenging a method must name an alternative method, *Baze v. Rees*, 553 U.S. 35, 52 (2008); *Glossip*, 576 U.S. at 877; *Bucklew v. Precythe*, 587 U.S. 119, 134 (2019), many plaintiffs offered amendments to the hypoxia protocol, but Lee did not; he instead argued for firing squad as his alternative.

Lee's case was deconsolidated from the litigation because the State moved for his execution on February 9, 2026, and it was scheduled for June 11. Although the State prevailed at trial, the Eleventh Circuit reversed. On remand, the district court permanently enjoined ADOC from executing Lee with its hypoxia protocol, Pet.App'x 55a, but it tailored its injunction "to remedy the specific harm at issue: that the Protocol violates the Eighth Amendment," Pet.App'x 25a. When the lower courts and this Court declined to stay the district court's injunction, Pet.App'x 136-68a, the State called off Lee's execution.

D. Lee's execution is reset, this time by lethal injection.

On June 12, the State filed a renewed motion to authorize Lee's execution in the Alabama Supreme Court, stating that ADOC would execute him via lethal injection. Resp.App'x A.

Four weeks after securing permanent injunctive relief against hypoxia, Lee tried to forestall his execution by lethal injection, too. First, on the last day to file under Rule 52, Lee moved "to amend [the] order on [the] scope of injunctive relief and final judgment." Resp.App'x F (citation modified). His motion argued that (1) the State was judicially estopped from executing him by lethal injection due to the joint dismissal in the first §1983 action in 2018, (2) the State was equitably estopped from

executing him by lethal injection for similar reasons, and (3) both lethal injection and electrocution were unavailable under state law. *Id.* at 101-03a.

Lee responded to the State's execution motion in the Alabama Supreme Court. He argued that (1) the State was judicially and equitably estopped from executing him by lethal injection, (2) state law prohibited his execution by lethal injection or electrocution, and (3) the State was permanently enjoined from executing him by the current hypoxia protocol. Resp.App'x B.

The State responded in the Alabama Supreme Court on July 9, Resp.App'x C, and objected to Lee's federal motion on July 17, Resp.App'x G. In both courts, the State argued that state law did not prohibit Lee's execution by lethal injection (although that state law could never justify a federal injunction in any event, *id.* at 138-40a). In the district court response, the State also pointed out that Lee never challenged lethal injection in his complaint, that the scope of injunctive relief was proper (given the violation identified), and that Lee had unclean hands and should not receive any equitable relief. *Id.* at 133-38a, 140-42a.

The Alabama Supreme Court granted the execution motion on July 22 without any dissent or special writing. Resp.App'x D. The district court denied Lee's motion later that day. Pet.App'x B.

Lee waited nearly two weeks, until August 4, to notice his appeal to the Eleventh Circuit. He argued that the district court's judicial estoppel analysis was improper and that he was entitled to an expanded injunction. Resp.App'x I. He also moved for a stay of execution. Resp.App'x J. The State countered that the district

court did not abuse its discretion, nor was Lee entitled to any estoppel ruling, and a stay was unwarranted. Resp.App’x K.

On September 9, the Eleventh Circuit denied the stay motion. Pet.App’x A. The circuit court held that Lee failed to show a substantial likelihood of success in proving that the district court abused its discretion in declining to extend its permanent injunction. Pet.App’x 8a. Noting that Lee presented no substantive evidence or argument concerning lethal injection below, Pet.App’x 9a, the court found that the district court “did not unreasonably or incorrectly apply the law” in its *New Hampshire* analysis and did not make clearly erroneous factual determinations, Pet.App’x 12a. Further, the circuit court found that the district court’s conclusion that ADOC is not presently prepared to use firing squad “was likely not an abuse of discretion.” Pet.App’x 13a.

STANDARD OF REVIEW

Lee must make a strong showing (1) that he is likely to succeed on the merits, (2) that he will suffer irreparable harm absent an injunction, (3) that the balance of equities favors him, and (4) that the injunction will not undermine the public interest. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). The Court gives “considerable weight” to the decisions below, *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983), when considering “judicial intervention that has been withheld,” *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (Kennedy, J., in chambers) (citation modified); *accord S. Bay United Pentecostal Church v. Newsom*, 590 U.S. 965, 966 (2020) (Roberts, C.J., concurring). This power must be used “sparingly and only in the most critical and exigent

circumstances, and only where the legal rights at issue are indisputably clear.” *Ohio Citizens for Responsible Energy v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers); accord, e.g., *Hobby Lobby v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers) (applying “indisputably clear” standard).

In the execution context, this Court “must also apply ‘a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.’” *Hill v. McDonough*, 547 U.S. 573, 584 (2006). “Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay. Last-minute stays should be the extreme exception, not the norm, and the last-minute nature of an application that could have been brought earlier, or an applicant’s attempt at manipulation, may be grounds for denial of a stay.” *Bucklew*, 587 U.S. at 150 (citation modified).

REASONS CERTIORARI AND A STAY OF EXECUTION SHOULD BE DENIED

I. This case does not warrant certiorari before judgment.

Lee petitions for certiorari before judgment, but he has not shown that his case warrants such extraordinary relief. Supreme Court Rule 11 states:

A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.

Few cases meet this standard.

Here, Lee argues that “[i]mmediate review is essential” because he is scheduled to be executed on September 17. Pet.5. That does not constitute the

showing of “imperative public importance” that Rule 11 requires, or else every eleventh-hour execution filing would qualify. This case does not threaten to “jeopardize our national defense” during wartime, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-83 (1952), or risk the lives of American hostages abroad, *Dames & Moore v. Regan*, 453 U.S. 654, 660, 664-66 (1981). Rather, the issue before the Court is whether the district court abused its discretion in denying a post-judgment motion and declining to expand the scope of an injunction. Pet.App’x 53a n.15. The fact that Lee believes it would be inequitable for ADOC to use lethal injection—a method of execution he has not challenged on any constitutional ground—does not constitute an emergency warranting pre-judgment certiorari.

II. The district court did not abuse its discretion in declining to expand its injunction.

Lee tries to position his case as an indictment of the State for reneging on a bargain. *See* Pet.12-15. But as the district court correctly noted:

Nothing before the Court suggests that, in June 2018, the State misrepresented that it would execute Lee by nitrogen hypoxia and not lethal injection. To the contrary, the record suggests that intervening events—Lee’s subsequent challenge to the Protocol, the Court’s declaration that the Protocol is unconstitutional, and the Court’s permanent injunction prohibiting the State from executing Lee using the Protocol—have caused the State’s later actions to deviate from its prior intentions.

Pet.App’x 23a n.8. The question before this Court is not whether to grant certiorari to review “when courts and litigants can rely on a State’s representation about its future conduct,” Pet.12, but rather whether certiorari is warranted where a district court exercises discretion to (1) tailor its injunction to address only the harm alleged, (2) decline to expand the injunction to incorporate grounds upon which no evidence

was presented at trial, and (3) put the blame for the changed circumstances on the party who proximately created them. Here, the district court's actions were well within its reasoned discretion, and certiorari is unwarranted.

A. In this case about nitrogen hypoxia, the district court correctly entered an injunction only as to nitrogen hypoxia.

“On this record, and in this posture,” the district court concluded that “Lee has shown that the ADOC’s nitrogen hypoxia execution protocol violates the Eighth Amendment. Consequently, the [c]ourt...enjoin[ed] the State from executing Lee pursuant to the Protocol.” Pet.App’x 54a. Far from an abuse of discretion, the district court’s final judgment heeded basic tenets of civil procedure and equity in declining Lee’s various requests to enjoin the State from executing him by lethal injection, by any method other than his pleaded alternatives, *see* Pet.App’x 25a, or by any method other than an unknown unspecified hypoxia protocol, Resp.App’x 117-21a.

1. This lawsuit was only about hypoxia, not lethal injection. Lee brought no claims or allegations about lethal injection, and he “may not” now “amend [his] complaint through argument.” *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004). The lawfulness of Lee’s execution by lethal injection was never “properly before” the district court. *Id.* Although Lee requested a broad injunction in his prayer for relief, he failed to press any claims about lethal injection at trial. Pet.App’x 9a (noting that Lee “did not seek any other relief specifically related to lethal injection,” “did not indicate that he would present any evidence related to...lethal injection” in “his trial brief,” did not present “witness[] testimony” on lethal injection except “in passing,” “did not ask the district court to make any

findings related to execution by lethal injection,” “[n]or did he propose injunctive relief related to lethal injection.”); *accord* Pet.10 (conceding “the absence of trial evidence” about lethal injection). Whether seen as a failure of proof, a forfeiture, or a straightforward application of the rule that factual findings must support any injunction, *see* Pet.App’x 8a (citing FED. R. CIV. P. 52(a), 65(d)), it was not an abuse of discretion to decline to fashion such a broad remedy.

2. The same conclusion flows from the maxim that any remedy must “be limited to the inadequacy that produced the injury in fact that the plaintiff has established.” *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *accord* *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977) (“The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself.”). Here, where the district court identified a constitutional violation in Lee’s anticipated execution by hypoxia, it enjoined the violative conduct—“no more, no less.” Pet.App’x 55a. The scope of its injunction conformed to the “well-settled” principle “that a district court abuses its discretion when it drafts an injunction that is unnecessarily broad in scope.” *Alley v. U.S. Dep’t of Health & Human Servs.*, 590 F.3d 1195, 1205 (11th Cir. 2009). Enjoining Lee’s execution by any other method would have been “more burdensome than necessary.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

These remedial principles have special salience in a case governed by the Prison Litigation Reform Act, which requires that injunctive relief “extend no further than necessary,” be “narrowly drawn,” and be “the least intrusive means necessary

to correct the violation.” 18 U.S.C. §626(a)(1)(A). A court must give “substantial weight to any adverse impact on...the operation of a criminal justice system.” *Id.***Error! Bookmark not defined.** Enjoining Lee’s execution by other methods would have expanded relief beyond his claims and proof. Such relief would also be highly intrusive, requiring that Alabama officials guess at what new protocol would satisfy Lee or the courts, Resp.App’x 121a (suggesting State could “devise a [new] means” of executing him by hypoxia); *see Nance v. Ward*, 597 U.S. 159, 174 (2022) (discussing PLRA as means “to streamline §1983 actions and protect ‘the timely enforcement of a sentence’”).

Indeed, it was critical to the district court’s injunction that the State would have an immediate path forward to carry out Lee’s lawful sentence. *See* Pet.App’x 52-55a & n.15. An injunction against *all* of Alabama’s authorized methods would “disturb the State’s ability to administer capital punishment.” Pet.App’x 54a. And the district court reasonably predicted that if the State adopted a new method or new protocol, it “would likely be challenged as well.” Pet.App’x 55a; *accord* 25a (“The need to avoid further delay is particularly salient here given Lee’s litigation history.”).

Although the delay attendant the State’s adoption of a new method is not necessarily an impediment to finding an Eighth Amendment violation under *Nance*, Pet.App’x 25-26a & n.9, it was a sound reason to deny Lee’s request for broader injunctive relief. For one, this Court has repeatedly weighed the prospect of delay when balancing the equities in execution cases. *See, e.g., Nance*, 597 U.S. at 174; *Ramirez v. Collier*, 595 U.S. 411, 434 (2022); *Bucklew*, 587 U.S. at 149; *Hill*, 547 U.S.

at 584; *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)**Error! Bookmark not defined.**; *Gomez v. U.S. Dist. Ct.*, 503 U.S. 653, 653-54 (1992); *In re Blodgett*, 502 U.S. 236, 240 (1992). And the State’s and the public’s interest in carrying out Lee’s lawful death sentence is not diminished just because he was successful in forestalling it for so long.

3. Had the district court granted Lee’s request, the court would have enjoined all the methods Alabama “is presently able to use” to carry out Lee’s sentence. Pet.App’x 26a. This result would be intolerable in a §1983 action, which “challenges not the validity of a death sentence, but only the State’s mode of carrying it out.” *Nance*, 597 U.S. at 172. In *Nance v. Commissioner*, the Eleventh Circuit held that a method-of-execution challenge was “not cognizable under section 1983 and must be brought in a habeas petition” because the “requested relief would prevent the State from executing [the plaintiff].” 981 F.3d 1201, 1209 (11th Cir. 2020). This Court reversed, holding that when §1983 plaintiffs plead and prove the availability of an alternative method, an order granting relief does not “‘necessarily prevent’ the State from carrying out its execution. Rather, the order gives the State a pathway forward.” 597 U.S. at 169 (citation modified). A prisoner may avail himself of §1983, but he “must make the case that the State really can put him to death, though in a different way than it plans.” *Id.* Otherwise, it’s a habeas claim.

Here, Lee has not proposed any “pathway forward,” *id.*, so his claim is not cognizable under §1983. He has suggested that *the State* must “devise a constitutional means” of implementing “his statutory election” of nitrogen hypoxia. Resp.App’x

121a; *accord* Resp.App’x 176a (criticizing State for declining to “revise the current Protocol”), 195a (similar); Pet.3, 8; Mot.1, 5 (similar). But this is backward. Lee won a permanent injunction against the use of the hypoxia protocol on the premise that the State could proceed to execute him via firing squad. Now he argues that the State must “honor[] its commitment to execute Mr. Lee by nitrogen hypoxia,” Resp.App’x 196a, but he never pleaded another hypoxia protocol; in fact, he has consistently suggested that there is no such protocol. *See* Oral Arg., *Lee v. Comm’r, Ala. Dep’t of Corr.*, No. 26-11864 (11th Cir. June 5, 2026), at 24:50-25:47 (rejecting that “there is an appropriate level of conscious suffocation under the Eighth Amendment”); *accord* Resp. to State’s Mot. to Set an Execution Date at 2, *Ex parte Lee*, No. 1021971 (Ala. Mar. 18, 2026) (“[Lee allege[s] that executing him by forced nitrogen gas violates the Eighth Amendment[.]”). The district court acted well within its discretion because Lee’s demand for a different hypoxia protocol without pleading any such alternative was relief cognizable only in habeas.

B. Estoppel cannot justify the injunction Lee requested.

Before addressing the merits of the estoppel claims, Respondents note a fundamental problem with Lee’s arguments and his question presented: estoppel is not an independent claim or cause of action on which a court can grant relief, but rather a defense. The case below was over in June, and the State is not presently asking the federal judiciary to adopt or “permit the State” to adopt (Pet.i) *any* position on the lawfulness of its plan to execute Lee by lethal injection. Accordingly, there was nothing for the district court to estop.

Put differently, the district court could estop the State from advancing any and every argument about lethal injection in this litigation, and it would make no difference to Lee's execution, which does not depend on the district court agreeing with the State on any issue. *Contra* Pet.16 (asserting that the State needs some "basis to abandon [a] representation"); Mot.9-10 (similar). The State is not "deriv[ing] an advantage from 'an improper use of judicial machinery'" where it is not using that machinery in the first place. Pet.16.

To be sure, the State took the position *in state court* that it could execute Lee by lethal injection, Resp.App'x A, and the Alabama Supreme Court did not object, Resp.App'x D. But the district court had no power to police the State's litigation position in state court. The notion that the district court could somehow restrain the State's chief legal officer from making arguments in the State's own courts—or forbid the state courts from adopting them—is inimical to federalism. *Cf. O'Shea v. Littleton*, 414 U.S. 488, 500-02 (1974) (cautioning against injunctions "aimed at controlling or preventing the occurrence of specific events" in "state criminal proceedings" as "intrusive and unworkable," "interference," and "antipathetic to established principles of comity"). It's one thing for a federal court to enjoin the enforcement of a State's criminal sentence; it's quite another to control the state judicial machinery by which that sentence is adjudicated and carried out. *Cf. Younger v. Harris*, 401 U.S. 37, 44 (1971).

C. The district court did not abuse its discretion in applying the doctrines of judicial and equitable estoppel.

If the Court believes that estoppel nonetheless could be the basis for enjoining Lee's execution by lethal injection, the district court still did not abuse its discretion.

In *New Hampshire v. Maine*, this Court set forth three considerations for determining whether to apply judicial estoppel, which the district court here accurately recited:

- (1) whether the party's later position is "clearly inconsistent" with its earlier position;
- (2) "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled'"; and
- (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

Pet.App'x 21a (quoting *New Hampshire*, 532 U.S. at 750-51) (formatting edited). The test is flexible, and the Court was clear that "judicial estoppel is an equitable doctrine invoked by a court at its discretion." *New Hampshire*, 532 U.S. at 750 (citation modified).² Moreover, judicial estoppel may not apply in a case "where the party's

² Importantly, *New Hampshire* was an extraordinary original-jurisdiction case in which the doctrine of judicial estoppel was not challenged. *New Hampshire* had argued only that the doctrine should be limited, not abolished. Plaintiff's Br. at *24, *New Hampshire v. Maine*, No. 130 Orig. (Oct. 10, 2000), 2000 WL 33324606. *New Hampshire* sheds little light on the existence and force of the doctrine because the elements of equitable estoppel were present and could have easily "justif[ied]" the same result. *Keathley v. Buddy Ayers Construction, Inc.*, 146 S. Ct. 1532, 1543 (2026) (Thomas, J., joined by Gorsuch, J., concurring). And because the Court exercises "greater flexibility" in cases among States, *id.*, *New Hampshire* may be better read as an extension of this Court's "interstate common law," *Kansas v. Colorado*, 206 U.S. 46, 98 (1907), rather than an instruction to all lower courts about their equitable powers.

changed position was ‘the result of a change in facts essential to the prior judgment.’” Pet.App’x 11a (quoting *New Hampshire*, 532 U.S. at 756).³

Here, the district court “[a]ssum[ed] without deciding that Lee has successfully shown that the *New Hampshire* factors counsel in favor of applying judicial estoppel or that he has satisfied the equitable estoppel elements, which the Court doubts.” Pet.App’x 23a. But the court nonetheless exercised its discretion not to enjoin Lee’s impending execution on estoppel grounds.

The gist of Lee’s argument seems to be that the State contradicted its stated intent to execute him by nitrogen hypoxia when it decided to execute him by lethal injection after he secured a permanent injunction against the only protocol Alabama has or knows for using nitrogen hypoxia. This argument does not satisfy the elements for judicial estoppel, which aims “to protect the integrity of the judicial process” by “prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *New Hampshire*, 532 U.S. at 749-50 (citation modified). First, the State does not take an “inconsistent” legal position when it responds to an injunction against one of its authorized methods of execution by moving forward with another. *Id.* at 750. Second, because the State changed its plans after the injunction in 2026, there is no risk of a “perception” that it “misled” the district court in 2018. *Id.* Third, there is no unfairness to Lee in the State’s decision to abandon—as to Lee—the

³ The Eleventh Circuit has applied its own two-pronged test: whether (1) the party took an inconsistent position under oath in a separate proceeding, and (2) these inconsistent positions were “calculated to make a mockery of the judicial system.” *Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1181 (11th Cir. 2017) (en banc) (formatting edited).

method he vigorously and successfully opposed in litigation and after he received an eight-year delay in the execution of his sentence after electing hypoxia.

If anything, Lee has gained a tremendous windfall from his election of nitrogen hypoxia in the form of an eight-year reprieve from justice. *Infra* §III. For this reason, even if Lee could satisfy the doctrine, which “ordinarily...is not applied to [S]tates,” *New Hampshire*, 532 U.S. at 755, and should not apply to anyone in federal court, *Keathley*, 146 S. Ct. at 1543 (Thomas, J., concurring), he should not receive any equitable relief. It is *Lee* who has changed positions. Twice. He became liable to execution by hypoxia only because *he* elected it. Then he challenged the very method he elected. Now, having won permanent injunctive relief, he insists that the State must either “revise the Protocol” (precisely how, he does not specify) or “proceed by firing squad” (unauthorized in Alabama) to carry out his judicial execution. Pet.3. The Court should weigh heavily the likelihood that granting the requested relief would add further delay in the State’s ability to carry out Lee’s overdue sentence.

i. The State has not taken clearly inconsistent legal positions, nor did it mislead the Southern District of Alabama when it expected to execute Lee by nitrogen hypoxia.

Considering the first and second *New Hampshire* prongs, Lee cannot show any inconsistency between the State’s prior litigation representations and its plan to execute him by lethal injection. In Lee’s first §1983 action, the parties jointly stipulated to dismissal without prejudice in 2018 because Lee “elected to be executed by nitrogen hypoxia,” so the State had planned to execute him by hypoxia, which rendered his claims moot. Pet.App’x K. All of that was true in 2018. But after Lee

secured a permanent injunction in 2026, the State no longer plans to execute him by hypoxia. There's no contradiction in changing plans in response to a federal order.

Lee's argument rests on a wooden reading of this language from the 2018 joint motion to dismiss: "if [Lee] is to be executed, Defendants will carry out that execution by nitrogen hypoxia." Pet.App'x 172-73a; *see* Resp.App'x 191-92a. In Lee's view, that was an irrevocable promise by the State to the district court that it would execute Lee by hypoxia no matter what. Resp.App'x 191-92a. He makes much of the fact that the parties did not include a disclaimer, such as "unless a federal injunction prohibits the State from using nitrogen hypoxia."

For starters, that sentence from the joint motion must be read in context. At the time, the State believed that Lee preferred to be executed by hypoxia, and it fully intended to honor that preference. Things changed after Lee challenged hypoxia and secured a permanent injunction against the State's only protocol for using it. There was never a representation that the State would perpetually abstain from executing Lee by lethal injection if he made execution by hypoxia impossible, and the parties could not reasonably be expected to identify every possible event or changed circumstance that could alter the State's plans. Doing so would not have been necessary to accomplish the joint filing's goal of informing the district court of the State's present intent. That was enough to moot the case. *See, e.g., Dow Jones & Co. v. Kaye*, 256 F.3d 1251, 1254 (11th Cir. 2001) (case is moot where parties agree "there is no reasonable expectation [of an] alleged violation" "at the present time").

The State's stated intent to execute Lee by hypoxia must be read against the

background assumption that it expected nitrogen hypoxia would be lawful to use—not blocked by an injunction—at the time of execution. It is not plausible that the State would permanently jettison its discretion over the means of carrying out Lee’s punishment in that single sentence. Indeed, state law expressly contemplates ways in which methods of execution may change, and they *have* changed many times in recent decades—by statute, regulation and judicial decree. Most notably, Lee ignores section 15-18-82.1(i) of the Code of Alabama, which provides that a convict’s election “shall at no time supersede the means of execution available to the Department of Corrections.”

Perhaps the Court could imagine a scenario in which judicial estoppel might be applied to prevent a State from defending one method of execution after promising a court that it would use another. *But see supra* §II.B. But that result would not occur simply because the State expressed its intention to use a particular method at one point in time without spelling out every well-known caveat. Methods of execution are subject to change due to intervening events, especially litigation.

For similar reasons, Lee cannot show that the Southern District “accepted” any position advanced by the State and was therefore misled. There was no settlement or injunction as a result of the State’s representation that it planned to execute Lee by hypoxia, and even “settlements...do not require the judicial acceptance of either party’s position” such that estoppel would be “warranted in a later proceeding.” *See Prideaux v. Tyson Foods, Inc.*, 387 F. App’x 474, 478 (5th Cir. 2010) (collecting cases). That reasoning applies with particular force here because the district court

predicated its dismissal of Lee’s first §1983 suit on the parties’ joint stipulation to dismiss *and* its independent determination that Lee’s method-of-execution challenge was moot. Pet.App’x K. Neither the State nor any other litigant could convince a federal court to accept a position on jurisdictional issues that “must be examined by the court on its own,” *Whiting v. Krassner*, 391 F.3d 540, 544 (3d Cir. 2004); *see also Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1227-28 (10th Cir. 2011) (declining to apply judicial estoppel to jurisdictional arguments); *Gray v. City of Valley Park*, 567 F.3d 976, 980-82 (8th Cir. 2009)**Error! Bookmark not defined.** (same).

While Lee has insisted that the district court was misled in 2018, Resp.App’x 188a, he speculates about what the court must have believed at the time of the joint motion. The best evidence—what the court actually *did*—favors the State. Its order dismissing *without prejudice* suggests the court believed that it could regain jurisdiction over Lee’s lethal-injection case—the possibility that Lee says became impossible after his election.⁴ As the Middle District correctly noted, “Nothing before the Court suggests that, in June 2018, the State misrepresented that it would execute Lee by nitrogen hypoxia and not lethal injection.” Pet.App’x 23a n.8; *contra* Pet.4, 17 (asserting the State in 2018 somehow already “possessed” facts that arose in 2026).

Lee adduced no evidence that the State foresaw this scenario, withheld its real intent to execute Lee by lethal injection, and then waited eight years to reveal its secret plan to renege on its stated intent to use nitrogen hypoxia. He offers no

⁴ For these reasons, too, Lee was not entitled to an equitable estoppel ruling because the State never “misrepresented material facts” despite “aware[ness] of the true facts” and “intended that [any] misrepresentation” be relied upon. *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1326 (11th Cir. 2008). If there was no inconsistency, then there was no misrepresentation, either.

explanation why the State would undertake such deception or what the State would have to gain from it. The State’s decision to use one method after another was enjoined is not a “threat to judicial integrity.” *New Hampshire*, 532 U.S. at 750.⁵

ii. There is no unfairness in executing Lee by lethal injection.

Turning to the third *New Hampshire* prong, Lee cannot show that the State has derived any unfair advantage or imposed on him any unfair disadvantage based on the alleged inconsistency. In Lee’s view, the State received an advantage in the form of a “dismissal of a constitutional challenge to its lethal injection protocol without litigating the claim’s merits.” Resp.App’x 189a. But the dismissal was without prejudice, so Lee could have tried to resurrect that suit when he again became subject to the method; the fact that he has not since challenged lethal injection is not attributable to the State. Moreover, even supposing that Lee lost the opportunity to challenge lethal injection, the loss of a frivolous Eighth Amendment claim is not unfair to him. This Court has already addressed and sustained “the very same protocol” for lethal injection that Alabama will use on Lee, *see Brooks*, 810 F.3d

⁵ Lee directs the Court to other Alabama hypoxia cases, attempting to show “inconsisten[cy] with its past practice,” Pet.14 n.7, which is both wrong and irrelevant.

As to Jarrod Taylor (Pet.14 n.7): In 2019, the State moved for the execution of Jarrod Taylor. Taylor objected, claiming he had timely elected hypoxia, and provided paperwork showing that he had tried to mail his election to the prison. ADOC agreed to accept the election and intends to honor it. There is no contradiction between the State’s treatment of Lee, who won a permanent injunction against the protocol, and Taylor, who has not. The State is confident that its position will prevail in Taylor’s case.

As to Tierra Gobble (Pet.14): In 2026, Tierra Gobble filed her second amended state postconviction petition. One of the grounds was that ADOC’s lethal injection protocol is unconstitutional. The State responded that her claim was not ripe because she elected hypoxia, and her claim “rests on the contingency that the nitrogen protocol might at some future point be invalidated and that the State might then seek to execute her by another means.” Pet.App’x 282a. As with Taylor, ADOC intends to execute Gobble by hypoxia; she has no injunction against its use.

If anything, these illustrations demonstrate the State’s *consistent* position that it generally intends to honor an inmate’s election. Of course, federal litigation can thwart the State’s intentions, but at this time, neither of the inmates discussed in Lee’s petition has secured any injunctive relief.

at 818 (discussing *Glossip*, 576 U.S. 863), so there is no reason to think Lee’s lawsuit would have been successful.

Any prejudice owing to the fact that Lee had three months (rather than years) to challenge lethal injection is also not attributable to the alleged inconsistency. Say, for example, the State had insisted that the joint motion be phrased more obviously predictively—to say that the State *expects* Lee will be executed by nitrogen hypoxia due to his election. This would not have resulted in Lee becoming subject to lethal injection any sooner than June 2026. The triggering event was Lee’s success in procuring a permanent injunction against his execution by nitrogen hypoxia, and whatever the State agreed to say in the 2018 filing, his lethal injection claim would likely have been moot until now, and it still would have been “impractical,” in his view, to resurrect it. For this reason, Lee’s argument about “lost years during which the lethal injection claim could have proceeded through discovery, expert development, trial, and appeal in the normal course” (Resp.App’x 189a, 200a) is a nonstarter. There was no live controversy in which to conduct discovery, expert development, trial, or an appeal. It goes without saying that Lee has no entitlement to progress litigation of a non-justiciable claim.

Finally, Lee ignores the glaring reality that he has benefitted tremendously from the State’s actions in 2018. He was eligible to be executed as soon as 2014. But by authorizing nitrogen hypoxia and planning to conduct Lee’s execution by that method, the State forwent its right to carry out Lee’s sentence for over eight years. Far from being prejudiced, Lee received a windfall. There is no world in which this

situation can be described as unfair to Lee.⁶

- iii. Even if Lee had shown the elements for estoppel, the district court did not abuse its discretion by denying equitable relief in light of the totality of circumstances, the presumption against estopping a State, and Lee’s shifting positions.**

The district court did not abuse its discretion in deciding that even if Lee had satisfied the elements of the *New Hampshire* test—which the court doubted—he should not receive an expanded injunction. Pet.App’x 23a. Here, the court reasonably assessed the totality of the circumstances, including that (1) “the change in the State’s position is a result of a change in essential facts,” (2) the State and Lee’s victims have an “important interest in the timely enforcement of his sentence,” and (3) Lee’s “litigation history” suggests there would be significant delay in carrying out his sentence if the court were to grant the requested relief. Pet.App’x 23-26a (citation modified).

This case exemplifies why “ordinarily the doctrine of estoppel...is not applied to [S]tates.” *New Hampshire*, 532 U.S. at 755. Because States must respond to emerging facts and legal developments, “broad interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests.” *Id.* Here, unlike *New Hampshire*, “estoppel *would* compromise a governmental interest in enforcing the law.” *Id.* (emphasis added). And that interest is one held by “the citizenry as a whole.” *Id.* For these reasons, *New Hampshire*—“a case between two States” in which there was no threat to one State’s

6. For the same reasons, there was no unfair and detrimental reliance on the alleged inconsistency such that equitable estoppel would apply. *E.g.*, *Busby*, 513 F.3d at 1326.

“interest in enforcing the law”—is wholly inapposite. *Id.* at 755-56 **Error! Bookmark not defined.**; accord *Keathley*, 146 S. Ct. at 1542 (Thomas, J., concurring) (distinguishing *New Hampshire* on similar grounds); *United States v. McCorkle*, 321 F.3d 1292, 1297 (11th Cir. 2003) (doubting whether “the estoppel doctrine” should be applied “as a matter of law” “in th[e] criminal forfeiture context”); *supra* n.3.

D. There is no conflict with *New Hampshire* or judicial-estoppel decisions of other federal courts of appeals.

Lee argues that certiorari is warranted “because the Eleventh Circuit’s rationale conflicts with this Court’s decision in *New Hampshire*.” Pet.15. Specifically, Lee blames the State for obtaining dismissal in 2018 despite knowing that it did not then have a hypoxia protocol and could not use an unconstitutional one, and he contends that the Eleventh Circuit’s finding of “changed circumstances” conflicts with decisions from the Federal and Eighth Circuits. Pet.15-16.

As noted above, the Eleventh Circuit ruled only on Lee’s stay motion, which makes this a particularly poor posture in which to address an alleged circuit split; it held that “[e]ven if we accept the premise that a party can seek equitable post-judgment relief untethered to the facts proven at trial,” Lee failed to show “a substantial likelihood that the district court abused its discretion in applying the estoppel doctrines.” Pet.App’x 10a. The court further held that the district court “did not unreasonably or incorrectly apply the law by concluding that the events of the intervening six years—including Alabama’s development of the nitrogen hypoxia protocol and Mr. Lee’s successful constitutional challenge to that protocol—constituted a change in circumstances.” Pet.App’x 12a.

The Eleventh Circuit properly rejected the cases Lee cites for his view that there were no relevant “changed circumstances” in his case: *Henry v. Nationwide Insurance Co.*, 1:06-cv-00612, 2007 WL 9717743 (S.D. Ala. Nov. 5, 2007), and *Spencer v. Annett Holdings, Inc.*, 757 F.3d 790 (8th Cir. 2014). *Henry* was unpersuasive because it relied on a formulation of the judicial-estoppel doctrine that the Eleventh Circuit had overruled. Pet.11a. *Spencer*, meanwhile, “held that a district court, applying Iowa law [in a diversity case], did not abuse its discretion in failing to ‘give enough weight to changed circumstances during the course of the litigation[.]’” *Id.* (quoting 757 F.3d at 797). The Eleventh Circuit correctly explained that *Spencer* “did not pronounce an absolute rule under federal estoppel law, and, even if it did, the district court here would not be bound by it.” Pet.11-12a. Accordingly, there was no abuse of discretion in the district court declining to reach the same result as in those two cases.

Lee did not present *Trustees in Bankruptcy of North American Rubber Thread Co. v. United States*, 593 F.3d 1346 (Fed. Cir. 2010) (“*NART*”), to the circuit court, see Pet.16; Resp.App’x I, but it does not support certiorari, either. That case—which, like *Spencer*, is not binding in the Eleventh Circuit—concerns a 1992 antidumping duty order. In 2004, Heveafil asked the Department of Commerce to conduct a changed circumstances review and revoke the order, effective 1995, because NART had declared bankruptcy. NART largely agreed but argued that the effective date should be 2003; Commerce agreed with NART. The following year, Heveafil and NART asked Commerce to make a second review, as NART had changed its mind about the

effective date and now wanted 1995 instead of 2003. Commerce denied the request. *NART*, 593 F.3d at 1349. The circuit court held that NART was judicially estopped from arguing for the 1995 date considering its previous arguments to Commerce. *Id.* at 1353. The court saw “a judicial estoppel problem” because NART “later support[ed] the very same date of revocation it previously opposed.” *Id.* at 1355. It was “not a situation” where a change in position “made sense” because “domestic industry has ceased manufacturing the products at issue” but instead, the bankrupt party changed its “legal position ‘simply because his interests have changed.’” *Id.* at 1355 (quoting *New Hampshire*, 532 U.S. at 749).

If this case and this doctrine can apply outside the bankruptcy context and can apply to States, *NART* nonetheless does not justify estoppel here. First, unlike NART, the State is not arguing contrary positions. *See supra* §II.C.i. Second, Lee’s situation is more akin to the change of circumstances *NART* recognized *would* justify a change in legal position—a domestic manufacturing shutdown. ADOC decided to use lethal injection only once the hypoxia protocol became unavailable *through Lee’s actions*, not because ADOC unilaterally changed its mind.

Finally, Lee directs the Court to *Keathley* for the commonsense proposition that “equitable inquiries require consideration of ‘all relevant facts and circumstances.’” Pet.17 (quoting 146 S. Ct. at 1539). That case does not provide a basis for cert. Here, the courts correctly considered the relevant facts and circumstances, *see* Pet.App’x10-14a, 23-26a, and concluded that equity weighed in favor of the State.

III. Lee is not entitled to equitable relief.

The courts below correctly denied equitable relief, including an injunction pending appeal that would stay Lee’s execution. For the reasons that follow, this Court should likewise deny cert and emergency relief.

A. Lee has unclean hands.

The situation in which Lee finds himself is of his own making. He elected nitrogen hypoxia, challenged hypoxia successfully, and now purportedly seeks to enforce his election of hypoxia. At some point, his “constant [] litigation” must end. Pet.App’x 55a; *see Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (deeming challenge waived where inmate elected the challenged method); *Middlebrooks v. Parker*, 22 F.4th 621, 628-29 (6th Cir. 2022) (Thapar, J., statement) (suggesting estoppel in similar circumstances). Lee proposes now—only after securing a permanent injunction against hypoxia—that the State can and *must* revise the protocol to use hypoxia. Pet.3. But he never pleaded or proved how the State could do so consistent with both the injunction he obtained and his view—undisclosed until now—that the State was forever bound to use hypoxia. The Court should consider that if Lee were “more interested...in avoiding unnecessary pain” than in delay, *Middlebrooks*, 22 F.4th at 628, he could have long ago pleaded an alternative nitrogen protocol that would have permitted the State to move forward with his June or September execution dates. His late-breaking demand for nitrogen hypoxia by an unknown protocol, after a year spent vigorously opposing hypoxia in all its forms, *supra* 16, should be rejected as the blatant contradiction and delay tactic that it is.

B. Other equitable factors weigh against Lee.

The district court gave consideration to several equitable factors, including the need to avoid further delay. Pet.App’x 25a. As the court explained, Lee obtained a de facto stay of execution from 2018 until 2023, when the hypoxia protocol was announced. Instead of offering amendments to the protocol that would make it constitutional in his view, Lee pivoted to firing squad (unauthorized in Alabama) and asked the court to limit his execution options to that method. When the State announced it would use lethal injection, “Lee claim[ed] that the State can only execute him by nitrogen hypoxia, just not using the existing protocol.” Pet.App’x 26a. The court rightly concluded, “Considering the totality of the circumstances, including the circumstances of the dismissal of Lee’s lethal injection challenge, equity does not demand that the Court prohibit the State from executing Lee by lethal injection, the State’s default execution method and one which it is presently able to use.” *Id.*

The court also noted that “the State’s and the victims’ interests in the enforcement of Lee’s sentence” weighed against expanding the injunction. *Id.* Lee is correct that “there is nothing ‘magical’ about the State’s chosen execution date,” Mot.14, but it *is* the date selected by the Governor for his execution—the second such date selected this year, due to Lee’s hypoxia litigation. Lee murdered Ellis and Thompson in 1998, and his appeals were exhausted in 2014. It is long past time for Lee to receive the punishment he is due for his crime. Indeed, this Court has recognized the real interest that the State and the families of victims have in the timely execution of sentences. *E.g., Hill*, 547 U.S. at 584 (“Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.”)

(citing *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)); *Baze*, 553 U.S. at 61 (considering fourteen-year delay since sentencing).

C. Lee faces no threat of irreparable harm, and a stay would undermine the public interest in justice.

Lee has not shown irreparable harm. He alleges no violation of federal law and no risk of physical injury beyond that needed to effectuate his sentence. Execution by lethal injection, a method not challenged in this litigation, is presumptively constitutional. His execution alone cannot count as an irreparable harm, *contra* Mot.13-14, because the State inflicts no cognizable harm when it carries out a lawful and just sentence. If Lee’s observation that the State intends to execute him qualified as a threat of irreparable harm, then this factor would be satisfied in every eleventh-hour proceeding. *Cf. Ramirez*, 595 U.S. at 433 (identifying risk of “spiritual” harm).

A stay or any other injunctive relief that might delay Thursday’s execution would undermine the powerful interest—shared by the State, the public, and the victims of Lee’s crime—in the timely enforcement of his sentence. *Hill*, 547 U.S. at 584. An unpunished murder is an intrinsic and ongoing harm to those interests and to the rule of law. Nearly twenty-eight years is decades too long. “Only with real finality” can we “move forward knowing the moral judgment will be carried out.” *Calderon*, 523 U.S. at 556. “To unsettle these expectations,” especially at the eleventh hour, “is to inflict a profound injury to...the State and the victims of crime alike.” *Id.*

Because the equities weigh heavily against Lee, the Court should deny a stay of execution.

CONCLUSION

The district court did not abuse its discretion in declining to expand the scope of its permanent injunction. This Court should deny certiorari and a stay of execution.

Respectfully submitted,

Steve Marshall
Alabama Attorney General

A. Barrett Bowdre
Solicitor General

Robert M. Overing
Principal Deputy Solicitor General

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

/s/Lauren A. Simpson
Deputy Attorney General

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Lauren.Simpson@AlabamaAG.gov