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

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September 15, 2026

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TAB A

IN THE SUPREME COURT OF ALABAMA

EX PARTE: JEFFERY LEE	)	
	)	
In re: State of Alabama,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1021971
	)	
Jeffery Lee,	)	
	)	
Respondent.	)	

STATE OF ALABAMA'S EXPEDITED RENEWED MOTION TO SET AN EXECUTION DATE

Pursuant to Rule 8(d)(1) of the Alabama Rules of Appellate Procedure, and out of abundance of caution given the changed circumstances since the Court first authorized Jeffrey Lee's execution, the State of Alabama respectfully moves this Honorable Court to issue an order authorizing the execution of Lee's lawfully imposed sentence of death. In support of this motion, the State offers the following:

I. Developments since the State's February 2026 execution motion.

In June 2018, Lee timely elected nitrogen hypoxia as his method of execution. The Alabama Department of Corrections announced a hypoxia protocol on August 25, 2023, but Lee waited until the end of the

limitations period in August 2025 to file a challenge to the method's constitutionality in the Middle District of Alabama.

On February 9, 2026, the State moved for Lee's execution by nitrogen hypoxia. This Court granted the motion on April 2, 2026, and Governor Ivey scheduled Lee's execution for June 11–12.

On June 9, the Middle District of Alabama granted Lee a permanent injunction prohibiting ADOC from executing him via nitrogen hypoxia. Mem. Final Judgment at 1, *Lee v. Lovelace*, 2:25-cv-00680 (M.D. Ala. June 9, 2026), DE188 ("Defendants are permanently enjoined from executing [Lee] using the Alabama Department of Corrections' nitrogen hypoxia protocol."). The court was clear that its "decision does not disturb the State's ability to administer capital punishment" because "Lee successfully challenged only the ADOC's nitrogen hypoxia protocol, not its electrocution or (this time) its lethal injection protocol." Op. at 24, *Lee*, *supra*, DE187.

The default method of execution in Alabama is lethal injection. ALA. CODE § 15-19-82.1(a). The Code provides in relevant part:

> (c) If electrocution, nitrogen hypoxia, and lethal injection are all held to be unconstitutional by the Alabama Supreme Court under the Constitution of Alabama of 1901, or held to be unconstitutional by the United States Supreme Court under

> the United States Constitution, or if the United States Supreme Court declines to review any judgment holding a method of execution to be unconstitutional under the United States Constitution made by the Alabama Supreme Court or the United States Court of Appeals that has jurisdiction over Alabama, then all persons sentenced to death shall be executed by any constitutional method of execution based on the sole discretion of the Commissioner of the Department of Corrections.
>
> […]
>
> (h) No sentence of death shall be reduced as a result of a determination that a method of execution is declared unconstitutional under the Constitution of Alabama of 1901, or the Constitution of the United States. In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.
>
> (i) An election for a choice of a method of execution made by a convict shall at no time supersede the means of execution available to the Department of Corrections.

While Lee elected hypoxia, he has made clear that he does not want to be executed by that method, and the federal courts have prohibited ADOC from employing it with him. ADOC is prepared, however, to execute Lee via lethal injection with the three-drug cocktail adopted in 2014 and used since that time.

II. Lee has fully exhausted his conventional appeals.

In 2000, Lee was convicted of capital murder for shooting Jimmy Ellis and Elaine Thompson during a robbery of Jimmy's Pawn Shop, just outside of Orrville, Alabama. The trial court sentenced him to death. After a remand for a revised sentencing order, the Alabama Court of Criminal Appeals (ACCA) affirmed, *Lee v. State*, 898 So. 2d 790, 808 (Ala. Crim. App. 2001). This Court denied certiorari, *Ex parte Lee*, 898 So. 2d 874 (Ala. 2004), as did the United States Supreme Court, *Lee v. Alabama*, 543 U.S. 924 (2004) (mem.).

Lee's Rule 32 proceedings commenced in February 2005. The circuit court summarily denied in August 2007. ACCA affirmed, *Lee v. State*, 44 So. 3d 1145, 1176 (Ala. Crim. App. 2009), and this Court denied certiorari, *Ex parte Lee*, 1090383 (Ala. Feb. 19, 2010).

Lee then filed a 28 U.S.C. § 2254 petition in the Southern District of Alabama. The district court denied relief, *Lee v. Thomas*, 1:10-cv-00587, 2012 WL 1965608 (S.D. Ala. May 30, 2012), the Eleventh Circuit affirmed, *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F. 3d 1172, 1228 (11th Cir. 2013), and the United States Supreme Court denied certiorari, *Lee v. Thomas*, 572 U.S. 1015 (2014) (mem.).

III. Method-of-execution litigation.

To date, Lee has filed two method-of-execution challenges.

A. Lethal injection (SDAL)

In September 2016, just before the two-year statute of limitations for challenges to ADOC's 2014 midazolam lethal injection protocol ran, Lee filed a 42 U.S.C. § 1983 challenge in the Southern District of Alabama. The district court dismissed in April 2017, *Lee v. Dunn*, 1:16-cv-00473 (S.D. Ala. Apr. 24, 2017), DE23, but the Eleventh Circuit vacated the dismissal as to Lee's Eighth Amendment claim, *Lee v. Comm'r, Ala. Dep't of Corr.*, 17-12271 (11th Cir. Apr. 24, 2018). Before the district court could consider the merits of Lee's claim, the parties informed the court that the new nitrogen hypoxia legislation could affect the case—and it did, as Lee elected hypoxia in June 2018. The complaint was dismissed without prejudice on the parties' motion in July 2018. Order, *Lee*, 1:16-cv-00473 (S.D. Ala. July 20, 2018), ECF 37.

B. Nitrogen hypoxia (MDAL)

Continuing his pattern of waiting until the eleventh hour to challenge methods of execution, Lee filed a § 1983 complaint in the Middle District of Alabama on August 22, 2025, concerning the

constitutionality of nitrogen hypoxia. The case was tried and appealed, and as set forth above, ADOC has been permanently enjoined from executing Lee by hypoxia.

***

In sum, ADOC has not been barred from executing Lee, only from executing him *by nitrogen hypoxia*. While Lee may try to reopen his 2016 challenge to the lethal injection protocol, that is no reason for this Court not to authorize Lee's execution. Indeed, given the history of this case, the Court should expedite that decision so that Lee does not continue to evade justice.

CONCLUSION

Lee has exhausted his conventional appeals. As such, it is time for his sentence to be carried out. Pursuant to Rule 8(d)(1) of the Alabama Rules of Appellate Procedure, the State requests that this Court expedite issuance of an order authorizing the Governor to set a timeframe for the execution of Lee's lawful sentence of death.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the word limitation set forth in ALA. R. APP. P. 27(d) and 32(b)(5). The motion contains 1,078 words, including all headings, footnotes, and quotations, and excluding the parts of the motion exempted under ALA. R. APP. P. 32(c).

I certify that this motion complies with the font requirements set forth in ALA. R. APP. P. 32(a)(7). The motion was prepared in 14-point Century Schoolbook font.

/s/ Lauren A. Simpson
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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2026, I filed the foregoing with the Clerk of the Court. I also served a copy of the foregoing on Jeffery Lee by United States Mail, first-class postage prepaid and addressed as follows:

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TAB B

IN THE SUPREME COURT OF ALABAMA

EX PARTE JEFFERY LEE	)	
	)	
In re: State of Alabama,	)	
	)	
Petitioner,	)	Case No. 1021971
	)	
v.	)	**DEATH PENALTY CASE**
	)	
Jeffery Lee,	)	
	)	
Respondent.	)	
	)	

RESPONDENT JEFFERY LEE'S OPPOSITION TO THE STATE OF ALABAMA'S EXPEDITED RENEWED MOTION TO SET AN EXECUTION DATE

This Court should deny the State of Alabama's Expedited Renewed Motion to Set Execution Date ("Renewed Motion") because it is not the "appropriate time [to] enter an order authorizing the Commissioner of the Department of Corrections to carry out [Mr. Lee's] sentence of death[.]"[1] At present, the State cannot identify a lawful and available method of executing Mr. Lee.

[1] Ala. R. App. P. 8(d)(1).

First, ADOC is judicially and equitably estopped from executing Mr. Lee using its 2014 three-drug lethal-injection protocol ("LI Protocol"). **Second**, Alabama law bars ADOC from executing Mr. Lee by lethal injection or electrocution. **Third**, ADOC is permanently enjoined from executing Mr. Lee under the current nitrogen hypoxia protocol ("nitrogen Protocol"). **Finally**, ADOC is neither authorized nor prepared to conduct a firing squad execution.

ARGUMENT

I. ADOC is judicially and equitably estopped from executing Mr. Lee via the LI Protocol.

In September 2016, Mr. Lee challenged the LI Protocol, asserting claims under the Eighth Amendment, the Equal Protection Clause, and the Due Process Clause.[2] After the district court dismissed his Complaint,[3] the Eleventh Circuit reversed and remanded, holding that Mr. Lee was entitled to litigate the merits of his Eighth Amendment challenge.[4]

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[2] *Lee v. Dunn, et al.*, No. 1:16-cv-473 (S.D. Ala. July 19, 2018), DE 1.

[3] *Lee v. Dunn* (July 19, 2018), DE 23 at 8.

[4] *Lee v. Dunn* (July 19, 2018), DE 28 at 9.

Before those proceedings occurred, however, "Plaintiff and all Defendants"[5] filed a Joint Motion to Dismiss Mr. Lee's lethal-injection lawsuit without prejudice.[6] The parties explained:

> Plaintiff's complaint seeks to enjoin Defendants from carrying out his execution **through Defendants' current three-drug midazolam lethal-injection protocol**. Because Plaintiff has elected to be executed by nitrogen hypoxia, rather than lethal injection, pursuant to Section 15-18-82.1, 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**.[7]

Citing this same language, the court granted the Joint Motion to Dismiss.[8]

The State is judicially estopped from executing Mr. Lee using the LI Protocol.[9] Under this Court's precedent, "for judicial estoppel to apply":

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[5] Defendants were represented by, *inter alia*, counsel of record on the Renewed Motion. Joint Mot. to Dismiss, *Lee v. Dunn* (July 19, 2018), DE 37 ("DE 37") at 3.

[6] *Id.*

[7] *Id.* at 2-3 (emphases added).

[8] Order, *Lee v. Dunn* (July 20, 2018), DE 38.

[9] This Court has adopted the federal approach to judicial estoppel. *Ex parte First Ala. Bank*, 883 So. 2d 1236, 1246 (Ala. 2003) ("embrac[ing] the factors set forth in *New Hampshire v. Maine*," 532 U.S. 742 (2001)).

> (1) "a party's later position must be 'clearly inconsistent' with its earlier position"; (2) the party must have been successful in the prior proceeding so that "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or second court was misled'"; and (3) the party seeking to assert an inconsistent position must "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."[10]

Here, all three factors favor applying judicial estoppel against the State.

First, in the joint motion to dismiss, the State's position was that Mr. Lee would not be subject to the LI Protocol. Its present position is that Mr. Lee should be executed using that very same protocol.[11] Those positions are "clearly inconsistent."

Second, the State was successful in the earlier litigation—having persuaded Mr. Lee and a federal district court—to dismiss a case based on the premise that it was moot because the State would not subject Mr. Lee to the LI Protocol (or any method other than nitrogen hypoxia). Permitting the State to employ the LI Protocol it promised the first court it would not use on Mr. Lee "would create the perception that either the first or second court was misled."

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[10] *Id.* at 1244-45 (internal citations omitted).

[11] Renewed Mot. at 3 (describing the LI Protocol).

Third, the State would derive an unfair advantage or impose an unfair detriment on Mr. Lee if not estopped—satisfying both alternative prongs of the third factor. The State clearly benefited by obtaining a dismissal of the lethal-injection lawsuit prior to a trial on the merits. Mr. Lee, moreover, has suffered an unfair detriment because he lost the ability to litigate that challenge without the time and logistical pressures of being under a warrant (or threat of warrant).

For similar reasons, the State is also equitably estopped from executing Mr. Lee by the LI Protocol. Mr. Lee did not dismiss his lethal-injection challenge only to face execution under the same protocol years later. When the parties jointly moved to dismiss that litigation in 2018, ADOC had not yet adopted a nitrogen protocol. Mr. Lee had every reason to believe any future nitrogen protocol would comply with constitutional requirements.[12] That assumption proved incorrect. *See infra*. Mr. Lee only dismissed his lawsuit, based on his understanding from the State

[12] Mr. Lee expressly reserved his "right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia." Ex. A to DE 37, DE 37-1 ("DE 37-1").

that "**if he is to be executed, Defendants will carry out that execution by nitrogen hypoxia**."[13]

If Alabama can proceed to execute Mr. Lee using the very protocol he challenged prior to dismissal, then fairness requires allowing Mr. Lee to challenge that method without the artificial deadline of a pending execution.[14] The State cannot claim the benefit of the dismissal while repudiating the representation on which it was obtained.[15] Even assuming Mr. Lee is subject to lethal injection, *see infra*, permitting the State to do so—thereby depriving Mr. Lee of the opportunity to litigate his challenge free of the compressed timeline imposed by a pending

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[13] DE 37 at 3.

[14] *See Ex parte Four Seasons, Ltd.*, 450 So. 2d 110, 111 (Ala. 1984) ("[a]lthough the doctrine of equitable estoppel is, as a general rule, not applicable to the state . . . or to state-created agencies, the doctrine is applicable where justice and fair play require it").

[15] The State's suggestion that Mr. Lee is free to return to federal court to resume his lethal injection challenge is not well-taken. It is not Mr. Lee who seeks to undo the parties' agreement. The burden to alter the status quo should fall on the State. If the State does so, the State should at a minimum certify that it is incapable of ever developing a nitrogen hypoxia protocol that meets Eighth Amendment requirements, rendering the consideration underlying the joint dismissal impossible to achieve.

warrant)—"would effectively deny [Mr. Lee] a remedy at law" and "work a serious injustice."[16]

* * *

Mr. Lee and the State agreed he would not be subject to the "three-drug midazolam lethal-injection protocol" the State now seeks permission to employ. Given that agreement, and the representations the State made to the court overseeing the lethal-injection lawsuit, the State should not be permitted to execute Mr. Lee via the LI Protocol. As such, now is not the appropriate time to issue an execution warrant.

II. Alabama law bars ADOC from executing Mr. Lee by lethal injection or electrocution.

The Renewed Motion incorrectly asserts that "[w]hile [Mr.] Lee elected hypoxia, he has made clear that he does not want to be executed by that method, and the federal courts have prohibited ADOC from employing it with him."[17] The State continues, "ADOC is prepared, however, to execute [Mr.] Lee via lethal injection with the three-drug

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[16] *Ex parte Four Seasons, Ltd.*, 450 So. 2d at 111.

[17] Renewed Mot. at 3; *see also id.* at 6 ("ADOC has been permanently enjoined from executing Lee by hypoxia."); *see also id.* ("In sum, ADOC has not been barred from executing [Mr.] Lee, only from executing him *by nitrogen hypoxia*.") (italics in original).

protocol adopted in 2014 and used since that time."[18] The State misstates the effect of Mr. Lee's election and the scope of federal district court's permanent injunction.

On June 26, 2018, Mr. Lee elected nitrogen hypoxia, while reserving his "right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia."[19] Five years later, ADOC adopted a nitrogen Protocol.[20] After five executions that made clear the nitrogen Protocol results in cruel and unusual punishment,[21] Mr. Lee filed a federal lawsuit challenging the nitrogen Protocol under the Eighth Amendment.[22] To be clear, Mr. Lee did not challenge nitrogen hypoxia in general. He challenged, as reserved under his opt-in form,[23] the constitutionality of the current **nitrogen Protocol**.

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[18] *Id.*

[19] DE 37-1.

[20] ADOC Execution Procedures (Aug. 2023), available at: https://files.deathpenaltyinfo.org/documents/Al_Lethal_Gas_Execution_Protocol_2023_08.pdf (last accessed: July 6, 2026).

[21] There have since been two more.

[22] Compl., *Lee v. Lovelace*, *et al.*, No. 2:25-cv-680 (M.D. Ala. Aug. 22, 2025), DE 1.

[23] DE 37-1.

Mr. Lee therefore has **not** "made it clear he does not want to be executed by [the nitrogen hypoxia] method."[24]

Following a three-day bench trial on the merits, and an expedited appeal resulting in remand, the U.S. District Court for the Middle District of Alabama found "ADOC's **nitrogen hypoxia execution protocol** violates the Eighth Amendment" and "PERMANENTLY ENJOINED" the State "from executing [Mr.] Lee using **the Protocol**[.]"[25] In other words, the court barred the State only from using the current **nitrogen Protocol** to execute Mr. Lee; no court has "prohibited ADOC from employing" nitrogen hypoxia more generally.[26]

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[24] As required under U.S. Supreme Court case law, *see Glossip v. Gross*, 576 U.S. 863 (2015), Mr. Lee pleaded an alternative substantially likely to reduce the serious risk of suffering under the nitrogen Protocol: death by firing squad using a protocol modeled on Utah's. *See* First Am. Compl., *Lee v. Lovelace* (Feb. 2, 2026), DE 40.

[25] Mem. Op. & Order, *Lee v. Lovelace* (June 9, 2026), DE 187 at 25 ("Permanent Inj.") (emphases added; capitalization in original). The court declined to enjoin the State from executing Mr. Lee by anything other than firing squad, noting that other statutory methods appeared to remain available. *Id.* at 24. Contemporaneous with this Opposition, and consistent with the arguments raised herein, Mr. Lee is moving the federal district court to amend the scope of its permanent injunction to also enjoin the State from executing him by lethal injection.

[26] Renewed Mot. at 3.

The State could, for example, revise the nitrogen Protocol to comport with the Constitution and execute Mr. Lee by that method.

Lethal injection is not statutorily available. Once Mr. Lee elected to be executed by the nitrogen hypoxia method, by the plain terms of Section 15-18-82.1(a), nitrogen hypoxia became his exclusive method absent a statutory exception. Section 15-18-82 provides that "[i]f electrocution or nitrogen hypoxia are held unconstitutional, the method of execution shall be lethal injection." But Alabama law differentiates between methods of execution[27] and ADOC's policies and procedures governing executions.[28] And as explained above, the **method** of nitrogen

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[27] *See* Ala. Code § 15-18-82(a) ("If electrocution or nitrogen hypoxia are held unconstitutional, the **method** of execution shall be lethal injection. If lethal injection is held unconstitutional or otherwise becomes unavailable, the **method** of execution shall be by nitrogen hypoxia.") (emphases added); *id.* § 15-18-82.1(c) ("If electrocution, nitrogen hypoxia, and lethal injection are held to be unconstitutional by the Alabama Supreme Court under the Constitution of Alabama . . . or by the United States Supreme Court under the United States Constitution, or if the United States Supreme Court declines to review any judgment holding a **method** of execution to be unconstitutional under the United States Constitution made by the Alabama Supreme Court or the United States Court of Appeals that has jurisdiction over Alabama, then all persons sentenced to death shall be executed by any constitutional **method** of execution based on the sole discretion of the Commissioner of the Department of Corrections.") (emphases added).

[28] Ala. Code § 15-18-82.1(g) ("The **policies and procedures** of the Department of Corrections for execution of persons sentenced to death

hypoxia has not been held to be unconstitutional. Rather, the current **nitrogen Protocol** has been held to violate the Eighth Amendment.[29] The statutory trigger to revert to lethal injection, accordingly, has not occurred.

Moreover, Section 15-18-82.1(c) expressly defines the circumstances under which an execution **method** is "held unconstitutional" for purposes of the execution statute: it must be "held unconstitutional" by (1) this Court under the Alabama Constitution, (2) the U.S. Supreme Court under the federal Constitution, or (3) this Court or the Eleventh Circuit under the federal Constitution if the U.S.

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shall be exempt from the Alabama Administrative Procedure Act, Chapter 22 of Title 41.") (emphasis added). Alabama execution protocols are set forth in a document entitled "Alabama Department of Corrections Execution **Procedures**." ADOC Execution Procedures, *supra* (emphasis added).

[29] Further, the Eleventh Circuit has rejected the State's argument that failure to develop a protocol for a method of execution renders it unavailable. *See Price v. Comm'r, Ala. Dep't of Corr.*, 920 F.3d 1317, 1328 (11th Cir. 2019) ("A State may not simultaneously offer a particular method of execution and deny it as 'unavailable.' Rather, because the State voluntarily included nitrogen hypoxia in its statute, we reject the State's argument that nitrogen hypoxia is not 'available' to Price simply because the State has not yet developed a protocol to administer this method of execution."); *id.* ("Indeed, Alabama's official legislature-enacted policy is that nitrogen hypoxia is an available method of execution in the State.").

Supreme Court declines review.[30] The federal district court's holding alone, without further appellate review, is therefore insufficient to trigger a reversion back to lethal injection. Mr. Lee's election of nitrogen hypoxia remains controlling.[31]

Any other reading of the execution statute would produce a perverse result. Mr. Lee exercised his statutory right to elect nitrogen hypoxia. Nothing in the statute suggests that a prisoner forfeits that election because the State failed to devise a constitutional means of

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[30] The State invoked this provision in its Renewed Motion at 2-3.

[31] Because Sections 15-18-82 and 15-18-82.1 are adjacent provisions of the same statute, canons of statutory construction require the term "held unconstitutional" to be read consistently. *See Ex parte Jackson*, 614 So. 2d 405, 406 (Ala. 1993) ("Subsections of a statute are in pari materia and should be construed together to ascertain the meaning and intent of each.") (citation and internal quotation marks omitted); *Something Extra Publ'g, Inc. v. Mack*, 350 So. 3d 663, 674 (Ala. 2021) (applying "the presumption of consistent usage" for statutory interpretation which it explained as: "'A word or phrase is presumed to bear the same meaning throughout a text'") (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 25, at 170 (Thompson/West 2012)). To the extent there is any ambiguity as to the meaning of "held unconstitutional" in Section 15-18-82, as a criminal statute, that ambiguity must be resolved in Mr. Lee's favor. *See Ex parte Evers*, 434 So. 2d 813, 817 (Ala. 1983) ("[I]t is well established that criminal statutes should not be 'extended by construction.'") (citation omitted).

carrying it out. The consequence of this failure should fall on the State, not a prisoner who exercised the right afforded to him by the Legislature.

Electrocution is not statutorily available. At the time of Mr. Lee's sentencing in 2001,[32] electrocution was Alabama's only method of execution.[33] In 2002, the Legislature made lethal injection the default method.[34] Prisoners were given "one opportunity to elect" to "be executed by electrocution": those in Mr. Lee's case posture were required to do so by providing a written election "delivered to the warden within 30 days after the certificate of judgment pursuant to a decision of the Alabama Supreme Court affirming the sentence of death" issued.[35] Mr. Lee did not elect electrocution within that timeframe. As such, by statute, he is not eligible to be executed by electrocution.

III. The State is permanently enjoined from executing Mr. Lee under the current nitrogen Protocol.

After a full merits trial, on June 9, 2026, the Middle District of Alabama found that "ADOC's nitrogen hypoxia execution protocol

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[32] Mr. Lee was originally sentenced in 2000, but remand resulted in a revised sentencing order in 2001.

[33] Ala. Code § 15-18-82(a) (2001).

[34] Ala. Code § 15-18-82.1(a) (2002).

[35] Ala. Code § 15-18-82.1(b) (2002).

violates the Eighth Amendment" and issued a permanent injunction prohibiting use of that protocol against Mr. Lee.[36] The State voluntarily dismissed its appeal of that decision, so the permanent injunction is final.[37] Without revising the nitrogen Protocol to comport with the Constitution, then, executing Mr. Lee by nitrogen hypoxia is not presently available.

Because lethal injection, electrocution, and the current nitrogen Protocol are presently unavailable, barring development of a new nitrogen Protocol, the State's only remaining alternative is Mr. Lee's proposed method of firing squad. Yet ADOC admits it is neither authorized nor prepared to conduct such an execution.[38]

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[36] Permanent Inj. at 25.

[37] *See* Stip. of Dismissal, *Lee v. Comm'r, Ala. Dep't of Corr.*, No. 26-12027 (11th Cir. June 15, 2026) (ECF No. 19); Order, *Lee v. Comm'r, Ala. Dep't of Corr.*, No. 26-12027 (11th Cir. June 15, 2026) (ECF No. 20).

[38] Emergency Application for a Stay or Vacatur of the Inj. Issued by the U.S. Dist. Ct. for the M.D. Ala., *Lovelace v. Lee*, No. 25A1381 (U.S. June 11, 2026) at 29 ("Alabama currently lacks a structure or facility that would be safe and appropriate for firing squad executions and would thus have to build the program 'from scratch.'") (citation omitted).

CONCLUSION

Because the State cannot identify a lawful, presently available method of carrying out Mr. Lee's sentence, Rule 8(d)(1) does not permit issuance of an execution warrant at this time. The Renewed Motion should be denied.

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Certificate of Compliance

I certify this motion complies with the word limitation in Ala. R. App. P. 27. This motion contains 2,923 words, including all headings, footnotes and quotations, and excluding the parts exempted under Ala. R. App. P. 32(c).

I further certify this motion complies with the font requirements listed in Ala. R. App. P. 32(a)(7). This motion was prepared in 14-point Century Schoolbook font.

/s/ Leslie S. Smith
Leslie S. Smith

Certificate of Service

I certify that on July 7, 2026, I electronically filed the foregoing and caused a copy to be served on counsel for the State by e-mail addressed as follows:

Paxton B. Weeks: Paxton.Weeks@AlabamaAG.gov
Polly S. Kenny: Polly.Kenny@AlabamaAG.gov
Lauren A. Simpson: Lauren.Simpson@AlabamaAG.gov

/s/ Leslie S. Smith
Leslie S. Smith

TAB C

IN THE SUPREME COURT OF ALABAMA

EX PARTE: JEFFERY LEE	)	
	)	
In re: State of Alabama,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1021971
	)	
Jeffery Lee,	)	
	)	
Respondent.	)	

STATE OF ALABAMA'S REPLY TO LEE'S RESPONSE TO EXPEDITED RENEWED MOTION TO SET AN EXECUTION DATE

On July 7, Lee asked this Court not to set his execution date because, he claims, "the State cannot identify a lawful and available method of executing" him. Resp. 1. He claims that (1) ADOC is judicially and equitably estopped from using its lethal injection protocol[1] to execute him, (2) Alabama law prohibits his execution by lethal injection or

1. The protocol calls for the sequential administration of midazolam hydrochloride, rocuronium bromide, and potassium chloride. This is the protocol the Supreme Court approved in 2015. *Glossip v. Gross*, 576 U.S. 863, 873 (2015); *see Price v. Dunn*, 385 F. Supp. 3d 1215, 1221 (S.D. Ala. 2019) (ADOC protocol is "functionally equivalent" to *Glossip* protocol); *see also Jordan v. Cain*, 3:15-cv-00295, 2025 WL 172866, at *11 (S.D. Miss. June 20, 2025) ("[N]umerous federal courts have held that a three-drug lethal injection protocol using midazolam as the first drug does not violate the Eighth Amendment.").

electrocution, (3) ADOC cannot use the current nitrogen hypoxia protocol on him, and (4) ADOC is not presently allowed (or prepared) to execute him by firing squad. *Id.* at 2.

Lee is correct that ADOC has been enjoined from using its current hypoxia protocol to execute him, and ADOC is not prepared to conduct a firing squad execution. Lee is mistaken, however, about ADOC's power to use lethal injection. And his response does not undermine the Court's prior determination that now is an "appropriate time" to execute his sentence. ALA. R. APP. P. 8(d)(1).

I. The State is not judicially or equitably estopped from executing Lee via lethal injection.

Lee first argues that ADOC is estopped from executing him by lethal injection because he and the State jointly moved to dismiss his 42 U.S.C. § 1983 action concerning lethal injection in 2018 after he elected nitrogen hypoxia. Resp. 2-7. The district court dismissed the case without prejudice, Order, *Lee v. Dunn*, 1:16-cv-00473 (S.D. Ala. July 20, 2018), ECF No. 38, because ***Lee had elected to be executed by hypoxia***[2] and

2. Whether Lee ever actually *wanted* hypoxia for his method of execution remains an open question. Asked why he elected, he said, "Because in 2018 I was a part of a lawsuit against lethal injection. So I elected nitrogen hypoxia." Ex. A at 23. When Lee and dozens of other inmates

ADOC had agreed to do so. But sometime between 2018 and 2025, Lee changed his mind as to hypoxia and obtained a judgment from another district court prohibiting ADOC from using its hypoxia protocol on him.

Lee claims that it is unfair for him to be forced into rushed litigation about lethal injection, but this is a problem of Lee's own making. Just as with his lethal injection lawsuit, he waited until the very end of the limitations period to bring his hypoxia lawsuit. He could have challenged hypoxia years ago, but he stalled until August 2025 despite knowing that his conventional appeals were exhausted in March 2014 and he was exposed to the possibility of an execution motion.[3] As of this filing, Lee has made no effort to revive his lethal injection lawsuit.

II. Alabama law does not prohibit execution by lethal injection.

Lee claims that he has not rescinded his nitrogen hypoxia election, but rather that he does not want to be executed by the current hypoxia protocol. Resp. at 9. Odd—in his federal hypoxia litigation, Lee did not suggest a modification by which the protocol would satisfy him but

---

elected in June 2018, ADOC did not have a hypoxia protocol. In effect, they bought themselves more than five years' respite from execution.

3. Asked why he waited, Lee said, "I really don't have an answer why because I just knew that I had to have it filed by August." Ex. A. at 22.

instead argued that he would prefer to be executed ***by firing squad***. *Accord* CA11 Oral Arg., No. 26-11864 (June 5, 2026) at 24:50-25:25 (arguing that there could be *no* constitutionally acceptable degree of oxygen deprivation). And when deposed, Lee expressed no reservation as to the circumstances that might render the method lawful:

> Q. So can you tell me what you believe your lawsuit to be about?
>
> A. An 8th Amendment challenge to the nitrogen hypoxia.
>
> Q. Okay. Can you tell me further what that means?
>
> A. It's just that—the 8th Amendment violation I believe is that nitrogen hypoxia is cruel and unusual.
>
> Q. And why do you think it's cruel and unusual?
>
> A. Just from some of the stuff I've heard about it.

Ex. A at 19–20. Lee's recent writings also compare nitrogen hypoxia to the Nazi gas chambers. *Id.* at 36–37.[4] For him to argue now that he still wants hypoxia, albeit by an undisclosed alternative protocol, is disingenuous at best. If any argument should be estopped, it's Lee's newfound position that the State should still execute him by hypoxia.

4. "Hitler hated the Jewish race of people so he used gas to annihilate millions of Jewish people. From that, Alabama and four other states birthed Nitrogen Suffocation." Jeffery Lee, *Untitled*, 29:1 ON WINGS OF HOPE 5 (2025), https://www.phadp.org/owoh29_1.

Regardless, lethal injection is available. Section 15-18-82.1 of the Code of Alabama provides:

> (i) An election for a choice of a method of execution made by a convict shall at no time supersede the means of execution available to the Department of Corrections.

ADOC has been enjoined from using its hypoxia protocol on Lee—which, clearly, he does not want in any case. As the protocol is not available to ADOC as to Lee, *see* Resp. 13-14, then ADOC may use another available method. ADOC has two, lethal injection and electrocution, and lethal injection is the default. ALA. CODE § 15-18-82.1(a).

CONCLUSION

Pursuant to Rule 8(d)(1) of the Alabama Rules of Appellate Procedure, the State requests that this Court again issue an order authorizing the Governor to set a timeframe for the execution of Lee's lawful sentence of death.

Respectfully submitted,

Steve Marshall
Attorney General

/s/ Lauren A. Simpson
Lauren A. Simpson
Deputy Attorney General

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the word limitation set forth in ALA. R. APP. P. 27(d) and 32(b)(5). The motion contains 995 words, including all headings, footnotes, and quotations, and excluding the parts of the motion exempted under ALA. R. APP. P. 32(c).

I certify that this motion complies with the font requirements set forth in ALA. R. APP. P. 32(a)(7). The motion was prepared in 14-point Century Schoolbook font.

/s/ Lauren A. Simpson
Lauren A. Simpson
Deputy Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2026, I filed the foregoing with the Clerk of the Court. I served a copy upon counsel for Lee by electronic mail, addressed as follows:

Leslie S. Smith
Leslie_Smith@fd.org

/s/ Lauren A. Simpson
Lauren A. Simpson
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Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CASE NUMBER: 2:25-CV-00680-ECM

JEFFERY LEE,
Plaintiff,
vs.
JOHN Q. HAMM, Commissioner;
and TERRY RAYBON, Warden
Defendants.

* * * * * * * * * * * * * * *

THE ORAL PROCEEDINGS
OF THE DEPOSITION OF JEFFERY LEE
MARCH 18, 2026

REPORTER: Paul Morse
Certified Court Reporter
and Notary Public

IT IS FURTHER STIPULATED AND AGREED that the signature to and the reading of the deposition by the witness is waived, the deposition to have the same force and effect as if full compliance had been had with all laws and rules of Court relating to the taking of depositions.

IT IS FURTHER STIPULATED AND AGREED that it shall not be necessary for any objections to be made by counsel to any questions except as to form or leading questions, and that counsel for the parties may make objections and assign grounds at the time of the trial, or at the time said deposition is offered in evidence, or prior thereto.

IT IS FURTHER STIPULATED AND AGREED that the notice of filing of the deposition by the Commissioner is waived.

* * * * * * * * * * * * * *

I N D E X

EXAMINATION

PAGE

By Ms. Kenny..... 6

EXHIBITS FOR THE DEPOSITION

PAGE

Exhibit 1, Complaint..... 25

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Exhibit 4, On Wings of Hope Article..... 35

* * * * * * * * * * * * * * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

BEFORE:
Paul Morse, Commissioner.

APPEARANCES:
POLLY KENNY, ESQUIRE, of THE ALABAMA ATTORNEY GENERAL'S OFFICE, 501 Washington Avenue, Montgomery, Alabama 36104, appearing on behalf of the Defendants.
LAUREN SIMPSON, ESQUIRE, of THE ALABAMA ATTORNEY GENERAL'S OFFICE, 501 Washington Avenue, Montgomery, Alabama 36104, appearing on behalf of the Defendants.
PAIGE SHARPE, ESQUIRE, of ARNOLD & PORTER, 601 Massachusetts Avenue NW, Washington D.C. 20001, appearing on behalf of the Plaintiff.

TAMRYN HOLLEY, ESQUIRE, of ARNOLD & PORTER, 601 Massachusetts Avenue NW, Washington D.C. 20001, appearing on behalf of the Plaintiff.

* * * * * *

I, Paul Morse, CCR, a Court Reporter of Daphne, Alabama, acting as Commissioner, certify that on this date, as provided by the Federal Rules of Civil Procedure and the foregoing stipulation of counsel, there came before me at the offices of Holman Correctional Facility, 866 Ross Road, Atmore, Alabama 36502, beginning at 10:00 a.m., Jeffery Lee, witness in the above cause, for oral examination, whereupon the following proceedings were had:

JEFFERY LEE,

being first duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. KENNY:

Q. Okay. So Mr. Lee, my name is Polly Kenny. I am from the Attorney General's Office. And this is Lauren Simpson. She's also from the Attorney General's Office. And we are here today to take your deposition. I know you've been able to talk to your

attorneys. I assume that you've never been deposed before?

A. I have not.

Q. Okay. I thought that was probably a safe assumption. So what we're going to do is, it's really just sort of having a conversation with you under oath. Right? So I'm going to ask you questions. You're going to answer them. You know, if your counsel objects to the question, they certainly have the right to do that. And then we will direct you whether or not to answer the question. Okay?

I would like to warn you -- and I'm sure that they have told you this -- but please if I ask you a question, don't tell me what they have told you. Okay? Because that is not -- based on my experience doing these, that tends to be something that the inmates want to do. So I'm not asking you what your attorneys told you. Okay? So I just want to go ahead and tell you that.

If you don't understand my question, please,

please say hey, Ms. Kenny, I don't understand, will you rephrase it. I'm happy to do that. We're not trying to trick you or get any gotcha's or anything like that. So just know that if you don't understand it, please let me know. Please answer verbally yes, no, et cetera. And you're nodding your head now. That's fine.

A. Yeah.

Q. But once I start asking you questions, make sure you say something out loud. And we'll try not to talk over each other as well. That's very important because the Court Reporter is trying to write down everything that we're saying.

MS. KENNY: I guess we'll do usual stipulations?

MS. SHARPE: That's fine.

MS. KENNY: Yeah. Okay.

Q. Okay. So could you please state your full name?

A. Jeffery James Lee.

Q. Okay. And how do you spell your

first name?

A. J-e-f-f-e-r-y.

Q. Okay. And what's your date of birth?

A. 12/26/76.

Q. How long have you been at Holman?

A. 25 years.

Q. So when did you get to Holman?

A. October of 2000.

Q. Can you describe your childhood home? Like did you have a mom, a dad, siblings, that kind of stuff?

A. Yeah. I had both parents in the home. I had got -- I had three brothers and three sisters.

Q. Okay. And are your parents still living?

A. Yes, ma'am.

Q. What about your siblings?

A. Two of them passed away. But four are still alive.

Q. Okay. And are your parents still together?

A. Yes, ma'am.
Q. How would you characterize your childhood?
A. It was poor, abusive, a lot of violence in the house. It was tough.
Q. Okay. But you remain close with your parents?
A. Yes, ma'am.
Q. And what about your siblings?
A. Yes, ma'am.
Q. Okay. Are you married?
A. No, ma'am.
Q. How old were you when you came into Holman?
A. 23.
Q. So any kids?
A. Yeah. I have a son.
Q. Okay. And do you have a relationship with him?
A. Yes, ma'am.
Q. Where does he live? Not an address, just generally.
A. Honolulu, Hawaii.

Q. Oh wow. That's far away.
A. Yeah.
Q. Does he ever get to visit?
A. Every now -- every couple years. He came last year.
Q. Okay. Is he in the military by any chance?
A. He was.
Q. Okay. What service?
A. He was in the United States Army.
Q. Okay. Is he married?
A. No, ma'am.
Q. Does he have children?
A. No, ma'am.
Q. Okay. What is your opinion -- or do you have an opinion about suicide?
A. I guess, yeah, I have an opinion about it. It's something that I don't think should happen. I don't think you should do suicide. I think that's morally wrong.
Q. Okay. And you're a Christian. Right?
A. Yes, ma'am.

Q. Okay. And is that based upon your Christian background, or is it based on your Christian background and more?
A. Yes.
Q. The second? So Christian background and more is why you believe it's morally wrong?
A. Yes.
Q. Okay. Have you lost anyone close to you due to suicide?
A. Yes.
Q. Was it your siblings?
A. No.
Q. Okay. Do you smoke?
A. No, ma'am.
Q. Have you ever?
A. I have.
Q. Okay. When did you smoke, from when to when?
A. I quit January of 2002.
Q. Okay. So you have not smoked for -- I'm sorry I'm doing math out loud -- but 24 years?

A. Yes, ma'am.
Q. Good for you. I know a lot of people smoke in prison.
A. Uh-huh.
Q. Would you consider yourself to be in good health?
A. Yes.
Q. Okay. What do you do -- in your 25 years here at Holman, what do you do to pass the time?
A. I read, study the Bible, workout, go to church, watch sports, cut hair, a little bit of everything.
Q. So I'm going to start backwards. You cut hair. So do you cut other people's hair?
A. Yes, ma'am.
Q. Okay. How many people do you do that for?
A. Sometimes 30 to 40 guys a month.
Q. Wow. That keeps you pretty busy.
A. Yes, ma'am.
Q. And you said you watch sports.

What kind of sports do you like to watch?
A. Baseball, basketball, football in that order.
Q. Okay. Have you got a team you root for?
A. Yes, ma'am.
Q. Which one?
A. Baseball, New York Yankees. Football, college, Florida State; pro, Minnesota Vikings. Basketball, the Philadelphia 76ers.
Q. Okay. Why Florida State?
A. I grew up in an Auburn/Alabama house. I didn't want to be a part of that rivalry, so I chose Florida State.
Q. Okay. And you said you workout. What do you do when you workout?
A. Lift weights, run, just -- lift weights. I used to play basketball, but I stopped playing basketball. So just lift, weights, run, job, stuff like that.
Q. Okay. And how often do you lift weights?

A. At least three to four times a week.

Q. And then what about running, jogging, how often do you do that?

A. Two to three times a week.

Q. Okay. And how long do you run? I know it's like distance would be hard for you to tell me probably. But do you do it for 10 minutes or 30 minutes?

A. We've got it broke down into miles. I try to do a half a mile a day on the three days I run.

Q. Okay. Okay. And you said you used to play basketball. When did you quit that?

A. 2017.

Q. And why?

A. I got injured. I've got a detached retina.

Q. I thought your eye looked a little cloudy there, your right eye. So that happened in basketball?

A. Yes, ma'am.

Q. Can you see well?
A. No, not out of that eye.
Q. Okay.
A. It's like looking through oil.
Q. Yeah. So you said you read a lot though. You're able to read?
A. Yeah. Yes, ma'am.
Q. Okay. You read the Bible, you said?
A. Yes.
Q. What else do you read?
A. I do a lot of fiction, nonfiction. Sort of kind of wars type stuff, history.
Q. Okay. Did you graduate from high school?
A. Yes, ma'am.
Q. Okay. What was your favorite subject in high school?
A. History.
Q. Okay. So that makes sense that you'd be watching that kind of -- or reading that kind of stuff. What about TV, do you watch TV, any movies?

A. Yes, ma'am.
Q. Okay. What kind of movies and stuff do you watch?
A. A little bit of everything.
Q. Okay.
A. I really don't have any favorite to watch with movies.
Q. Tell me about Project Hope. What is that?
A. It's an inmate organization that is run from inside of the prison to inform guys on the inside as well as the outside about the in's and out's of the death penalty.
Q. Okay. And have you been a part of Project Hope the whole time you've been at Holman?
A. Yes, ma'am.
Q. Okay. And you're now in a leadership role?
A. Yes, ma'am.
Q. How long have you been in a leadership role with Project Hope?
A. About seven to eight years.

Q. And what was the first leadership role you had?
A. In Project Hope?
Q. Uh-huh.
A. Assistant coordinator.
Q. Okay. And then what did you have next?
A. The role I've got now. Well, I had coordinator then. The role I have now.
Q. Okay. And you're the secretary/treasurer?
A. Yes, ma'am.
Q. And what does that involve?
A. Keeping up with donations, sending out receipts from donations, and organizing the group when we have meetings. Like we've got a meeting today from 11 to 1:30. I'll go around and inform the guys what time we go and try to get the guys to the meeting and a keeping a record of what's said in the meeting, keeping our file cabinet organized, stuff like that.
Q. Okay. Do you -- so the donations, are those, like, physical cash donations?

A. No.
Q. Or is it like electronic money?
A. Electronic because it goes to our assistant director that's out in the streets.
Q. In the free world?
A. Yeah.
Q. Okay. Are you involved in creating the newsletter?
A. I am.
Q. Okay. Is that part of your role as secretary/treasurer, or you just help?
A. My job is to let the guys know when we have to do articles and when they're due, sometimes topic-wise, and just make sure to have it in on the deadline.
Q. And you're an author who writes articles as well for the newsletter?
A. Yes, ma'am.
Q. All right. So you know we're here because you have filed a lawsuit. Right?
A. (Witness nods head in the affirmative.)
Q. So can you tell me what you

believe your lawsuit to be about?

A. An 8th Amendment challenge to the nitrogen hypoxia.

Q. Okay. Can you tell me further what that means?

A. It's just that -- the 8th Amendment violation I believe is that nitrogen hypoxia is cruel and unusual.

Q. And why do you think it's cruel and unusual?

A. Just from some of the stuff I've heard about it.

Q. What have you heard, without telling me anything your lawyers told you?

A. Just some stuff we seen on TV.

Q. So like the news?

A. Yes, ma'am.

Q. Okay. Have you seen any, like, documentaries or anything like that?

A. I have not.

Q. What about reading any sort of print newspaper articles or anything like that?

A. Yes, I have.

Q. You have done that?
A. Yes.
Q. Okay. Are you associated with Reverend Dr. Jeff Hood?
A. Yes, in a way.
Q. Okay. Is he your spiritual advisor?
A. No, ma'am.
Q. Have you ever talked to him face to face?
A. No, not personally.
Q. Okay. Have you ever talked to him on the phone?
A. No, I have not.
Q. So you said you're associated with him in a way. In what way?
A. He's a member of our outside board in Project Hope.
Q. Okay. So any interactions you've had with him, not direct interactions but interactions were through Project Hope?
A. Yes.
Q. Okay. Is he giving donations?

A. I do not -- no, not personally, he has not.

Q. Okay. So you haven't sent him, like, a receipt for a donation?

A. No.

Q. Okay.

MS. SHARPE: And just make sure you let her finish the question. Just a reminder for the Court Reporter's sake.

MS. KENNY: Thank you.

MS. SHARPE: But you're doing good.

MS. KENNY: Yeah.

Q. So you brought your lawsuit in August of last year. Why did you wait until August of last year to do that?

MS. SHARPE: And again, without disclosing anything you might have discussed with your attorneys, Mr. Lee.

A. I really don't have an answer why because I just knew that I had to have it filed by August.

Q. Okay. So you elected nitrogen

hypoxia in 2018. Right?

A. Yes.

Q. And why did you elect nitrogen hypoxia?

A. Because in 2018 I was a part of a lawsuit against lethal injection. So I elected nitrogen hypoxia.

Q. So the whole group of that lawsuit elected nitrogen hypoxia. Right?

A. I don't know that everybody did.

Q. Okay.

A. I don't know.

Q. But that was what led you to elect it?

A. Yes.

Q. Okay. Other than what you've heard on TV, what do you know about nitrogen hypoxia?

A. Just what I've heard and read, like newspaper articles, news stuff we've seen on television. But just what I've heard and what I've read from newspaper articles and stuff like that.

Q. Do you know how it works?
A. Not -- no, I do not.
Q. Okay. Now, you had a lawsuit about lethal injection and then elected nitrogen hypoxia. Why did you not want lethal injection?
A. Because of the -- the history of it leading up to that day, to that time.
Q. And what was that history?
A. We read and seen news articles -- well, we read newspaper articles, seen news clippings of the torture stuff that was going on with guys getting lethal injections, not just in the state of Alabama.
Q. Okay. Have you followed the news of the last few lethal injections here in Alabama?
A. I have.
Q. Okay. And what have you heard about that?
A. Basically the same thing that we was hearing from before.
Q. Okay. I'm going to show you what

I'm going to mark as Exhibit 1, which is your complaint.

MS. SHARPE: Polly, I think we've been making an effort to do the exhibit numbers sequentially.

MS. KENNY: Oh, from us? For us too? No, we did A and B in McKenzie.

MS. SIMPSON: Do you want to call this Exhibit C then?

MS. SHARPE: We can go off the record.

(A discussion was held off the record.)

MS. KENNY: Okay. And I have tabbed it for him because I know it's hard for them to flip pages.

Q. (Ms. Kenny) So this is Defendant's Exhibit 1. And take a moment to look at that front page and flip through it if you want to. But I'm going to ask questions about where I've got the yellow tab at page 20, the paragraph 71 page.

(Defendant's Exhibit Number 1

is marked for identification.)

MS. SHARPE: You said it's page twenty?

MS. KENNY: Page twenty. I've just learned it's easier if I tab it for them.

Q. Okay. So do you recognize this document? Have you seen it before, the whole thing?

A. Yes, I have.

Q. Okay. And it was filed in August of 2025. Did you see it sometime way back then?

A. I think I seen this. It was around that time, yes.

Q. Okay. So this is your original complaint for your lawsuit. So what I want to ask you about is at the bottom of page twenty and going on to the top of page twenty-one, if you can just take a minute and review paragraph 71 and then paragraph 72 and 73. If you'll just take a minute and review those.

A. (The witness complied.)

Q. Okay. Have you had a chance to

review that?

A. Yes.

Q. Okay. So medical aid in dying is an alternative execution method that you have said that you want. Is that your understanding of this complaint?

A. Yes.

Q. Okay. So can you explain just in your words what medical aid in dying is?

A. To me, medical aid in dying, it's like getting help to die by like a physician or something like that.

Q. Okay. And are you willing to cooperate and drink this lethal cocktail to die?

A. No. Because I don't think this is a part of my -- I'm trying to think of the right word. I've elected something else besides nitrogen hypoxia. I don't think medical aid in dying is a part of it no more.

Q. The --

MS. KENNY: Do you want to take a minute with him?

MS. SHARPE: Actually, Polly, I can tell you we are not going to be moving forward with medical aid in dying as an alternative in the trial of this case.

MS. KENNY: Okay. So you're abandoning that as an alternative?

MS. SHARPE: We are not moving forward with it as an alternative at trial.

MS. KENNY: Okay.

Q. Okay. So just so you know, it is still in the papers as to what, you know, we believed we needed to defend against. So you would not cooperate with that is what you're saying?

A. No.

Q. Okay. All right. Then let's go to Exhibit 2.

(Defendant's Exhibit Number 2 is marked for identification.)

MS. SHARPE: And are we done with Exhibit 1?

MS. KENNY: We are. Thank you.

MS. SHARPE: Okay. You can just

set that one to the side.

Q. Okay. And again, if you want to take a minute to review what this is and then go to the yellow tab.

MS. SHARPE: And Polly, which page is the yellow tab in this one?

MS. KENNY: I'm sorry. I meant to tell you that. It's page 20 again, paragraph 70 and the following paragraphs.

MS. SHARPE: Thank you.

A. Okay.

Q. And then if you can flip the page and scan through that next page or read it as thoroughly as you want.

Have you had time to review that?

A. Yes.

Q. Okay. Okay. So it appears that you've elected firing squad instead of nitrogen hypoxia. Correct?

A. Yes.

Q. Okay. And what is your understanding of firing squad?

A. You're strapped down and you get

shot in the heart.

Q. Okay. And are you electing that by your own choice?

A. Yes.

Q. And do you trust five ADOC personnel -- is it five that y'all had in this? Yeah, five. Do you trust five ADOC personnel to shoot you in the heart?

A. I'm going to say no because you used trust.

Q. Do you believe they could shoot you in the heart?

A. Yes.

Q. What do you think about the pain level of being shot?

MS. SHARPE: Objection to form.

Q. You can answer.

A. I don't know.

Q. Putting aside the crime that you're here for, I don't want to ask you anything about that. Okay? Have you ever witnessed anyone getting shot?

A. Yes.

Q. Okay. And how did they react?
A. Like it hurt.
Q. Okay. Did they scream or moan?
A. Yes.
Q. Have you ever been shot?
A. No.
Q. Have you ever had to care for anyone -- or not directly, but like a friend or somebody that is recovering from a gunshot wound?
A. Yes.
Q. And how was that?
A. It wasn't good.
Q. Pretty painful?
A. Yes.
Q. Are you aware as we're sitting here today that you are breathing nitrogen?
A. Yes.
Q. A large portion of what you're breathing is nitrogen.
A. Is that a question?
Q. Are you aware of that?
A. I -- I don't know. I don't know

how much it is.

Q. Sir, you can put aside Exhibit 2. So you have one alternative you're asking for now. Right? The firing squad. Is that correct?

A. Yes.

Q. When did you decide that you did not want medical aid in dying?

A. Last year.

Q. Can you tell me when last year?

A. No, I cannot.

Q. Was it before or after August of last year when y'all filed the complaint?

A. After.

Q. Okay. And why did you decide that? What was your thought process?

A. Moral reasons.

Q. Moral reasons such as what we talked about in regard to assisting your own death --

A. Yes.

Q. -- being akin to a suicide?

A. Yes.

Q. And that was your decision. Correct?
A. Yes.
Q. Okay. I'm going to mark as Exhibit 3 the On Wings of Hope Newsletter, Volume 28, Issue 3 from July to September of 2024, an excerpt of it.
(Defendant's Exhibit Number 3 is marked for identification.)
A. Okay.
Q. So is this the newsletter that is published by Project Hope?
A. Yes.
Q. Do you recognize it as such?
A. Yes.
Q. Okay. And the first page is -- just so we have the date, if you could flip to the second page and tell us what's on the second page. What is that?
A. That's one of my articles.
Q. And this is from 2024. Correct?
A. Yes.
Q. And would it be fair to say that

this article is in opposition to the death penalty?

A. Yes.

Q. And in particular you mentioned in paragraph two the electric chair and the problems with that?

A. I don't understand the question.

Q. Do you criticize the electric chair in paragraph two -- oh, I'm sorry, paragraph three of your article?

A. Yes.

Q. And do you also criticize lethal injection in that same article?

A. Yes.

Q. If you could, read for me the sentence starting with even with lethal injection. Can you read that out loud?

A. In paragraph three?

Q. Yes.

A. Even with lethal injection, men were tortured to their death so sedated they couldn't reveal the fact that they were being drowned as the poison flowed through their

veins. Pull back the curtain, America, and see what you have been allowing to happen to your citizens.

Q. Okay. Thank you. You don't mention or criticize nitrogen hypoxia in this article, do you?

A. I do not.

Q. Okay. You can put that one aside. I'm going to now hand you Defendant's Exhibit 4, which is another issue of On Wings of Hope, which is the newsletter from Project Hope. Do you recognize that?

(Defendant's Exhibit Number 4 is marked for identification.)

A. Yes.

Q. And is it dated January to March of 2025?

A. Yes.

Q. Okay. And I would ask you if you'll turn to page two.

MS. SHARPE: And Polly, just for the record, this is another excerpt?

MS. KENNY: Yes. Another excerpt

containing the first page so that we have the identification of the volume and date. And then this is page five, I believe.

Q. Can you tell us what appears on the second page of this exhibit?

A. An article that I wrote.

Q. Okay. And would it be fair to say that this article also is criticizing the death penalty as a whole?

A. I don't understand the question.

Q. Are you criticizing the death penalty in this article?

A. Yes.

Q. Okay. And you're complaining about the secrecy involved with the way the executions are conducted. Correct?

A. Yes.

Q. And it appears that you compare nitrogen hypoxia to the death of the Nazis -- I mean the death of the Jewish people at the hand of Hitler. Is that correct?

A. Could you repeat the question?

Q. It appears that you compare death

by nitrogen hypoxia to the death of millions of Jewish people by Hitler?

A. Yes.

Q. Do you know whether nitrogen hypoxia is the same as the lethal gases that Hitler used?

A. No.

Q. So you don't have any direct knowledge about that?

A. No.

Q. Okay. You can put that exhibit aside. Were you in the military after high school?

A. No.

Q. Did you have a job after high school?

A. Yes.

Q. What did you do?

A. I was a painter.

Q. Okay. Painting in what way?

A. We painted houses, stores, and stuff like that.

Q. Inside or outside?

A. Both.
Q. Okay. Did you ever wear a mask for that -- for painting so that you wouldn't inhale the fumes?
A. Yes. The cloth kind.
Q. Okay. And you said cloth kind?
A. Yes.
Q. Okay. If you are executed by nitrogen hypoxia, are you going to hold your breath?
A. No, I don't think so. No.
Q. Okay. Will you try to get the mask off?
A. No.
Q. Will you be cooperative?
A. I don't know.
Q. Will you be cooperative if you're executed via a firing squad?
A. I don't know.
MS. KENNY: If I could have just a minute.
(A break was taken.)
MS. KENNY: That's all the

questions I have.

MS. SHARPE: And I do not have any questions.

(The deposition ended at 10:49 a.m. CST.)

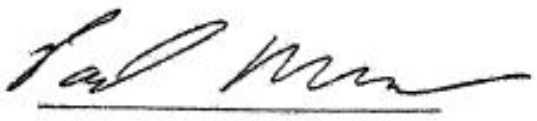
REPORTER'S CERTIFICATE

STATE OF ALABAMA,

BALDWIN COUNTY,

I, Paul Morse, Certified Court Reporter and Commissioner for the State of Alabama at Large, do hereby certify that the above and foregoing proceedings was taken down by me by stenographic means, and that the content herein was produced in transcript form by computer aid under my supervision, and that the foregoing represents, to the best of my ability, a true and correct transcript of the proceedings occurring on said date and at said time.

I further certify that I am neither of kin nor of counsel to the parties to the action nor in any manner interested in the result of said case.



Paul Morse, CCR

ACCR #588 Expires 9/30/26

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

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VERITEXT LEGAL SOLUTIONS

COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

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TAB D

IN THE SUPREME COURT OF ALABAMA

July 22, 2026

1021971

Ex parte Jeffery Lee PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Jeffery Lee v. State of Alabama) (Dallas Circuit Court: CC-99-21; Criminal Appeals: CR-00-0084).

ORDER

On June 12, 2026, the State of Alabama filed a motion renewing its request that this Court, pursuant to Rule 8(d)(1), Ala. R. App. P., enter an order authorizing the Commissioner of the Department of Corrections to carry out Jeffery Lee's sentence of death within a time frame set by the Governor. Upon due consideration of such motion,

IT IS ORDERED that the Motion is GRANTED.

IT IS FURTHER ORDERED that the Commissioner of the Department of Corrections is authorized to carry out Jeffery Lee's sentence of death within a time frame set by the Governor of the State of Alabama.

IT IS FURTHER ORDERED that the Governor shall set a time frame, which shall not begin less than 30 days from the date of this order, within which the Commissioner of the Department of Corrections shall carry out Jeffery Lee's sentence of death.

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit forthwith a certified copy of this Order electronically or by mailing a copy thereof by United States mail, postage prepaid, to the following:

- the attorney of record for Jeffery Lee;
- the Governor of Alabama;
- the Attorney General of Alabama;

- the Commissioner of the Department of Corrections;
- the Clerk of the Alabama Court of Criminal Appeals; and
- the Clerk of the Dallas Circuit Court.

This Order authorizing the Commissioner to carry out Jeffery Lee's sentence of death constitutes the execution warrant for Jeffery Lee.

Stewart, C.J., and Shaw, Wise, Bryan, Sellers, Mendheim, Cook, McCool, and Parker, JJ., concur.

I, Megan B. Rhodebeck, Clerk of the Supreme Court of Alabama, do hereby certify the foregoing is a full, true, and correct copy of the judgment and order of the Supreme Court of Alabama regarding Jeffery Lee as the same appears of record in this Court.

Witness my hand and seal this 22nd day of July, 2026.

Megan B. Rhodebeck

Megan B. Rhodebeck
CLERK OF COURT
SUPREME COURT OF ALABAMA

TAB E

OFFICE OF THE GOVERNOR

KAY IVEY
GOVERNOR

STATE CAPITOL
MONTGOMERY, ALABAMA 36130

(334) 242-7100
FAX: (334) 242-3282

STATE OF ALABAMA

July 30, 2026

Greg Lovelace, Commissioner
Department of Corrections
301 S. Ripley Street
Montgomery, AL 36130

Dear Commissioner Lovelace:

The Supreme Court of Alabama has entered an order authorizing you to carry out inmate Jeffery Lee's sentence of death for the capital murders of Jimmy Ellis and Elaine Thompson, and the attempted murder of Helen King. According to the Supreme Court's order, the execution must occur within a time frame set by the governor, which shall not begin less than 30 days from July 22, 2026, the date of the order.

Accordingly, I hereby set a thirty-hour time frame for the execution to occur, beginning at 12:00 a.m. on Thursday, September 17, 2026, and expiring at 6:00 a.m. on Friday, September 18, 2026.

The order of the Supreme Court of Alabama, which I enclose with this letter, constitutes the death warrant.

Although I have no current plans to grant clemency in this case, I retain my authority under the Constitution of the State of Alabama to grant a reprieve or commutation, if necessary, at any time before the execution is carried out.

Sincerely,

Kay Ivey

Kay Ivey
Governor

Enclosure

TAB F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JEFFERY LEE, Plaintiff, v. GREG LOVELACE, Commissioner, Alabama Department of Corrections, *et al.*, Defendants.	CASE NO. 2:25-cv-680 ECM CAPITAL CASE

PLAINTIFF'S MOTION TO AMEND ORDER ON SCOPE OF INJUNCTIVE RELIEF AND FINAL JUDGMENT

Pursuant to Federal Rules of Civil Procedure 52(b) and 59(e), Plaintiff Jeffery Lee hereby moves the Court to amend its Memorandum Opinion and Order (ECF No. 187) (the "Opinion" or "Op.") and Final Judgment (ECF No. 188) (the "Judgment") only as to the scope of the declaratory and injunctive relief. This issue did not become ripe until ***after*** the Court issued its Opinion and entered the Judgment, when the State moved to set an execution date for Mr. Lee using lethal injection.[1] *See* State's Expedited Renewed Mot. to Set an Execution Date, No. 1021971 (Ala. June 12, 2026) (Exhibit A).

[1] Because Defendants are state officials sued in their official capacities, this Motion refers to them as "the State." *See* Op. at 2 n.1.

INTRODUCTION

Following a three-day bench trial and after remand on appeal to the Eleventh Circuit, the Court held that ADOC's nitrogen hypoxia Protocol (the "Protocol") violates the Eighth Amendment: the "Protocol presents a substantial risk of serious harm" and Mr. Lee's proposed method—execution by firing squad—is a feasible, readily implementable alternative that would "significantly reduce[] the substantial risk of serious harm posed by the Protocol." Op. at 24 (quotation marks and citation omitted). The Court then entered a permanent injunction enjoining the State from executing Mr. Lee under the Protocol. *Id.* at 24–25. The Court declined, however, to enjoin the State from using electrocution or lethal injection, because Mr. Lee had not challenged those methods in this litigation. *Id.* Mr. Lee respectfully submits that that would result in manifest injustice.

First, the State is judicially estopped from executing Mr. Lee by lethal injection. In 2016, Mr. Lee filed suit in the Southern District of Alabama challenging the State's lethal injection protocol. In 2018, the parties jointly agreed to dismiss that lawsuit as moot based on Mr. Lee's election to be executed by nitrogen hypoxia under the newly passed statute authorizing that method. *See* Ala. Code § 15-18-82.1. In granting dismissal, the court noted that "the parties jointly represent[ed] that . . . 'if [Mr. Lee] 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." Order, *Lee v. Dunn*, No. 16-0473-WS-B (S.D. Ala. July 20, 2018) (ECF No. 38) (Exhibit B) (emphasis added). Having secured dismissal of that action based on that representation, the State cannot reverse course. Yet in seeking a new execution date for Mr. Lee after he prevailed in challenging the Protocol, the State now asserts that it "is prepared [ ] ***to execute Lee via lethal injection with the three-drug cocktail*** adopted in 2014." Exhibit A at 3 (emphasis added). Judicial estoppel bars the State's change in positions.

Second, for similar reasons, the State is equitably estopped from executing Mr. Lee by lethal injection. Mr. Lee reasonably relied on the State's representation that his execution would be by nitrogen hypoxia, not lethal injection, and dismissed his lethal injection lawsuit as a result. Equity forbids the State from reversing on that representation to Mr. Lee's detriment.

Third, Alabama's execution statute confirms that lethal injection and electrocution are not available methods to execute Mr. Lee. Electrocution is not available because Mr. Lee did not elect that method. *See* Ala. Code § 15-18-82.1(b)(1). And because he timely elected nitrogen hypoxia, lethal injection is available only if nitrogen hypoxia as a method of execution—not merely the Protocol implementing it—is held unconstitutional by the Alabama Supreme Court or the U.S. Supreme Court, or by the Eleventh Circuit if certiorari is denied. *See id.* §§ 15-18-82.1(a), (c). None of those conditions has occurred.

Accordingly, the Court should amend its Opinion and Judgment to declare that the State is estopped from proceeding by lethal injection; to remove language suggesting that the State could, consistent with Alabama law, proceed to execute Mr. Lee by lethal injection or electrocution; and to amend its permanent injunction consistent with these conclusions.[2]

FACTUAL BACKGROUND

I. The Prior Lawsuit Challenging Lethal Injection

In 2016, Mr. Lee filed a lawsuit challenging the State's three-drug lethal injection protocol under the Eighth Amendment. *See* Dkt., *Lee v. Dunn*, No. 1:16-cv-473-WS-B (S.D. Ala.). The Office of the Attorney General, including the same defense counsel here, represented the State. While the case was pending, Alabama passed legislation authorizing execution by nitrogen hypoxia and provided condemned inmates thirty (30) days to elect the method. *See* Ala. Code § 15-18-82.1. Mr. Lee timely elected nitrogen hypoxia on June 26, 2018, while expressly reserving his "right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia." Lee Election Form (Exhibit C).

[2] Mr. Lee requests a modification of the injunction to foreclose execution by lethal injection. He does not seek reconsideration of the Court's other factual findings or legal conclusions, and the State has dismissed its appeal in the Eleventh Circuit with prejudice, leaving those factual findings and legal conclusions unchallenged. *See infra* pp. 6–7 & n.4.

After Mr. Lee's election, the parties jointly moved to dismiss his lethal injection action as moot, representing to the court (hereinafter, the "Southern District") that "if he is to be executed, Defendants will carry out that execution by nitrogen hypoxia." Jt. Mot. to Dismiss ¶ 6, No. 1:16-cv-473-WS-B (S.D. Ala. July 19, 2018) (ECF No. 37) (Exhibit D). The Southern District dismissed the lawsuit based on 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.

Exhibit B (emphasis added).

II. The Present Lawsuit Challenging the Nitrogen Hypoxia Protocol

In August 2025, Mr. Lee filed this challenge to ADOC's nitrogen hypoxia Protocol. *See* Compl. (ECF No. 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." *Id.*

at 27; *see also* First Am. Compl. at 23 (ECF No. 40) (same). Mr. Lee identified execution by firing squad as that alternative. *See* First Am. Compl. ¶¶ 70–72.[3]

Following a three-day bench trial and remand from the Eleventh Circuit, on June 9, 2026, this Court held that Mr. Lee had established an Eighth Amendment violation and permanently "enjoin[ed] the State from executing Lee pursuant to the Protocol." Op. at 24. The Court did not, however, enjoin the State from executing Mr. Lee by a method other than firing squad, as he had requested. The Court explained that Alabama also authorizes "lethal injection and electrocution. Here, Lee challenged only the ADOC's nitrogen hypoxia protocol . . . . [H]e is not entitled to an injunction barring the State from executing him using one of those [other] methods." *Id.* at 22–23; *see also id.* at 24–25.

The State immediately sought appellate relief, but both the Eleventh Circuit and the U.S. Supreme Court declined to stay or vacate this Court's permanent injunction. *See* Order, *Lee v. Comm'r, Ala. Dep't of Corr.*, No. 26-12027 (11th Cir. June 10, 2026) (ECF No. 17); Order, *Lovelace v. Lee*, No. 25A1381 (U.S. June 11, 2026). On June 15, 2026, the parties stipulated to dismiss the State's appeal with prejudice. *See* Stip. of Dismissal, *Lee v. Comm'r, Ala. Dep't of Corr.*, No. 26-12027

[3] Mr. Lee also initially proposed medical-aid-in-dying ("MAID"), *see* First Am. Compl. ¶¶ 73–76, but dismissed that alternative before trial, *see* Stip. to Withdraw Medical-Aid-in-Dying as Alternative Execution Ground (ECF No. 98); *see also* Order (May 26, 2026) (ECF No. 172) (construing the stipulation as a motion for leave to amend and granting it).

(11th Cir. June 15, 2026) (ECF No. 19).[4] On June 23, 2026, the Eleventh Circuit granted the stipulation and dismissed the appeal. *See* Order, *Lee v. Comm'r, Ala. Dep't of Corr.*, No. 26-12027 (11th Cir. June 23, 2026) (ECF No. 20).

III. The State's Renewed Motion for an Execution Date

On June 12, 2026, the State filed a renewed motion for an execution date for Mr. Lee in the Alabama Supreme Court. *See* Exhibit A. In that motion, the State now asserts that it "is prepared [ ] to execute Lee via lethal injection with the three-drug cocktail adopted in 2014." *Id.* at 3.

LEGAL STANDARD

"[T]he decision to alter or amend judgment is committed to the sound discretion of the district judge." *Taylor v. First N. Am. Nat'l Bank*, 331 F. Supp. 2d 1354, 1355 (M.D. Ala. 2004) (quoting *Am. Home Assurance Co. v. Glenn Estess & Assocs., Inc.*, 763 F.2d 1237, 1238–39 (11th Cir. 1985)). There are four grounds for granting a Rule 59(e) motion: "(1) manifest errors of law or fact upon which the judgment was based; (2) newly discovered or previously unavailable evidence; (3) manifest injustice in the judgment; and (4) an intervening change in the controlling law." *Id.*; *see also Smith v. Dunn*, 2021 WL 312617, at *1 (M.D. Ala.

[4] On June 12, 2026, the State contacted Mr. Lee's counsel, noting its intent to file a motion to dismiss the Eleventh Circuit appeal, agreeing that costs would be allocated against the State, and asking whether Mr. Lee would oppose the motion. On June 15, 2026, counsel for Mr. Lee stipulated to the dismissal.

Jan. 9, 2021) (Marks, J.) (same). Such a motion "[cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). Similarly, the purpose of a Rule 52(b) motion "is to correct manifest errors of law or fact or, in some limited situations, to present newly discovered evidence." *Johnson v. New Destiny Christian Ctr. Church, Inc.*, 771 F. App'x 991, 995 n.5 (11th Cir. 2019) (quoting *Fontenot v. Mesa Petrol. Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986)).

These rules exist to permit a court to "rectify its own mistakes" before appellate proceedings commence. *See White v. N.H. Dep't of Emp. Sec.*, 455 U.S. 445, 450 (1982); *Banister v. Davis*, 590 U.S. 504, 508 (2020) (same); *see also, e.g.*, *Birdsong v. Wrotenbery*, 901 F.2d 1270, 1272 (5th Cir. 1990) (concluding that the motion to amend the scope of an injunction fell under Rule 59(e)).

ARGUMENT

I. Alteration or Amendment of the Judgment Is the Appropriate Relief

This Motion satisfies the standard for relief under Rules 52(b) and 59(e). The Court declined to enjoin the State from executing Mr. Lee by lethal injection or electrocution on the ground that he had not challenged those methods in the present lawsuit. *See* Op. at 22–23. Mr. Lee respectfully submits that that would result in manifest injustice, because the doctrines of judicial and equitable estoppel foreclose

lethal injection as to Mr. Lee and because, based on his election of nitrogen hypoxia, neither lethal injection nor electrocution is available under Alabama law.

Mr. Lee could not have raised these arguments, and the Court could not have considered them, prior to entry of the Judgment. Any challenge to lethal injection or electrocution in this lawsuit would have been unripe, because it would have "rest[ed] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998); *see also Digital Props., Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997) ("Article III . . . limits the jurisdiction of the federal courts to cases and controversies of sufficient concreteness to evidence a ripeness for review." (citations omitted)). Alabama's statutory election scheme gave Mr. Lee no reason to anticipate that the State would disregard his election of nitrogen hypoxia and seek to execute him by a different method—until June 12, 2026, when the State sought a new execution date for Mr. Lee by lethal injection. Only then—***three days after*** this Court entered the Judgment—did a concrete controversy arise as to whether lethal injection remained available.

Because this issue could not have been raised before entry of the Judgment, Mr. Lee is not asking the Court to reconsider anything it already decided. This Motion instead asks the Court to address a new controversy that, if left unaddressed, would result in manifest injustice: Mr. Lee would face execution by a method he

specifically elected away and that the State represented he would not face. And the State would ignore the feasible alternative method—execution by firing squad—that Mr. Lee advanced and that the Court held provided a path forward under *Glossip*.

This Court has the full record, the parties before it, and the ability to determine the scope of the Opinion, Judgment, and permanent injunction before an execution date is set. Rules 52(b) and 59(e) contemplate that the rendering court—not another tribunal—will correct or clarify its judgment when necessary to prevent manifest injustice. That is particularly true here. The State has ***already*** invoked this Court's Opinion in seeking an execution date by lethal injection. *See* Exhibit A at 2. This Court should therefore clarify the scope and effect of its Opinion and Judgment before another court relies on the premise that lethal injection remains available. Because only this Court can amend its Opinion and define the scope of the equitable relief it has entered, amendment of the Opinion and Judgment is warranted.

II. The State Is Judicially Estopped from Executing Mr. Lee by Lethal Injection

Because the State previously represented to the Southern District that it would ***not*** execute Mr. Lee by lethal injection and ***obtained a dismissal*** of his lawsuit as a result, the State is judicially estopped from taking a different position now.

Judicial estoppel is a federal common law doctrine designed "to protect the integrity of the judicial process" by prohibiting litigants from prevailing on one position in a judicial proceeding and then taking a contrary position when

circumstances change. *See New Hampshire v. Maine*, 532 U.S. 742, 749–51 (2001) (quotation marks and citations omitted); *Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1176 (11th Cir. 2017) (en banc) ("[J]udicial estoppel . . . protect[s] courts against parties who seek to manipulate the judicial process by changing their legal positions to suit the exigencies of the moment."). Judicial estoppel applies when "(1) the party t[akes] an inconsistent position under oath in a separate proceeding, and (2) these inconsistent positions [are] 'calculated to make a mockery of the judicial system.'" *Slater*, 871 F.3d at 1181 (citation omitted).[5] In analyzing whether a party intended to make a mockery of the judicial system, courts consider the totality of the circumstances, including the party's "level of sophistication, his explanation for the omission, whether he subsequently corrected the [inconsistent position], and any action taken by the [first] court concerning the [inconsistent position]." *Id.* at 1176–

[5] The Eleventh Circuit does not strictly require that the prior statement be made "under oath." *See, e.g.*, *Ward v. AMS Servicing, LLC*, 606 F. App'x 506, 510 (11th Cir. 2015) (rejecting the argument that "judicial estoppel does not apply because her prior statement was not made under oath as it was contained in a consent decree that both parties presented to the bankruptcy court for its approval"); *Slater*, 871 F.3d at 1181 (explaining that the factors are not "inflexible prerequisites"); *see also Allapattah Servs., Inc. v. Exxon Corp.*, 372 F. Supp. 2d 1344, 1368 n.12 (S.D. Fla. 2005) ("By filing pleadings, and later advocating positions consistent therewith, an attorney makes representations to the court equivalent to an oath for purposes of judicial estoppel."); *Rice v. Regions Bank*, 2010 WL 11614152, at *15 (N.D. Ala. Mar. 8, 2020) ("[T]he signing, filing, and/or submission of pleadings or other documents to the court is the practical equivalent of making a statement under oath, at least for purposes of an estoppel analysis.").

77; *see also New Hampshire*, 532 U.S. at 750–51 (considering also whether the party would derive an unfair advantage or impose an unfair detriment if not estopped). These factors support a finding of judicial estoppel here.

First, the State's current position—that it can execute Mr. Lee by lethal injection—is clearly inconsistent with its prior position in the Southern District. In 2018, the State represented to the Southern District that Mr. Lee's lethal injection lawsuit should be dismissed as moot because "if he is to be executed, Defendants will carry out that execution by nitrogen hypoxia." Exhibit D ¶ 6; *see also* Defs.' Proposed Findings of Fact & Conclusions of Law at 50–51 (ECF No. 148) ("[Lee] became subject to nitrogen hypoxia in 2018 ***when the State agreed not to execute him by lethal injection***." (emphasis added)). The State now advances the opposite position. In moving the Alabama Supreme Court for a new execution date, the State now represents that "ADOC is prepared . . . to execute Lee via lethal injection." Exhibit A at 3.

Second, the State's inconsistent positions make a mockery of the judicial process when considering the totality of the circumstances. The State cannot characterize its inconsistency as mistaken or a good faith response to an unforeseen event. The State is a sophisticated litigant. Represented by the same experienced counsel in both proceedings, the State made an unqualified commitment—not an ambiguous or passing remark, but the central premise for dismissal—that "if [Mr.

Lee] is to be executed, [it] will carry out that execution by nitrogen hypoxia." Exhibit D ¶ 6. That representation was ***not*** contingent on Mr. Lee forgoing a constitutional challenge to nitrogen hypoxia or the possibility that a court would agree with him on that challenge. In fact, Mr. Lee expressly reserved the right to challenge the nitrogen hypoxia Protocol in his election form. *See* Exhibit C. The State cannot now claim surprise at the outcome of litigation it knew it would face.

What is more, the State has never attempted to withdraw or explain its inconsistent positions. Quite the opposite, when the State invoked the dismissal of Mr. Lee's lethal injection lawsuit in its motion to the Alabama Supreme Court, the State failed to disclose the basis for that dismissal—that the State had represented it would execute Mr. Lee only by nitrogen hypoxia. *See* Exhibit A at 5. And the Southern District accepted and expressly relied on the State's representation in dismissing the lethal injection lawsuit. *See generally* Exhibit B; *see also* Exhibit D ¶ 6; *New Hampshire*, 532 U.S. at 750 ("[J]udicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'" (citations omitted)). Had the State disclosed that it intended to preserve lethal injection as an available method of execution, Mr. Lee's lethal injection challenge would not have been dismissed as moot. Allowing the State to reverse course would confer precisely the sort of unfair litigation advantage that judicial estoppel is designed to prevent.

This Court should not permit the State to "chang[e] [its] legal position[] to suit the exigencies of the moment," *Slater*, 871 F.3d at 1176, and should therefore amend the Opinion and Judgment to bar the State from executing Mr. Lee by lethal injection.

III. The State Is Equitably Estopped from Executing Mr. Lee by Lethal Injection

For similar reasons, the federal doctrine of equitable estoppel bars the State from executing Mr. Lee by lethal injection. Equitable estoppel applies where "(1) words, acts, conduct, or acquiescence caus[ed] another to believe in the existence of a certain state of things; (2) willfulness or negligence with regard to the acts, conduct, or acquiescence; and (3) detrimental reliance by the other party upon the state of things so indicated." *Matter of Garfinkle*, 672 F.2d 1340, 1347 (11th Cir. 1982); *see also Dawkins v. Fulton Cnty. Gov't*, 733 F.3d 1084, 1089 (11th Cir. 2013) (similar). When a party seeks to apply equitable estoppel against the government, moreover, it must be "clear that the representations were within the scope of the agent's authority." *OPM v. Richmond*, 496 U.S. 414, 419–20 (1990); *Tefel v. Reno*, 180 F.3d 1286, 1303 (11th Cir. 1999) (requiring "some affirmative misconduct by the government"). Those elements are satisfied here.

First, the State represented in Mr. Lee's lethal injection litigation that, if he is executed, the State will use nitrogen hypoxia—not lethal injection. The State not only obtained dismissal of that lawsuit on the ground that lethal injection was no

longer at issue, but also continued to litigate this action on the same premise. The State objected to discovery about lethal injection as irrelevant, because "Plaintiff has opted not to be executed by lethal injection." Defs.' Resps. to Pl.'s 1st Set of Requests for Prod. Nos. 30 and 31 (Exhibit F).[6] Having successfully excluded lethal injection from discovery, the State cannot revive that method as a way to execute Mr. Lee.

Second, Mr. Lee reasonably relied on the State's prior representation in dismissing his lethal injection lawsuit. The State has acknowledged as much. In its Proposed Findings in this case, the State wrote: "It bears repeating at this point that Lee chose to die by nitrogen hypoxia. He was not required to elect the method in June 2018. Rather, ***he did so to avoid lethal injection***." Defs.' Proposed Findings of Fact & Conclusions of Law at 50 (ECF No. 148) (citations omitted). Mr. Lee testified the same: "Q. And why did you elect nitrogen hypoxia? A. Because in 2018 I was part of a lawsuit against lethal injection. So I elected nitrogen hypoxia." Lee Dep. at 23:3–9 (Def. Trial Ex. 60).[7]

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[6] Mr. Lee requested documents related to the IV team to explore the feasibility of MAID before dismissing it as an alternative method of execution, not because he believed he would be executed by lethal injection.

[7] The reasonableness of Mr. Lee's reliance is reinforced by the fact that (1) other inmates challenging lethal injection also dismissed their lawsuits based on their election of nitrogen hypoxia and similar State representations, and (2) even today, the State has represented to other inmates that ADOC intends to proceed with their executions by nitrogen hypoxia. *See* Jt. Mot. to Dismiss ¶ 5, *In re Ala. Execution*

Third, the detriment here is not merely that Mr. Lee expected to be executed by a different method; he surrendered a pending federal lawsuit based on the State's representation. The State itself has recognized this loss, noting in its motion to the Alabama Supreme Court that Mr. Lee "may try to reopen his 2016 challenge to the lethal injection protocol." Exhibit A at 6.[8] The U.S. Supreme Court has long recognized that equitable estoppel applies when a party's representations induce another to refrain from asserting legal rights. In *Glus v. Brooklyn Eastern District Terminal*, for example, the Court held that a defendant could be estopped from asserting a limitations defense where its representations caused the plaintiff to delay suit. 359 U.S. 231, 231–32, 235 (1959). If inducing a plaintiff to delay filing suit

Protocol Litig., No. 2:12-cv-316-WKW (M.D. Ala. July 10, 2018) (ECF No. 427) (the parties jointly represented that "Plaintiffs have elected to be executed by nitrogen hypoxia, rather than lethal injection . . . . Plaintiffs' claims and causes of action are now moot because ***their executions will be carried out at the appropriate time by nitrogen hypoxia***" (emphasis added)); Email from P. Kenny to J. Lerer (June 23, 2026) (Exhibit E) (confirming that "Defendants plan to continue using the current nitrogen hypoxia protocol as to the consolidated Plaintiffs").

[8] Reopening the Southern District litigation is impractical. Had the State not represented that Mr. Lee would be executed by nitrogen hypoxia, he would have continued litigating his challenge to lethal injection, which likely would have been resolved years ago. Instead, Mr. Lee dismissed that action in reliance on the State's representation. It is neither fair nor realistic to require him to revive that litigation and challenge ADOC's lethal injection protocol on an expedited basis simply because the State has now reversed course and sought an execution date at the same time.

can support estoppel, as in *Glus*, then inducing a plaintiff to dismiss a lawsuit presents an even stronger case for equitable relief.

Beyond losing his opportunity to challenge lethal injection, Mr. Lee was foreclosed from developing any factual record on lethal injection in ***this*** case. The parties litigated this case on the shared understanding that lethal injection was not available, with the State successfully objecting to discovery related to lethal injection. *See, e.g.*, *supra* pp. 13–14. As a result, no expert testimony or facts were developed concerning lethal injection in this action.

Finally, the State's prior representation to Mr. Lee was not an inadvertent communication or a failure to act. It was a formal written commitment by counsel of record submitted to a federal court, upon which that court expressly relied in dismissing a lawsuit. The State then compounded its representation by successfully blocking lethal injection discovery in this case. That conduct goes well beyond "negligence or inaction." *United States v. McCorkle*, 321 F.3d 1292, 1297 (11th Cir. 2003) (citing *Tefel*, 180 F.3d at 1302–04). The State's repudiation of its long-standing position—only after receiving an adverse Judgment—amounts to affirmative misconduct. *See, e.g.*, *Fredericks v. Comm'r*, 126 F.3d 433, 439–40 (3d Cir. 1997) ("We believe that the misrepresentations here . . . rise to affirmative misconduct . . . inducing Fredericks to sign and rely on the terms of the Form 872 on three different occasions in three different years."); *Johnson v. Williford*, 682

F.2d 868, 872 (9th Cir. 1982) (equitable estoppel applied against government that provided "active misadvice" about parole eligibility, because "[e]ven convicted criminals are entitled to be treated by their government in a fair and straightforward manner").

Equity does not permit these tactics, and the State should be estopped from executing Mr. Lee by lethal injection.

IV. Following Mr. Lee's Election of Nitrogen Hypoxia, Lethal Injection and Electrocution Are Not Available to the State Under Alabama Law

Because Mr. Lee timely elected nitrogen hypoxia, neither lethal injection nor electrocution is a method available to the State under Alabama Code § 15-18-82.1. The Court should amend the Opinion and Judgment to remove any suggestion that the State may use these methods to execute Mr. Lee.[9]

Section 15-18-82.1(a) establishes the default rule: a death sentence "shall be executed by lethal injection, ***unless*** the person sentenced to death affirmatively elects to be executed by electrocution or nitrogen hypoxia." Ala. Code § 15-18-82.1(a) (emphasis added). Section 15-18-82.1(b) gives the inmate a one-time opportunity to make that election. With respect to electrocution, the election is

[9] Mr. Lee is not seeking to amend his Complaint to assert a state law cause of action or obtain prospective relief on the basis that the State has violated Alabama law. Rather, the State has placed the meaning of Alabama's execution statute at issue by asserting that lethal injection remains available notwithstanding Mr. Lee's timely election. Resolving that question is necessary to determine whether the State may evade the Court's existing injunction by substituting another execution method.

"waived unless it is personally made by the person in writing and delivered to the warden . . . within 30 days after July 1, 2002." *Id*. § 15-18-82.1(b)(1). Mr. Lee never elected to be executed by electrocution.

With respect to nitrogen hypoxia, Section 15-18-82.1(b)(2) provides that the election is "waived unless it is personally made by the person in writing and delivered to the warden . . . within 30 days of [June 1, 2018]." Mr. Lee complied with that requirement: on June 26, 2018, he submitted a written election for nitrogen hypoxia. *See* Exhibit C. Once Mr. Lee exercised that statutory right, by the plain terms of Section 15-18-82.1(a), nitrogen hypoxia became his exclusive method of execution unless a statutory exception applies. Section 15-18-82 provides that "[i]f electrocution or nitrogen hypoxia are held unconstitutional, the method of execution shall be lethal injection." But that provision does not apply here for two reasons.

First, this Court did not find the ***method*** of nitrogen hypoxia to be unconstitutional, as required under Section 15-18-82. Rather, the Court found the ***Protocol*** to be unconstitutional: "Lee has shown by a preponderance of the evidence that the ***Protocol*** constitutes cruel and unusual punishment in violation of the Eighth Amendment." Op. at 24 (emphasis added); *id.* (finding that "Lee has shown that the ADOC's nitrogen hypoxia execution ***protocol*** violates the Eighth Amendment," and enjoining the State from executing him "pursuant to the ***Protocol***" (emphases added)). Nothing in the Opinion holds, or could be read to hold, that the method of

nitrogen hypoxia itself is unconstitutional—only how ADOC has implemented it. Nor does the Court's Opinion and Judgment prevent ADOC from revising the Protocol to comply with the Constitution.[10]

Second, there has not been a court decision that would trigger a return to lethal injection. Section 15-18-82.1(c) expressly defines the circumstances under which an execution method is "held unconstitutional" for purposes of the execution statute: the method must be "held unconstitutional" by (1) the Alabama Supreme Court under the Alabama Constitution, (2) the U.S. Supreme Court under the federal Constitution, or (3) the Alabama Supreme Court or the Eleventh Circuit under the federal Constitution if the U.S. Supreme Court declines review.[11] In other words,

[10] During a June 22, 2026 meet-and-confer in the consolidated nitrogen hypoxia cases, defense counsel represented that ADOC is planning to proceed with other nitrogen hypoxia executions ***without*** revising the Protocol, because "Defendants believe that the current Protocol is not unconstitutional and has only been held unconstitutional as to Jeffery Lee on the record in that case." Exhibit E. The State, thus, is taking the position that although it cannot constitutionally use the Protocol to execute Mr. Lee, it can—consistent with the Constitution—use the same Protocol to execute other inmates. Putting aside the merits of that position, it confirms that the State does not understand this Court's Opinion and Judgment to have held the Protocol—let alone nitrogen hypoxia as a method of execution—to be unconstitutional as a general matter.

[11] In full, Section 15-18-82.1(c) reads: "If electrocution, nitrogen hypoxia, and lethal injection are all held to be unconstitutional by the Alabama Supreme Court under the Constitution of Alabama of 1901, or held to be unconstitutional by the United States Supreme Court under the United States Constitution, or if the United States Supreme Court declines to review any judgment holding a method of execution to be unconstitutional under the United States Constitution made by the Alabama Supreme Court or the United States Court of Appeals that has jurisdiction over

there must be a final appellate holding that the method of nitrogen hypoxia is unconstitutional. Here, neither the U.S. Supreme Court, the Alabama Supreme Court, nor the Eleventh Circuit has held the nitrogen hypoxia method to be unconstitutional, and the State eliminated any possibility of such a ruling when it voluntarily dismissed its appeal. *See supra* pp. 6–7 & n.4. Accordingly, under Alabama law, Mr. Lee's election to be executed by the nitrogen hypoxia method is controlling.[12]

Indeed, any other reading of the execution statute would produce a perverse result. Mr. Lee exercised his statutory right to elect the nitrogen hypoxia method.

Alabama, then all persons sentenced to death shall be executed by any constitutional method of execution based on the sole discretion of the Commissioner of the Department of Corrections." The State invoked this statutory provision in its expedited motion to set Mr. Lee's execution by lethal injection. *See* Exhibit A at 2–3.

[12] Because Sections 15-18-82 and 15-18-82.1 are adjacent provisions of the same statute, canons of statutory construction require the term "held unconstitutional" to be read consistently. *See Hylton v. U.S. Att'y Gen.*, 992 F.3d 1154, 1159 (11th Cir. 2021) ("We presume that words or phrases . . . bear the same meaning throughout a text, and that presumption is strengthened the more connection the cited provision has with the provision under consideration." (citation, quotation marks, and alterations omitted)); *United States v. Garcon*, 54 F.4th 1274, 1278 (11th Cir. 2022) (en banc) ("[W]e presume that identical words used in different parts of the same act are intended to have the same meaning." (quotation marks and citation omitted)). To the extent there is any ambiguity as to the meaning of "held unconstitutional" in Section 15-18-82, as a criminal statute, that ambiguity must be resolved in Mr. Lee's favor. *See United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." (citing cases)).

This Court found only that ADOC's chosen Protocol for implementing that method—drafted by attorneys without consulting medical professionals—violates the Eighth Amendment. Nothing in the statute suggests that an inmate forfeits his statutory election because the State failed to devise a constitutional means of carrying it out. The consequence of this failure should fall on the State, not on Mr. Lee, who exercised the right that the Legislature afforded to him.

In short, Alabama's execution statute does not leave the State free to substitute another execution method merely because this Court found the current nitrogen hypoxia Protocol unconstitutional. Mr. Lee's statutory election remains operative, and none of the Legislature's specified conditions for reverting to lethal injection has occurred. The Court should therefore amend the Opinion and Judgment to remove any suggestion that lethal injection and electrocution are available methods to execute Mr. Lee.

CONCLUSION

For these reasons, the Court should amend the Opinion and Judgment as follows:

1. To declare that the State is judicially estopped from executing Mr. Lee by lethal injection, having represented to the U.S. District Court for the Southern District of Alabama that, if Mr. Lee is to be executed, "Defendants will carry out

that execution by nitrogen hypoxia," and having secured dismissal of Mr. Lee's lethal injection lawsuit on that basis;

2. To declare that the State is equitably estopped from executing Mr. Lee by lethal injection, having induced Mr. Lee to dismiss his lethal injection lawsuit in reasonable reliance on the State's representation that it would execute him by nitrogen hypoxia, to his substantial detriment;

3. To remove any and all language suggesting that the State may, consistent with Alabama Code § 15-18-82.1, execute Mr. Lee by lethal injection or electrocution; and

4. To amend the permanent injunction consistent with the foregoing declarations.

Dated: July 7, 2026

Respectfully submitted,

/s/ Angelique A. Ciliberti

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed, via the CM/ECF system, on July 7, 2026, which will cause Defendants' counsel to receive an electronic copy.

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TAB G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JEFFERY LEE, Plaintiff, v. GREG LOVELACE, Commissioner, Alabama Department of Corrections, et al., Defendants.	)	Case No. 2:25-cv-00680-ECM

DEFENDANTS' OBJECTION TO PLAINTIFF'S MOTION TO AMEND ORDER ON SCOPE OF INJUNCTIVE RELIEF AND FINAL JUDGMENT

Lee's motion is meritless, and it lays bare that he is "more interested in…delaying his execution" than vindicating constitutional rights. *Bucklew v. Precythe*, 587 U.S. 119, 140 (2019). Lee elected nitrogen hypoxia in 2018, waited seven years, and then challenged the very method he elected. He won, so the State predictably moved to execute him by lethal injection instead. Now, contradicting himself a second time, Lee says his election still binds the State, which must "devise a [new and unspecified] means of carrying [ ] out" his execution by hypoxia. DE204:22.

The Court should not countenance Lee's latest gambit. ***First***, he has no claim about lethal injection. ***Second***, the Court's injunction correctly sweeps no broader

than necessary for full relief. ***Third***, the Court cannot enjoin the State on purely state-law grounds. ***Fourth***, Lee's unclean hands disqualify him from the relief he seeks.

BACKGROUND

Lee was sentenced to death on October 11, 2000. At that time, Alabama's method of execution was electrocution.

On April 25, 2002, Alabama Laws Act 2002-492 made lethal injection Alabama's primary method of execution. Inmates sentenced to death before the act's effective date had a thirty-day window to elect electrocution, which had been relegated to the backup method. None did.

Lee has raised claims about methods of execution since his direct appeal. *See Lee v. State*, 898 So. 2d 790, 871 (Ala. Crim. App. 2001) (claims about electrocution moot after adoption of ALA. CODE § 15-18-82(a)); Pet. for Writ of Cert. at 57, *Ex parte Lee*, No. 1021971 (Ala. Oct. 3, 2003) (reiterating claims about electrocution and challenging "procedures implementing lethal injection"); *Lee v. State*, 44 So. 3d 1145, 1175 (Ala. Crim. App. 2009) (affirming procedural bar to claim that change to lethal injection was ex post facto change in punishment); *Lee v. Thomas*, 1:10-cv-00587, 2012 WL 1965608, at *65-66 (S.D. Ala. May 30, 2012) (denying method-of-execution claim as improperly brought in habeas).[1]

1. Lee's amended Rule 32 petition *disavowed* the opportunity to elect his method of execution, stating:

On September 10, 2014, ADOC adopted its third lethal injection protocol, which called for the sequential administration of 500 mg of midazolam hydrochloride, 600 mg of rocuronium bromide, and 240 mEq of potassium chloride. The statute of limitations for § 1983 method-of-execution claims is two years in Alabama. *E.g.*, *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008).

Lee's conventional appeals concluded March 24, 2014, and he has been eligible for execution since then. Despite his longstanding opposition to lethal injection,[2] Lee waited until ***two days*** before the limitations period ran in September

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> [S]uch a "choice" is no choice at all, and, in fact, it simply exacerbates the cruelty of this process. Petitioner did not elect the punishment he was to receive when he was sentenced, and he has not, and should not be forced to, elect the method of carrying out that punishment. ***It is the State's (not the condemned's) duty to determine how to kill him***; making him choose how the State will kill him is macabre, gratuitously torturous, and mocking. It shocks the conscience, and violates the evolving standard of decency in a free society. As such, the alleged "choice" is itself cruel and unusual punishment under both federal and state constitutional law.

Amended Rule 32 Petition ¶ 470, *Lee v. State*, 27-CC-1999-000021.60 (Dallas Cnty. Cir. Ct. Apr. 22, 2005) (emphasis added).

2. Beyond his legal filings, Lee has contributed to *On Wings of Hope*, a publication by Holman inmates, for more than a decade, where he has discussed methods of execution. In the first issue of 2015, Lee railed against the use of midazolam, concluding, "So Alabama, instead of trying to reach and come up with a more perfect execution protocol, just reach back to when the death penalty was nonexistent because the more perfect execution protocol is to have no death penalty at all." Jeffery Lee, G-9, The Caring Christian, *(Untitled)*, 19:1 ON WINGS OF HOPE 10 (2015), www.phadp.org/volume-19-issue-1-january-march-2015. Lee discussed *Glossip v. Gross* a year before he filed his first § 1983 complaint.

2016 to file a complaint in the Southern District of Alabama alleging that the midazolam protocol was unconstitutional. Complaint, *Lee v. Dunn*, 1:16-cv-00473 (S.D. Ala. Sept. 8, 2016), DE1. His alternative? A single-drug protocol with pentobarbital, *id.* ¶ 80, the previous first drug in ADOC's protocol; ADOC had switched to midazolam because it could no longer secure pentobarbital for use in executions.[3] The district court dismissed the complaint, holding that Lee's claims were untimely and failed to state plausible claims for relief. Order, *Lee v. Dunn*, 1:16-cv-00473 (S.D. Ala. Apr. 24, 2017), DE23. But one year later, the Eleventh Circuit reversed in part, holding that Lee's complaint "adequately set forth facts which, if proven true, would satisfy *Glossip*," vacating the dismissal of his Eighth Amendment claim (which was not time-barred), and remanding. *Lee v. Comm'r, Ala. Dep't of Corr.*, 731 F. App'x 885 (11th Cir. 2018).

Back in the district court, the parties asked for an extension of the deadlines, as section 15-18-82.1 of the Code of Alabama had been modified to include nitrogen

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See Jeffery Lee, The Caring Christian, *The Unexpected*, 19:2 ON WINGS OF HOPE 10 (2015), www.phadp.org/vol-19-issue-3-july-september-2015.

3. Considering Lee's discussion of the "plethora of lethal injection protocols" in use in early 2017, including his recognition that States had switched cocktails "[d]ue to drug shortages," Lee—and surely his counsel—must have been aware of the unavailability of pentobarbital to ADOC when suggesting it as an alternative. Jeffery Lee, The Caring Christian, *Lethal Injection: Have We Become the New Guinea Pigs?*, 21:1 ON WINGS OF HOPE 13 (2017), www.phadp.org/vol-21-issue-1-january-to-march-2017.

hypoxia, and Lee might elect. Stipulation, *Lee v. Dunn*, 1:16-cv-00473 (S.D. Ala. June 5, 2018), DE35. Lee did, in fact, elect hypoxia, and instead of filing an amended complaint, he and Defendants filed a joint motion to dismiss, explaining that his claims about lethal injection were moot. Joint Motion to Dismiss, *Lee v. Dunn*, 1:16-cv-00473 (S.D. Ala. July 19, 2018, DE37. The district court dismissed without prejudice. Order, *Lee v. Dunn*, 1:16-cv-00473 (S.D. Ala. July 20, 2018), DE38.

Whether Lee ever actually wanted nitrogen hypoxia as his method of execution remains an open question. Asked in 2026 why he had elected, he said, "Because in 2018 I was a part of a lawsuit against lethal injection. So I elected nitrogen hypoxia." Ex. A at 23. In effect, he bought himself years while ADOC developed a hypoxia protocol, which was not announced until August 2023.

But between his June 2018 election and the end of the two-year limitations period for hypoxia challenges in August 2025, Lee apparently soured on the method. In early 2025, he compared nitrogen hypoxia to the Nazi gas chambers.[4] He stated in deposition in 2026, "[T]he 8th Amendment violation I believe is that nitrogen hypoxia is cruel and unusual," Ex. A at 20—not *the protocol*, but *nitrogen hypoxia*. Following his playbook, Lee waited until the very end of the limitations period to

4. "Hitler hated the Jewish race of people so he used gas to annihilate millions of Jewish people. From that, Alabama and four other states birthed Nitrogen Suffocation." Jeffery Lee, *Untitled*, 29:1 ON WINGS OF HOPE 5 (2025), www.phadp.org/owoh29_1.

initiate this lawsuit,[5] claiming that ADOC's hypoxia protocol was cruel and unusual. He named two alternatives, MAID and firing squad (and won with the latter), but he never pleaded any alteration to the hypoxia protocol that would make it constitutional in his eyes. Indeed, during oral argument in the Eleventh Circuit, Lee's counsel was asked how a hypoxia protocol could be satisfactory:

> Court: Tell me, tell me what would it be perfectly appropriate.…In other words, this method, if it's inherent to have some suffocation, what's appropriate?
>
> Counsel: Well, Your Honor, I think that…the alternative we alleged is firing squad, not an alternative nitrogen—
>
> Court: Well, no, I understand that, but I'm talking about, we're talking about in…2023 [sic], when your client elected this, tell me…what would have been appropriate, what's an appropriate level of suffocation for him under the Eighth Amendment?
>
> Counsel: Well…Your Honor, I don't think that there *is* an appropriate level of conscious suffocation under the Eighth Amendment.
>
> Court: I guess that's the question. So…how would your client possibly elect this and say that "This is a way I wanted to die," and then say…"It's not just that the way that it's done here is inappropriate, I wouldn't agree, there is simply not an appropriate way to do this." How are those two things consistent?

5. Asked why he waited, Lee said, "I really don't have an answer why because I just knew that I had to have it filed by August." Ex. A. at 22.

Oral Arg., *Lee v. Comm'r, Ala. Dep't of Corr.*, No. 26-11864 (11th Cir. June 5, 2026), at 24:50-25:47, ca11.uscourts.gov/sites/default/files/oral_argument_recordings/26-11864_06052026.mp3 (emphasis added); *see also* Plaintiff-Appellant's Opening Br., No. 26-11864 (11th Cir. filed June 1, 2026), at 4 (arguing that "conscious suffocation" is "constitutionally unacceptable").

Lee asked this Court to enjoin Defendants from executing him "via nitrogen hypoxia," to enjoin Defendants from executing him "using any method other than one of the alternatives provided by his attorneys," and to grant any other relief deemed proper. DE40:23. On June 9, on remand from the Eleventh Circuit, this Court entered an injunction prohibiting ADOC from executing Lee using its nitrogen hypoxia protocol but did not limit ADOC to using Lee's proposed alternative methods. DE187:25. Lee's scheduled June 11 execution was eventually canceled.

On June 12, the State moved the Alabama Supreme Court to reset Lee's execution, explaining that ADOC intended to execute him using its lethal injection protocol (which has not materially changed since the introduction of midazolam in September 2014).[6] *See* Expedited Renewed Motion to Set an Execution Date, *Ex parte Jeffery Lee*, No. 1021971 (Ala. filed June 12, 2026). Lee objected on July 7, raising similar issues as in the motion at bar, and the State replied on July 9.

6. The inmate was permitted to have a spiritual advisor sit in the holding cell with him as of April 2019, and in March 2021, this was expanded to permit the inmate's spiritual advisor to minister to him in the execution chamber.

Lee now asks this Court to amend its opinion and judgment to declare that Defendants are judicially and equitably estopped from executing Lee by lethal injection, and to "remove any and all language suggesting that the State may, consistent with Alabama Code § 15-18-82.1, execute Mr. Lee by lethal injection or electrocution." DE204:22-23.

LEGAL STANDARDS

Lee's motion asserts a "manifest injustice in the judgment." DE204:7-8. But "the only grounds for granting a Rule 59 motion are newly-discovered evidence or manifest errors of law or fact." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (citation modified). Likewise, Lee concedes that "the purpose of a Rule 52(b) motion 'is to correct manifest errors of law or fact or, in some limited situations, to present newly discovered evidence.'" DE204:8 (quoting *Johnson v. New Destiny Christian Ctr. Church*, 771 F. App'x 991, 995 n.5 (11th Cir. 2019)).

ARGUMENT

I. There is no claim concerning lethal injection before the Court.

This Court should deny Lee's motion because the asserted "injustice" of executing him by lethal injection is not properly before the Court. In effect, Lee seeks an injunction against his execution by lethal injection, but he has no claim upon which that relief can be granted. Lee's amended complaint raised no claim concerning lethal injection, nor could it have done so, as the limitations period for

§ 1983 claims about the 2014 protocol ran in 2016. Rather, Lee asked the Court to "declar[e] the Protocol unconstitutional to the extent it provides for executions by nitrogen hypoxia" and to enjoin Defendants from executing Lee "via nitrogen hypoxia." DE40:23. As Lee concedes, the parties did not present "expert testimony or facts" about ADOC's midazolam protocol. DE204:17. On his own telling, the motion raises a wholly "new controversy." DE204:9. But a new controversy requires either amending the complaint, which Lee disclaims, *id.* at 18 n.9, or a new lawsuit. Not only is there no legal or factual basis for expanding the injunction, but it would also violate due process because Defendants have not had notice of Lee's claims against lethal injection nor a meaningful opportunity to be heard on them.

Lee's various estoppel arguments fare no better. Estoppel is not a claim or cause of action on which the Court can grant relief. Estoppel is a defense. *See, e.g.*, *Millennium Funding, Inc. v. 1701 Mgmt. LLC*, 576 F. Supp. 3d 1192, 1219 (S.D. Fla. 2021). But this case is over, and Defendants have not taken any position or raised any claim against which estoppel would be an appropriate defense. While Lee references "the State's current position—that it can execute Mr. Lee by lethal injection," DE204:12, that is the State's position *in the Alabama Supreme Court* in a wholly separate case.

To recap, Lee asked not to be executed by nitrogen hypoxia, the Court enjoined Defendants from executing Lee with ADOC's hypoxia protocol, and

Defendants, bound by that injunction, canceled Lee's scheduled hypoxia execution. The move to execute him by lethal injection—as the Court even contemplated in its order—is not circumvention, nor does it "make a mockery of the judicial system." DE204:11 (quoting *Slater v. U.S. Steel*, 871 F.3d 1174, 1181 (11th Cir. 2017)).[7]

II. The Court properly limited the scope of the permanent injunction.

Lee asks the Court to broaden its injunction to prohibit his execution "by lethal injection"—not just the midazolam protocol—and electrocution. DE204:23. The motion should be denied for the same reason the Court already gave: Lee's sole claim for relief was fully remedied by the injunction against his execution by nitrogen hypoxia. "But because Lee has not established that Alabama's other statutorily authorized methods violate the Eighth Amendment, he is not entitled to

7. Concerning Lee's lethal injection litigation in the Southern District, Defendants note that when the case was dismissed in 2018, Lee ostensibly wanted to be executed by nitrogen hypoxia, and Defendants intended to honor his election. (If Defendants had not intended to honor it, then the State could have moved for his execution by another method during the hypoxia protocol development period.) But as of 2025, the situation has materially changed: Lee has made it abundantly clear that he does ***not*** want to be executed by hypoxia. He asked this Court to enjoin Defendants from executing him "***via nitrogen hypoxia***," DE40:23, and proposed novel alternatives (to which he wanted ADOC to be limited), not tweaks to the hypoxia protocol. As of June 9, ADOC has been enjoined from executing Lee by its hypoxia protocol. For Lee to argue that ADOC should be estopped from using one of its other two available methods because ADOC agreed in 2018 to execute him by a third method that he claimed to want but has now disavowed (and that ADOC is prohibited from using on Lee ***by his own actions***) is fundamentally unfair. Lee's claim that his hypoxia election "remains operative," DE204:22, and so prevents ADOC from using another method is simply brazen.

an injunction barring the State from executing him using one of those methods." DE187:22-23; *see also id.* at 24-25. This holding has firm footing in blackletter equitable principles—namely, the tenet that injunctive relief should be narrowly tailored to address the harm, *see Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."); *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."); *Keener v. Convergys Corp.*, 342 F.3d 1264, 1269 (11th Cir. 2003) ("Injunctive relief should be limited in scope to the extent necessary to protect the interests of the parties."); *Alley v. U.S. Dep't of Health & Human Servs.*, 590 F.3d 1195 (11th Cir. 2009) ("It is well-settled that a district court abuses its discretion when it drafts an injunction that is unnecessarily broad in scope.").

Here, Lee asked the Court to enjoin Defendants "from executing Mr. Lee via nitrogen hypoxia" and "from executing Mr. Lee using any method other than one of the alternatives provided by his attorneys." DE40:23. The Court, following trial, the submission of evidence, and remand from the Eleventh Circuit, enjoined Defendants "from executing Lee using the [nitrogen hypoxia execution] Protocol," DE187:25, but did ***not*** enjoin Defendants from executing Lee by any other method. The harm

Lee established (though Defendants respectfully maintain their disagreement) was that he would suffer superadded pain during an execution by ADOC's hypoxia protocol. The Court thus properly tailored an injunction to address that harm: ADOC cannot use its hypoxia protocol to execute Lee.

The Court correctly declined to limit ADOC's methods of execution to those Lee provided. There was nothing before the Court to suggest that ADOC's midazolam protocol (the *Glossip* protocol) is unconstitutional—or, for that matter, that its electrocution protocol is unconstitutional. As the Court explained, "Lee challenged only the ADOC's nitrogen hypoxia protocol—not lethal injection or electrocution. After carefully considering traditional equitable principles," the Court concluded that Lee was "not entitled" to relief beyond an injunction "prohibiting the State from executing Lee using the Protocol." DE187:22-23.

Indeed, it was partly *because* the Court's remedy was "narrowly tailored to remedy the specific harm at issue" that the Court found a "permanent injunction [to be] appropriate." *Id.* at 23 n.15. An injunction against Alabama's other authorized methods—or all possible methods other than those Lee prefers—would run afoul of both traditional equitable principles and 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. § 3626(a)(1)(A). A court must give "substantial weight to any adverse impact

on…the operation of a criminal justice system." *Id.* Enjoining three methods at once would expand relief beyond Lee's claims and proof. It would also be highly intrusive, requiring either that Alabama officials guess at what new hypoxia protocol would satisfy Lee, DE204:22 (suggesting the State could "devise a [new] means" of executing him by hypoxia), or that they adopt an entirely new method, *id.* at 9-10 (suggesting firing squad). As to the latter, while the Court discounted—for Eighth Amendment purposes—concerns that Alabama has never had a firing squad, lacks a proper facility, and would prefer not to depend upon five skilled marksmen to be ready and willing to serve as executioners at all times, those objections are still good reasons not to expand the scope of relief.

III. The Court should not take up Lee's meritless state-law claim.

Ground IV of Lee's motion, DE204:18-22, is a pure state-law claim, which does not appear in his complaint, *id.* at 18 n.9 (conceding he does not "seek[ ] to amend"), and which is barred by *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Because "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law," *id.* at 106, "federal courts do not have the authority to compel state actors to comply with state law" whatsoever, *Doe v. Bush*, 261 F.3d 1037, 1055 (11th Cir. 2001). Moreover, the issue Lee raises is presently before the Alabama Supreme Court in his objection to the State's renewed execution motion

and the State's reply. Even if this Court were not barred from considering this matter of first impression under Alabama law, it should abstain from deciding it. If the State's highest court agrees with Lee's reading of Alabama Code § 15-18-82.1, then it may well deny the State's execution motion.

Should the Court consider Lee's state-law claim, it should deny the motion. Section 15-18-82.1 sets out various provisions concerning execution methods, including that lethal injection is the default, the procedure for electing electrocution or nitrogen hypoxia, and the procedure to follow if all of Alabama's statutory methods of execution are held to be unconstitutional. Subsection (i), new as of the 2018 amendment, then offers a catch-all provision: "An election for a choice of a method of execution made by a convict shall at no time supersede the means of execution available to the Department of Corrections."

By the plain text of section 15-18-82.1(i), the State is not bound by Lee's election. It is not bound particularly in these circumstances where a permanent injunction has rendered the elected method no longer "available." *Id.* On Lee's view, ADOC can still "devise a constitutional means" of executing him by nitrogen hypoxia. DE204:22. But he offers no guidance—no explanation how ADOC could adopt a new, feasible, and significantly safer hypoxia protocol consistent with this Court's injunction. It is not Alabama law that an inmate can elect a method, challenge the method, win an injunction against the method, and yet hamstring the

State from carrying out his execution unless officials correctly guess what changes to the protocol would make it acceptable to the inmate.

IV. Lee's unclean hands disqualify him from further equitable relief.

Lee's filing is full of invective, accusing the State of taking "inconsistent positions" and "mak[ing] a mockery of the judicial process." DE204:12. Nothing could be further from the truth. When Lee elected hypoxia in June 2018, ADOC intended to honor that election. ADOC intended to honor it in 2023, when the protocol was announced, and in 2026, when the State moved for Lee's execution. ADOC has abided by the statements it made in 2018 when Lee and the State jointly moved to dismiss his first § 1983 action.

No, it is Lee who mocks. After spending the better part of a year litigating *against* nitrogen hypoxia, procuring an injunction, and derailing his execution, Lee insists that the State honor his election of that very method. *Id.* at 22. His new position flatly contradicts his argument—particularly on appeal—that any oxygen deprivation is unconstitutional. It contradicts the view he expressed at his deposition. And it contradicts his numerous published writings. By now, it is crystal clear that *Jeffery Lee does not want to be executed by nitrogen hypoxia*.

In these circumstances, *of course* the State is "free to substitute another execution method," *contra id.*, just as the Court anticipated it would. And Lee's motion smacks of gamesmanship. If he had an alternative way for the State to

execute him by nitrogen hypoxia consistent with his constitutional objection, he should have pleaded it in his complaint. Instead, he waited nearly a year to say so, and even still, his motion to amend the judgment does not give the State any semblance of a pathway forward. If there were ever an inmate "more interested in delaying [his] execution[ ] than in avoiding unnecessary pain," Lee is that inmate. *See Middlebrooks v. Parker*, 22 F.4th 621, 628 (6th Cir. 2022) (Thapar, J., statement). Call it unclean hands, estoppel, or waiver, Lee's belated and contradictory request for even more extraordinary equitable relief must be rejected. *Cf. Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (8–1 decision holding that inmate waived his method-of-execution claim because he chose the challenged method). Where (1) Lee clearly opposes nitrogen hypoxia and (2) the Court enjoined his execution by the State's only protocol for using nitrogen hypoxia, it cannot be a "manifest injustice" for Lee to be executed by a method other than nitrogen hypoxia. If there is any injustice here, it lies with Lee's attempt at further delay.

* * *

Lethal injection is a constitutional method of execution, and ADOC's protocol—again, the one approved in *Glossip*—has been successfully employed for more than a decade. It is presumptively constitutional. If Lee wishes to try to enforce his election of nitrogen hypoxia in state court, he is represented there by the Federal Defenders for the Middle District of Alabama, who have raised to the Alabama

Supreme Court many of the same arguments as in the present motion. If he wishes to challenge lethal injection on Eighth Amendment grounds, his § 1983 action was dismissed without prejudice in the Southern District, and it is possible that court might permit further litigation.

In any event, none of the arguments in Lee's motion are properly before this Court, which has already entered complete relief for Lee's claim.

CONCLUSION

The Court should deny Lee's motion.

Respectfully submitted,

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ATTORNEY GENERAL OF ALABAMA
BY—

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Principal Deputy Solicitor General

/s/ Lauren A. Simpson
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CERTIFICATE OF SERVICE

I certify that on July 17, 2026, I served a copy of the foregoing upon counsel for the Plaintiff by filing the same via the Court's CM/ECF system.

Respectfully submitted,

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TAB H

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JEFFERY LEE, Plaintiff, v. GREG LOVELACE, Commissioner, Alabama Department of Corrections, *et al.*, Defendants.	CASE NO. 2:25-cv-680 ECM CAPITAL CASE

PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTION TO AMEND ORDER ON SCOPE OF INJUNCTIVE RELIEF AND FINAL JUDGMENT

As the State's Response confirms, none of the facts underlying this Motion are in dispute. Mr. Lee previously challenged the State's lethal injection protocol. After the Legislature amended the execution statute, Mr. Lee timely elected execution by nitrogen hypoxia. The State then represented to the Southern District and to Mr. Lee that if he is executed, it will be by nitrogen hypoxia—not lethal injection. As a result, the Southern District dismissed the lethal injection lawsuit. But after this Court entered its Opinion (ECF No. 187) and Judgment (ECF No. 188), the State changed course. Contrary to its prior representations, the State now intends to execute Mr. Lee by lethal injection. Under these circumstances, the State cannot abandon its prior representations and revert to lethal injection.

Rather than take on these facts, the State relies on procedural objections and equitable defenses that do not apply. The State claims the Court does not have the authority to enjoin the ADOC from executing Mr. Lee by lethal injection, because he has not challenged lethal injection in this lawsuit. But this Motion does not assert a new constitutional challenge to the lethal injection protocol; it invokes estoppel as a basis for amending the Court's Opinion and Judgment in light of the State's post-judgment position—exactly the type of relief that Rules 52 and 59 contemplate.

The State's unclean hands argument fares no better: it faults Mr. Lee for exercising a right he expressly reserved when he made his election—and that the State knew about when it told the Southern District it would execute Mr. Lee by nitrogen hypoxia. The State cannot convert its own failure to develop a constitutionally valid nitrogen hypoxia Protocol into an equitable defense against Mr. Lee.

Nor does this Motion implicate, as the State contends, sovereign immunity concerns. The State's post-judgment actions—not Mr. Lee's—have placed the Alabama execution statute squarely at issue. Based on the statutory text, Mr. Lee asks only that the Court remove from the Opinion the discussion suggesting the availability of lethal injection and electrocution, not order any prospective relief compelling the State to comply with Alabama law.

Because the State's post-judgment actions have altered the premise on which the Court addressed the scope of relief, the Court should amend its Opinion and Judgment.

ARGUMENT

I. The State Fails to Rebut Mr. Lee's Estoppel Arguments.

The State fails to respond substantively to Mr. Lee's judicial and equitable estoppel arguments. The State agrees that it previously represented to the Southern District and to Mr. Lee that his lethal injection challenge was moot because, "if he is to be executed, Defendants will carry out that execution by nitrogen hypoxia." Mot. at 5; Resp. at 5. The State does not dispute that Mr. Lee gave up his lethal injection lawsuit—and the Southern District dismissed the case—as a result of that representation. Mot. at 5, 15. And the State agrees that it now takes the opposite position: that Mr. Lee, in fact, should be executed by lethal injection. Mot. at 7; Resp. at 7. The doctrines of judicial and equitable estoppel exist to prevent the State from reversing course.

The State instead argues that estoppel does not apply, because estoppel is "not a claim or cause of action on which the Court can grant relief." Resp. at 9 (citing *Millennium Funding, Inc. v. 1701 Mgmt. LLC*, 576 F. Supp. 3d 1192, 1219 (S.D.

Fla. 2021).[1] But Mr. Lee is not asserting a cause of action for estoppel. His Motion instead raises these equitable doctrines as a reason to amend the Opinion and Judgment. The State cites no authority for the proposition that a federal court may not consider these equitable principles when determining whether to amend its own findings and judgment under Rules 52(b) and 59(e).[2]

The State is also wrong that circumstances have changed—namely, Mr. Lee no longer wants to be executed by nitrogen hypoxia, *see* Resp. at 10 n.7—that justify its change in positions. Mr. Lee has ***never*** withdrawn his election to be executed by nitrogen hypoxia. And in bringing this lawsuit, he challenged the ADOC's current Protocol, not the method of nitrogen hypoxia more broadly. The State, moreover,

[1] The State misreads *Millennium Funding*. In that case, the district court held that "equitable estoppel is not an independent cause of action and cannot be brought as a 'stand-alone' claim." *Millennium Funding*, 576 F. Supp. 3d at 1219 (citation omitted). The case says nothing about whether an estoppel can be asserted alongside another claim.

[2] The State cites no authority suggesting that judicial estoppel may be invoked only by the court in which the inconsistent positions were taken. *See* Resp. at 9 ("While Lee references 'the State's current position—that it can execute Mr. Lee by lethal injection,' DE204:12, that is the State's position *in the Alabama Supreme Court* in a wholly separate case." (emphasis in original)). To the contrary, judicial estoppel is an equitable doctrine invoked by courts "to protect the integrity of the judicial process." *New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001). Moreover, after the State filed its Response, the Alabama Supreme Court granted the State's renewed motion for an execution warrant. *See* ECF No. 207-1. That order contains ***no*** discussion of judicial or equitable estoppel or the meaning of Alabama Code § 15-18-82.1. Those issues therefore remain unresolved and are properly presented in this Motion.

does not claim that its prior representations were somehow mistaken or inadvertent. *See Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1181 (11th Cir. 2017) (in assessing judicial estoppel, considering whether the inconsistent positions were "inadvert[ent]" or a "mistake"). The fact that Mr. Lee has successfully vindicated his constitutional rights does not permit the State to renege on its prior representations.

Finally, the State's argument that Mr. Lee has "unclean hands"—because he elected nitrogen hypoxia and then challenged the ADOC's Protocol implementing that method—fails. *See* Resp. at 15–16.[3] Unclean hands requires "wrongdoing [that] is directly related to the claim against which it is asserted." *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 451 (11th Cir. 1993). Mr. Lee's actions are the opposite of wrongdoing: he expressly ***reserved*** the right to challenge a protocol when he made his election in 2018. *See* Mot. at 4. The State knew about this reservation of rights when it represented to the Southern District that, if

[3] The State mischaracterizes statements by Mr. Lee's counsel during oral argument in the Eleventh Circuit. Counsel argued that "***conscious suffocation***" violates the Eighth Amendment, *see* Resp. at 6, not that any amount of "oxygen deprivation" is unconstitutional, *see id.* at 15. Nothing in counsel's argument suggested that Mr. Lee's successful challenge to the ADOC's nitrogen hypoxia Protocol forfeited his statutory election or released the State from its prior representations.

executed, the ADOC will use nitrogen hypoxia and not lethal injection.[4] In light of these facts, it is the State that has acted inequitably, not Mr. Lee.

The State's related complaint that Mr. Lee should have pleaded "an alternative way for the State to execute him by nitrogen hypoxia," Resp. at 15–16, inverts the burden the Eighth Amendment imposes. An inmate's obligation is to identify a feasible, readily implemented alternative method that significantly reduces the risk posed by the challenged one—exactly what Mr. Lee did in proposing firing squad, and exactly what this Court held he proved. *See* Op. at 11 (explaining that Mr. Lee has "provided Alabama with a 'pathway forward'" (quoting *Nance v. Ward*, 597 U.S. 159, 169 (2022))). Nothing in the Supreme Court jurisprudence required Mr. Lee to also draft a corrected nitrogen protocol as a condition of prevailing on his claim against the existing one. Designing and implementing execution protocols is the ADOC's statutory responsibility,[5] not the condemned inmate's. If the State

[4] The State's argument that Mr. Lee could reopen his dismissed lethal injection action, *see* Resp. at 17, underscores, rather than defeats, why the State is equitably estopped from executing him by lethal injection. Had the State not represented that Mr. Lee would be executed by nitrogen hypoxia, his lethal injection challenge likely would have been litigated years ago. *See* Mot. at 16 n.8.

[5] *See* Ala. Code § 15-18-82.1(g) (referring to "[t]he policies and procedures of the Department of Corrections for execution of persons sentenced to death"); *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1274 (11th Cir. 2016) ("[T]he legislature left it to the ADOC to devise the policies and procedures governing lethal injection executions." (citing Ala. Code § 15-18-82.1(g))); P0005 at I.A (redacted Protocol) ("Approval authority for changes or amendments to the protocol is the Commissioner of the Alabama Department of Corrections (the 'ADOC').").

wishes to execute Mr. Lee by nitrogen hypoxia consistent with the Eighth Amendment and his own election, it—not Mr. Lee—bears the burden of adopting a protocol that does so.

II. This Motion Seeks Modification of the Court's Opinion and Final Judgment, Not Adjudication of a New Lethal Injection Claim.

The State's procedural arguments fare no better. It argues that the Court lacks the authority to amend its Opinion and Judgment because there is "no claim concerning lethal injection before the Court." Resp. at 8–10. But this Motion is not asking the Court to adjudicate a new claim on the constitutionality of Alabama's lethal injection protocol. *See* Mot. at 18 n.9.

Similarly, the State's argument that the Court properly limited the scope of its permanent injunction, *see* Resp. at 10–13, misses the point. Mr. Lee does not contend that the Court erred based on the record before it. Rather, ***after*** the Court issued its Opinion and entered the Judgment, the State revealed for the first time that it intended to execute Mr. Lee by lethal injection notwithstanding its prior representations and the plain language of the Alabama execution statute. Neither issue was presented to or considered by the Court before the Opinion and Judgment, because the parties were litigating this case on the shared premise that Mr. Lee would be executed by nitrogen hypoxia—not lethal injection. *See* Mot. at 14–15, 17. Rules 52(b) and 59(e) exist precisely so that a district court may amend its findings and judgment when post-judgment developments require clarification or modification.

III. The State's Statutory Arguments Mischaracterize the Relief Mr. Lee Seeks.

The State's invocation of sovereign immunity also misses the mark. *See* Resp. at 13–15 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984)). *Pennhurst* holds that the Eleventh Amendment bars a federal court from ordering state officials to conform their future conduct to state law—that is, from issuing prospective injunctive relief compelling compliance with a state-law obligation. *See* 465 U.S. at 106 ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). That rule has no application here.

It was the State—not Mr. Lee—that placed the meaning of Alabama's execution statute at issue by representing, after entry of the Opinion and Judgment, that Alabama law permits it to execute Mr. Lee by lethal injection notwithstanding his statutory election. This Motion, notably, does not assert a state-law cause of action or seek an injunction requiring Alabama officials to comply with state law. *See* Mot. at 18 n.9. Mr. Lee instead asks the Court only to amend its Opinion by removing its discussion that lethal injection and electrocution remain available under Alabama law. *Pennhurst* does not prohibit that narrow relief, and the State cites no case law suggesting otherwise.

Turning to the merits of Mr. Lee's statutory argument, the State does not dispute that § 15-18-82(a) permits the ADOC to disregard an inmate's election and

revert back to lethal injection only if the ***method*** of nitrogen hypoxia—as opposed to the nitrogen hypoxia ***Protocol***—is held unconstitutional. *See* Mot. at 19–20. The State does not dispute that § 15-18-82.1(c) expressly defines the term "held to be unconstitutional" to mean when the Alabama Supreme Court, the United States Supreme Court, or (if certiorari is denied) the Eleventh Circuit concludes the method is unconstitutional. *See* Mot. at 20–21. And the State does not dispute that none of those events has occurred.

The State instead relies exclusively on § 15-18-82.1(i), arguing that the provision makes clear that Mr. Lee's election does not limit the State's ability to use a method of execution. *See* Resp. at 14–15. It does not. Subsections (a) and (b) of the same statute give a condemned inmate the right to elect execution by nitrogen hypoxia over lethal injection, and outline the procedure for doing so.[6] If the State is

[6] *See* Ala. Code § 15-18-82.1(a) ("A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution or nitrogen hypoxia."); *id.* § 15-18-82.1(b) ("A person convicted and sentenced to death for a capital crime at any time shall have one opportunity to elect that his or her death sentence be executed by electrocution or nitrogen hypoxia. (1) The election for death by electrocution is waived unless it is personally made by the person in writing and delivered to the warden of the correctional facility . . . . [I]f a certificate of judgment is issued before July 1, 2002, the election must be made and delivered to the warden within 30 days after July 1, 2002. . . . (2) The election for death by nitrogen hypoxia is waived unless it is personally made by the person in writing and delivered to the warden of the correctional facility . . . . If a certificate of judgment is issued before June 1, 2018, the election must be made and delivered to the warden within 30 days of that date. . . .").

correct, the election provisions in subsections (a) and (b) would be rendered meaningless: every statutorily authorized method of execution would remain "available" to the ADOC regardless of the inmate's election. This is a non-starter. "A basic premise of statutory construction is that a statute is to be interpreted so that no words shall be discarded as being meaningless, redundant, or mere surplusage." *United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991) (citation omitted); *id.* ("It is our duty to give effect, if possible to every clause and word of a statute rather than to emasculate the entire section, as the Government's interpretation requires." (citation and quotation marks omitted)); *see also Richardson v. Stanford Props., LLC*, 897 So. 2d 1052, 1058 (Ala. 2004) ("There is a presumption that every word, sentence, or provision [of a statute] was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used." (citation and quotation marks omitted)).[7]

At a minimum, § 15-18-82.1(i)—which provides that a condemned inmate's election "shall at no time supersede the means of execution available to [ADOC]"—is ambiguous. The statute never explains the term "means of execution available."

[7] The State's interpretation likewise cannot be squared with § 15-18-82.1(c), which expressly provides when an inmate's election actually ceases to govern—namely, when nitrogen hypoxia has been "held to be unconstitutional" by the courts identified in the statute.

Is an execution method available because it is authorized by statute, addressed and implemented by a current ADOC protocol, challenged but found constitutional by a court on the merits, or something else? Nor does the statute explain when a method of execution is available. Is it when the inmate makes the election, when the warrant issues, when the protocol is finalized, or when the execution begins? Because Alabama's execution statute is penal in nature, any statutory ambiguities must be resolved in Mr. Lee's favor. *See* Mot. at 21 n.12 (citing *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.)).

To the extent the State points to Mr. Lee's deposition testimony and personal writings expressing distress about nitrogen hypoxia, *see* Resp. at 5 & n.4, those statements do not—and legally cannot—undo his statutory election. Section 15-18-82.1(b) gives a condemned inmate "one opportunity" to elect nitrogen hypoxia, "personally made by the person in writing and delivered to the warden." Ala. Code § 15-18-82.1(b)(2). There is no dispute that Mr. Lee timely made this election. Nothing in the statute allows an inmate's later commentary—in a deposition, an interview, or a prison newsletter—to revoke that election. If it did, any inmate's criticism of the method he elected would hand the State unilateral discretion to select a different one, and the entire election scheme in § 15-18-82.1 would be illusory.

CONCLUSION

For the aforementioned reasons and those stated in the opening Motion, the Court should amend the Opinion (ECF No. 187) and Judgment (ECF No. 188).

Dated: July 22, 2026

Respectfully submitted,

/s/ Angelique A. Ciliberti

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed, via the CM/ECF system, on July 22, 2026, which will cause Defendants' counsel to receive an electronic copy.

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TAB I

No. 26-12710

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JEFFERY LEE,

Plaintiff and Appellant,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, AND WARDEN, HOLMAN CORRECTIONAL FACILITY,

Defendants and Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama
No. 2:25-cv-680-ECM (Hon. Emily Coody Marks)

PLAINTIFF-APPELLANT'S OPENING BRIEF

Capital Case – Execution Scheduled for September 17, 2026

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 26.1-2, Plaintiff-Appellant Jeffery Lee hereby submits a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal:

1. Alabama Department of Corrections – Government agency involved in the underlying proceedings;
2. American Thoracic Society – Amicus curiae in prior appeal;
3. Antognini, Joseph F. – Defendants-Appellees' expert witness in the underlying proceedings;
4. Arnold & Porter Kaye Scholer LLP – Law firm representing Plaintiff-Appellant in the underlying proceedings and on appeal;
5. Bastarache, Julie A. – Plaintiff-Appellant's expert witness in the underlying proceedings;
6. Bickler, Philip E. – Plaintiff-Appellant's consulting expert witness in the underlying proceedings;
7. Bowdre, Alexander Barrett – Defendants-Appellees' counsel in the underlying proceedings and on appeal;
8. Bredar, Thomas – Counsel for amicus curiae American Thoracic Society in prior appeal;

9. Butts, Talmadge – Defendants-Appellees' counsel in the underlying proceedings and on appeal;

10. Ciliberti, Angelique – Plaintiff-Appellant's counsel in the underlying proceedings;

11. Cline, Kevin A. – Plaintiff-Appellant's counsel in the underlying proceedings and on appeal;

12. Hamm, John – Former Commissioner, Alabama Department of Corrections, Defendant-Appellee in the underlying proceedings;

13. Heath, Mark J. – Plaintiff-Appellant's consulting expert witness in the underlying proceedings;

14. Huynh, Tommy – Plaintiff-Appellant's counsel in the underlying proceedings;

15. Jones, R. Stanton – Counsel for amici curiae Professor John F. Stinneford and Professor Stephen I. Vladeck in prior appeals;

16. Kenny, Polly – Defendants-Appellees' counsel in the underlying proceedings and on appeal;

17. Lee, Jeffery – Plaintiff-Appellant in the underlying proceedings and on appeal;

18. Lovelace, Greg – Commissioner, Alabama Department of Corrections, Defendant-Appellee in the underlying proceedings and on appeal;

19. Marks, Hon. Emily Coody – United States District Judge for the Middle District of Alabama, judge in the underlying proceedings;

20. Marshall, Steve – Alabama Attorney General and Defendants-Appellants' counsel in the underlying proceedings and in prior appeals;

21. Overing, Robert – Defendants-Appellees' counsel in the underlying proceedings and in prior appeals;

22. Raybon, Terry – Warden, William C. Holman Correctional Facility, Defendant-Appellee in the underlying proceedings and on appeal;

23. Reichman, Dylan S. – Counsel for amicus curiae American Thoracic Society in prior appeal;

24. Schwartzstein, Richard M. – Plaintiff-Appellant's expert witness in the underlying proceedings;

25. Schoenfeld, Alan E. – Counsel for amicus curiae American Thoracic Society in prior appeal;

26. Sharpe, Paige H. – Plaintiff-Appellant's counsel in the underlying proceedings and on appeal;

27. Simpson, Lauren – Defendants-Appellees' counsel in the underlying proceedings and on appeal;

28. Stinneford, John F. – Amicus curiae in prior appeal;

29. Thompson, Anna K. – Plaintiff-Appellant's counsel in the underlying proceedings and on appeal;

30. Thompson, Brenton – Defendants-Appellees' counsel in the underlying proceedings and on appeal;

31. Thompson, Caleb – Plaintiff-Appellant's counsel in the underlying proceedings;

32. Trial Lawyers for Justice – Law firm representing amici curiae Professors John F. Stinneford and Stephen I. Vladeck in prior appeals;

33. Tutt, Andrew T. – Counsel for amici curiae Professor John F. Stinneford and Professor Stephen I. Vladeck in prior appeals;

34. Uria, Alejandra C. – Plaintiff-Appellant's counsel on appeal;

35. Vigeland, Sophie – Counsel for amicus curiae American Thoracic Society in prior appeal;

36. Vladeck, Stephen I. – Amicus curiae in prior appeal;

37. Weeks, Paxton – Defendants-Appellees' counsel on appeal;

38. Wiesner, Jocelyn A. – Plaintiff-Appellant's counsel in the underlying proceedings and on appeal;

39. Williams, James S. – Plaintiff-Appellant's expert witness in the underlying proceedings; and

40. Wilmer, Cutler, Pickering, Hale & Dorr LLP – Law firm representing amicus curiae American Thoracic Society in prior appeal.

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

/s/ Paige H. Sharpe
Paige H. Sharpe

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and Eleventh Circuit Rule 28-1(b), Plaintiff-Appellant Jeffery Lee ("Mr. Lee") respectfully requests oral argument.

This appeal presents important and novel questions arising from the first successful challenge to Alabama's nitrogen hypoxia execution protocol (the "Protocol"). After a three-day bench trial, an appeal, and remand, the district court held that the Protocol violates the Eighth Amendment and permanently enjoined the State from using it to execute Mr. Lee.[1] Instead of revising the Protocol to comport with the Constitution or proceeding with execution by firing squad—the alternative that Mr. Lee established is feasible, readily implemented, and significantly less harmful, *see Glossip v. Gross*, 576 U.S. 863, 877 (2015)—the State announced, in contravention of his method of execution election, its intent to execute him by lethal injection.

[1] Defendants-Appellees are the Commissioner of the Alabama Department of Corrections ("ADOC") and the Warden of William C. Holman Correctional Facility. 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 Defendants are state officials sued in their official capacities, this brief refers to them and their predecessors as "the State."

Mr. Lee filed a motion in the district court to amend the scope of the permanent injunction, arguing that the State is judicially and equitably estopped from executing him by lethal injection. Mr. Lee sought relief based on his previous challenge to Alabama's lethal injection protocol. After he elected nitrogen hypoxia, the State represented to the court overseeing that lawsuit that if he were executed, the method would be nitrogen hypoxia—not lethal injection. The State did so knowing that when Mr. Lee made his election, he had reserved the right to challenge the nitrogen hypoxia Protocol. The court and Mr. Lee accepted the State's representation, and the lethal injection lawsuit was accordingly dismissed as moot. The State now takes the opposite position: that Mr. Lee can and will be executed by lethal injection.

In denying Mr. Lee's motion to amend, the district court nevertheless concluded that the State could renege on its prior representation because the essential facts had changed—namely, Mr. Lee succeeded in challenging the nitrogen hypoxia Protocol. This appeal therefore presents questions about the intersection of methods-of-execution challenges and estoppel doctrines, which no appellate court has addressed. Mr. Lee submits that oral argument will assist the Court in deciding these important issues. Because his execution is scheduled for September 17, 2026, Mr. Lee respectfully requests oral argument before that date.

Contemporaneous with the filing of this brief, Mr. Lee is moving this Court to enjoin and stay his execution pending resolution of this appeal.

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JURISDICTIONAL STATEMENT

Mr. Lee's lawsuit, brought under 42 U.S.C. § 1983, challenged the constitutionality of Alabama's current nitrogen hypoxia Protocol. The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a), 2201(a), and 2202.

Following a full merits trial, and after remand from this Court, the district court held under *Glossip v. Gross*, 576 U.S. 863, 877 (2015), that the Protocol presents a substantial risk of serious harm and that execution by firing squad is a feasible and readily implemented alternative that would significantly reduce that risk. A702 (Doc. 187 at 24).[2] The district court then permanently enjoined the State from using the Protocol to execute Mr. Lee. A702–A703 (Doc. 187 at 24–25); A705 (Doc. 188). But because Mr. Lee had not challenged lethal injection or electrocution in bringing his case, the district court declined to enjoin the State from using those execution methods. A702–A703 (Doc. 187 at 24–25).

After entry of the judgment, the State sought a warrant to execute Mr. Lee by lethal injection. A735 (Doc. 204-1 at 3). Mr. Lee timely moved under Federal Rules of Civil Procedure 52(b) and 59(e) to amend the district court's opinion and

[2] Citations to the Appendix are styled "A##," followed by (1) the docket number in the district court and, if applicable, a pin-cite. This brief also cites publicly available opinions and docket entries from the parties' prior appeals and related proceedings. Those materials are not part of the Appendix and are cited for background purposes only.

judgment to declare that the State is estopped from proceeding by lethal injection. A707 (Doc. 204). On July 22, 2026, the district court denied the motion. A776 (Doc. 209).

Mr. Lee timely filed a notice of appeal on August 3, 2026. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in declining to apply judicial estoppel by treating Mr. Lee's successful challenge to the nitrogen hypoxia Protocol as a "change in essential facts," even though the State's agreement to dismiss Mr. Lee's lethal injection lawsuit accounted for the possibility that Mr. Lee would challenge the Protocol.

2. Whether the district court abused its discretion in declining to apply judicial estoppel where the asserted "change in essential facts" is attributable to the State, *i.e.*, its failure to implement a constitutional protocol for nitrogen hypoxia.

3. Whether the district court abused its discretion in declining to apply judicial estoppel by relying on execution delay, the victims' interests, and the State's interest in enforcing a criminal judgment, rather than focusing on protecting the integrity of the judicial process.

4. Whether the district court failed to give proper weight to the alternative method requirement under *Glossip*, where Mr. Lee established that execution by

firing squad is a feasible and readily implemented alternative that would significantly reduce the substantial risk of serious harm posed by the nitrogen hypoxia Protocol.

5. Whether the district court abused its discretion in declining to apply equitable estoppel by focusing on whether the State anticipated its later change in position, rather than on the material facts the State knew when it made its prior representation.

INTRODUCTION

This appeal concerns whether the State may execute Mr. Lee by lethal injection after previously representing to him and to a federal district court that he would be executed by nitrogen hypoxia—not lethal injection.

In 2016, Mr. Lee filed a lawsuit challenging the State's lethal injection protocol in the Southern District of Alabama ("Southern District"). After the Legislature authorized nitrogen hypoxia in 2018, Mr. Lee timely elected that method while expressly reserving his right to challenge the constitutionality of any nitrogen hypoxia protocol that the State might later adopt. In response, the State represented to Mr. Lee and to the Southern District that "if he is to be executed, Defendants will carry out that execution by nitrogen hypoxia." A749 (Doc. 204-4 at 2–3, ¶ 6). Relying on that representation, the Southern District dismissed the lawsuit as moot.

After the State took years to develop the Protocol—and after a full merits trial, an appeal, and remand—the district court held that the State's nitrogen hypoxia Protocol violates the Eighth Amendment. It found that the Protocol presents a substantial risk of serious harm and that execution by firing squad—the alternative method Mr. Lee proposed—is a feasible and readily implemented alternative that would significantly reduce that risk. The district court then permanently enjoined the State from executing Mr. Lee under the existing Protocol. After appealing to this Court and to the Supreme Court to stay the judgment pending appeal, and after losing both motions, the State voluntarily dismissed its appeal with prejudice.

Rather than revise the current Protocol to one that passes constitutional muster or continue to defend it on appeal, the State announced that it would execute Mr. Lee by lethal injection instead. Mr. Lee accordingly moved to amend the scope of the injunction, arguing that the State was judicially and equitably estopped from abandoning its prior litigation position that it would execute him by nitrogen hypoxia, not lethal injection. The relief sought did not enlarge the remedy for the Eighth Amendment violation that Mr. Lee already proved and obtained; it rested on the independent equitable wrong that resulted from the State's inconsistent litigation positions and that became apparent only when the State moved to execute Mr. Lee by lethal injection. The district court denied the motion, however, citing Mr. Lee's

successful challenge of the Protocol as a "change in essential facts" that excused the State's reversal. A784 (Doc. 209 at 9). That was an abuse of discretion.

First, Mr. Lee's successful challenge is not the type of changed circumstance that judicial or equitable estoppel contemplates. When the State committed to execute Mr. Lee by nitrogen hypoxia in 2018, it knew that he had expressly reserved the right to challenge any future protocol. A746 (Doc. 204-3). That he might challenge that protocol and ultimately prevail were therefore necessarily part of the State's calculus. The asserted changed circumstance, moreover, resulted from the State's failure to develop a constitutional protocol, not any inequitable conduct by Mr. Lee. The district court failed to account for either point.

Second, the district court gave dispositive weight to execution delay, the victims' interests, and the State's interest in carrying out Mr. Lee's sentence. But those considerations do not protect the integrity of the judicial process—the very purpose of the doctrine judicial estoppel. In any event, most if not all of the delay the district court identified is attributable to the State, which inexplicably spent five years developing a protocol that the district court ultimately found unconstitutional. *See Lee v. Comm'r, Ala. Dep't of Corr.*, 2026 WL 1741802, at *7–8 (11th Cir. June 10, 2026) (concluding that the State's attempts to attribute any delay to Mr. Lee are "not well taken"). Mr. Lee should not be forced to bear the consequences of the State's failures.

The district court's reliance on delay, moreover, failed to account for its prior finding that firing squad is a feasible and readily implemented alternative that would significantly reduce the risk of harm associated with the Protocol. Mr. Lee could prevail on his Eighth Amendment claim only by proving that firing squad is a feasible and readily implemented alternative—a finding that bears directly on the hardship associated with estopping the State from reverting to lethal injection. The district court erred in failing to give that finding any meaningful weight.

Third, the court erred in rejecting equitable estoppel by focusing on whether the State intended to honor its commitment rather than the material facts the State knew when it made its representation in the first place. In 2018, the State knew that Mr. Lee had elected nitrogen hypoxia and that he had reserved the right to challenge any future protocol. It nevertheless made an unqualified representation that, if Mr. Lee were executed, the method would be nitrogen hypoxia.

The order denying Mr. Lee's motion to amend should be reversed.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Mr. Lee's Prior Lethal Injection Lawsuit and His Statutory Election of Nitrogen Hypoxia

In 2016, Mr. Lee filed a lawsuit in the Southern District of Alabama challenging the State's three-drug lethal injection protocol under the Eighth Amendment. *See* Dkt., *Lee v. Dunn*, No. 1:16-cv-473-WS-B (S.D. Ala.). While that

case was pending, the Alabama Legislature authorized a new method of execution that it termed "nitrogen hypoxia" and provided condemned prisoners thirty (30) days to elect the method. *See* Ala. Code § 15-18-82.1. On June 26, 2018, Mr. Lee timely elected nitrogen hypoxia: "Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection." A746 (Doc. 204-3). That election was predicated on the State's obligation to develop a constitutionally valid protocol to carry out execution by nitrogen hypoxia. Mr. Lee's written election form thus expressly reserved his "right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia." *Id*.

After Mr. Lee's election, the parties jointly moved to dismiss the lethal injection action as moot, representing to the Southern District that "if he is to be executed, Defendants ***will*** carry out that execution by nitrogen hypoxia." A749 (Doc. 204-4 at 2–3, ¶ 6) (emphasis added). 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.

A744 (Doc. 204-2) (emphasis added).

B. The Development of the Nitrogen Hypoxia Protocol

In August 2023, the State released a protocol for executions by nitrogen hypoxia. *See* A160 (Doc. 138 at 3). Lawyers in the Office of the Attorney General with no medical or scientific background drafted that Protocol. *See* A86, A96 (Doc. 119-2 at 10, 20, Nos. 10, 19); A153–A156 (Doc. 119-3 at 56–59, Nos. 243, 244–252. 255–257); A379 (4/27/2026 Tr. at 217:6–8). They did not consult with medical professionals, scientists, or engineers in the drafting process. *See* A86 (Doc. 119-2 at 10, No. 10); A125–A127 (Doc. 119-3 at 27–29, Nos. 92–104); A380 (4/27/2026 Tr. at 218:3–23); A408 (4/27/2026 Tr. at 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* A380–A381 (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* A160 (Doc. 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). A563, A577, A580 (4/28/2026 Tr. at 138:22–25, 152:21–24, 155:17–19). None sought to determine when a prisoner would lose consciousness. A577–A578 (4/28/2026 Tr. at 152:25–153:6). And none assessed whether the prisoner would suffer air hunger or

pain. A579–A581 (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 Nitrogen Hypoxia Lawsuit

On August 22, 2025, Mr. Lee filed his lawsuit challenging the Protocol under the Eighth Amendment. A24 (Doc. 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." A50 (Doc. 1 at 27); *see also* A74 (Doc. 40 at 23) (same). Mr. Lee identified execution by firing squad as that alternative. A71–A73 (Doc. 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 Lee v. Lovelace*, 2026 WL 1493098, at *1 (M.D. Ala. May 28, 2026), *rev'd & remanded*, 2026 WL 1651147 (11th Cir. June 8, 2026) (per curiam). On May 28, 2026, the district court entered judgment for the State. *Id*. at *26. Although the district court found that a prisoner would consciously experience severe air hunger for one to three minutes, *id.* at *25, it concluded that Mr. Lee had not established an Eighth Amendment violation. *Id.* at *26.

This Court reversed, concluding that the district court's findings established a substantial risk of serious harm. *See Lee*, 2026 WL 1651147, at *6. But because the district court failed to address Mr. Lee's proposed alternative—execution by firing squad—this Court remanded the case for additional findings. *Id*. at *8.

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. A702 (Doc. 187 at 24). The district court permanently enjoined the State from executing Mr. Lee using the Protocol. A702–A703 (Doc. 187 at 24–25); A705 (Doc. 188). 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. A702–A703 (Doc. 187 at 24–25). It reasoned that he had challenged only the nitrogen hypoxia Protocol—not lethal injection or electrocution. A700–A703 (Doc. 187 at 22–25).

The State sought appellate relief, but the district court, this Court, and the Supreme Court declined to stay or vacate the permanent injunction. *See Lee v. Lovelace*, 2026 WL 1678986 (M.D. Ala. June 10, 2026); *Lee v. Comm'r, Ala. Dep't of Corr.*, 2026 WL 1741802 (11th Cir. June 10, 2026); *Lovelace v. Lee*, 2026 WL 1694504 (U.S. June 11, 2026).

B. The State Reverts to Lethal Injection

After the Supreme Court's denial of the State's request for emergency relief, the State changed course. On June 12, 2026, it asked Mr. Lee to consent to dismiss the federal appeal defending its Protocol.[3] That same day, it filed a motion in the Alabama Supreme Court seeking a new execution warrant and announcing that the execution method would instead be "via lethal injection with the three-drug cocktail adopted in 2014." A735 (Doc. 204-1 at 3).

On July 7, 2026, Mr. Lee timely moved under Rules 52(b) and 59(e) to amend the district court's opinion and judgment in light of the State's post-judgment change in positions. A707 (Doc. 204). The motion argued, among other things, that the State was judicially and equitably estopped from executing him by lethal injection. A716–A724 (Doc. 204 at 10–18).[4]

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[3] Mr. Lee agreed, and on June 15, 2026, the State filed a stipulation to dismiss the appeal with prejudice, which this Court granted on June 23, 2026. *See* Stip. of Dismissal, *Lee v. Comm'r, Ala. Dep't of Corr.*, No. 26-12027 (11th Cir. June 15, 2026) (ECF No. 19); Order, *Lee v. Comm'r, Ala. Dep't of Corr.*, No. 26-12027 (11th Cir. June 23, 2026) (ECF No. 20).

[4] Mr. Lee also argued that, under Alabama Code § 15-18-82.1, his timely election of nitrogen hypoxia precludes the State from executing him by lethal injection or electrocution. The district court declined to reach that issue, concluding that *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), barred it from granting the requested relief. A788–A790 (Doc. 209 at 13–15). Although Mr. Lee respectfully disagrees with that conclusion, he does not appeal that aspect of the district court's decision and has instead filed an action in the Circuit Court of Montgomery County seeking a declaration on the meaning of § 15-18-82.1. That action is pending.

On July 22, 2026, the district court denied the motion. A776 (Doc. 209). The district court assumed without deciding that the factors supporting judicial estoppel, *see New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001), and equitable estoppel, *see Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1326 (11th Cir. 2008), were satisfied. A784 (Doc. 209 at 9). The district court nevertheless concluded that the State's reversal was warranted because of a "change in essential facts," namely that Mr. Lee had successfully challenged the Protocol and secured an injunction against its use. A784–A785 (Doc. 209 at 9–10). The court also relied on the State's and victims' interests in enforcing the death sentence and on the delay that might result if the State had to revise the Protocol to conform with the Constitution or had to implement firing squad. A785–A787 (Doc. 209 at 10–12). As to equitable estoppel, the district court further expressed doubt whether the State misrepresented material facts or knew in 2018 that it would later seek to execute Mr. Lee by lethal injection. A784 (Doc. 209 at 9 & n.8).

SUMMARY OF THE ARGUMENTS

The district court abused its discretion in denying Mr. Lee's motion to amend the judgment.

First, the district court misapplied *New Hampshire*, 532 U.S. at 749–56, by treating Mr. Lee's successful challenge to the Protocol as a "change in essential facts" that excused the State's inconsistent positions. A784–A785 (Doc. 209 at 9–

10). But the State ***knew*** when it made its representation that Mr. Lee reserved the right to challenge any future nitrogen hypoxia protocol. A746 (Doc. 204-3). And it ***knew*** that he could prevail should it fail to develop a constitutionally valid protocol. Mr. Lee's ultimate success in challenging the Protocol was therefore an anticipated development the State considered when it committed to execute him by nitrogen hypoxia and not lethal injection.

The district court's asserted change in essential facts, moreover, was attributable to ***the State***, not Mr. Lee. The State developed the Protocol without consulting medical or scientific professionals and without investigating whether it would cause the prisoner any pain or suffering. The district court's permanent injunction—barring the State from executing Mr. Lee under the Protocol—was therefore a result of the State's own implementation choices. Equity does not permit a party to invoke the constitutional failure of its own conduct as justification for its inconsistent positions.

Second, the district court relied on equitable considerations—execution delay, the victims' interests, and the State's interest in enforcing its criminal judgment—that are not relevant to the goals underlying judicial estoppel. A785–A787 (Doc. 209 at 10–12). Judicial estoppel exists to protect the integrity of the courts by preventing litigants from obtaining judicial benefits through inconsistent positions.

The district court's analysis instead treated Mr. Lee's exercise of his statutory and constitutional rights as inequitable conduct. But Mr. Lee timely elected nitrogen hypoxia as Alabama law permitted, expressly preserved his right to challenge the State's future protocol as offered and agreed to by the State, and proved at trial that the Protocol violates the Eighth Amendment. The district court abused its discretion by transforming Mr. Lee's successful assertion of these rights into something inequitable to justify the State's backtracking.

In doing so, the district court also failed to give proper weight to the alternative method showing that Mr. Lee made under *Glossip*, 576 U.S. at 877. Mr. Lee prevailed on his Eighth Amendment claim only after proving that execution by firing squad is a feasible and readily implemented alternative that would significantly reduce the substantial risk of serious harm that the Protocol poses. The State disregarded that adjudicated alternative and substituted a method of execution that Mr. Lee never litigated (because it had induced him to give up his prior litigation). Having found the Mr. Lee met his burden under *Glossip*, the district court then failed to consider that finding in balancing the equities.

Third, equitable estoppel independently bars the State's reversal. The State made an unqualified representation to induce dismissal of Mr. Lee's lethal injection lawsuit, and he detrimentally relied on that representation exactly as the State intended. But the district court instead focused on whether, in 2018, the State

anticipated that it would later change positions. Equitable estoppel turns on the material facts the State knew when it made its representation—not whether it foresaw every future litigation development.

STANDARD OF REVIEW

This Court reviews a denial of a Rule 52(b) or Rule 59(e) motion for abuse of discretion. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1343 n.20 (11th Cir. 2010). A district court abuses its discretion by "fail[ing] to apply the proper legal standard or to follow proper procedures in making the determination or bases an award upon findings of fact that are clearly erroneous." *United States v. Munoz*, 112 F.4th 923, 932 (11th Cir. 2024); *see also Talavera v. Sch. Bd. of Palm Beach Cnty.*, 129 F.3d 1214, 1216 (11th Cir. 1997) ("We note that '[t]he abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.'" (citation omitted)).[5]

[5] A Rule 59(e) or Rule 52(b) motion may be granted based on a "manifest error[] of law or fact." *Jacobs*, 626 F.3d at 1344 (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (per curiam)). The district court did not decide which ground applied here, instead expressing doubt that any published Eleventh Circuit decision recognizes prevention of a "manifest injustice" as an available basis for Rule 59(e) relief. A780 (Doc. 209 at 5 n.5). The district court assumed, without deciding, that some basis for relief was available under Mr. Lee's theory and proceeded directly to the merits of his estoppel arguments. A780, A784 (Doc. 209 at 5 n.5, 9). This Court likewise need not resolve that threshold categorization. Because the district court reached the merits, the question on appeal is whether its resolution of those merits—not the underlying label attached to Mr. Lee's theory—reflects an abuse of discretion, including whether the court's discretion "was guided by erroneous legal

ARGUMENT

I. THE DISTRICT COURT MISAPPLIED THE DOCTRINE OF JUDICIAL ESTOPPEL

Judicial estoppel protects "'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 (citations omitted). The doctrine applies when a litigant obtains judicial acceptance of one position and later seeks an advantage through a clearly inconsistent position. *Id*. at 750–51. The Supreme Court has identified three factors to consider in the judicial estoppel analysis: (1) whether the later position is clearly inconsistent with the earlier position; (2) whether a court accepted the earlier position, such that acceptance of the later position would create the perception that one court had been misled; and (3) whether the inconsistent position would produce an unfair advantage or detriment. *Id.*

The relevant facts here are undisputed and support a finding of judicial estoppel. ***First***, the State previously stated that, if Mr. Lee were executed, it would be by nitrogen hypoxia—not lethal injection. A749–A750 (Doc. 204-4 at 2–3 ¶ 6). The State nonetheless now intends to execute him by lethal injection. A735 (Doc. 204-1 at 3). Those positions are clearly inconsistent. ***Second***, the Southern District

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conclusions." *Talavera*, 129 F.3d at 1216, (citation omitted).

accepted the State's representation and dismissed Mr. Lee's lethal injection lawsuit as moot. A744 (Doc. 204-2). ***Third***, the State obtained an unfair advantage: it secured the dismissal of a constitutional challenge to its lethal injection protocol without litigating the claim's merits. The State also imposed an unfair detriment on Mr. Lee.[6] He lost years during which the lethal injection claim could have proceeded through discovery, expert development, trial, and appeal in the normal course. If required to refile that lawsuit today, Mr. Lee would have to litigate under a compressed schedule accompanying an execution warrant, likely through an expedited preliminary injunction proceeding rather than a full merits trial.[7]

The district court assumed that the *New Hampshire* factors support judicial estoppel, *see* A784 (Doc. 209 at 9), but declined to apply the doctrine because it believed that "essential facts" had changed to excuse the State's reversal. *See* A784–A785 (Doc. 209 at 9–10). That reasoning was an abuse of discretion.[8]

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[6] The district court doubted that Mr. Lee had shown an unfair detriment; it did not dispute that the State obtained an unfair advantage. A784 (Doc. 209 at 9 n.8). Either showing satisfies the third *New Hampshire* factor, which asks 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." 532 U.S. at 751 (emphasis added; citations omitted).

[7] *See, e.g.*, Br. of Stephen I. Vladeck as Amicus Curiae in Opp'n to the Application, *Lovelace v. Lee*, No. 25A1381 (U.S. June 11, 2026) (explaining the implications of obtaining a preliminary versus permanent injunction in a methods-of-execution case).

[8] Nor does the general reluctance to estop sovereigns counsel a different result. *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 369 (1946), on which the district

A. Mr. Lee's Successful Challenge to the Nitrogen Hypoxia Protocol Was Not a Change in Essential Facts Excusing the State's Reversal

The district court abused its discretion by concluding that "essential facts" had changed, because Mr. Lee initially elected execution by nitrogen hypoxia but later challenged the State's nitrogen hypoxia Protocol and obtained a permanent injunction against its use. A784–A785 (Doc. 209 at 9–10).

First, the district court misapplied *New Hampshire* by treating Mr. Lee's successful constitutional challenge as a "change in facts essential to the prior judgment" that excused the State's inconsistent positions. A784 (Doc. 209 at 9) (citing *New Hampshire*, 532 U.S. at 756). Courts have rejected claimed "changed circumstances" where the later development merely altered a party's litigation incentives or rested on facts already known when the earlier position was taken. *See Henry v. Nationwide Ins. Co.*, 2007 WL 9717743, at *5 (S.D. Ala. Nov. 5, 2007) (although changed circumstances altered the plaintiff's motives, judicial estoppel

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court relied for the proposition that "ordinarily the doctrine of estoppel . . . is not applied to states," A783 (Doc. 209 at 8), involved competing sovereign tax-lien priorities, *see Illinois*, 329 U.S. at 363—not, as here, a deliberate representation made to secure a tactical advantage against an individual litigant. The related caveat in *New Hampshire* for changes reflecting "a change in public policy" or that would "compromise a governmental interest in enforcing the law," 532 U.S. at 755–56, has no application here. Alabama has changed neither its execution statutes nor its position that nitrogen hypoxia remains an authorized method, and estopping the State from switching to lethal injection would not impair its interest in enforcing Mr. Lee's sentence—only the method by which that sentence is carried out.

applied); *Spencer v. Annett Holdings, Inc.*, 757 F.3d 790, 797–98 (8th Cir. 2014) (rejecting changed circumstances argument where the later litigation position rested on facts known earlier).

This understanding derives from *New Hampshire* itself. The Supreme Court borrowed the "change in facts essential" language from the doctrine of collateral estoppel. *See New Hampshire*, 532 U.S. at 756 (citing *Montana v. United States*, 440 U.S. 147, 159 (1979)). Under that doctrine, a later development defeats collateral estoppel only if it constitutes "a material differentiating fact that would alter the legal inquiry." *CSX Transp., Inc. v. Bd. of Maint. of Way Emps.*, 327 F.3d 1309, 1317–18 (11th Cir. 2003); *Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1504 (11th Cir. 1984) (explaining that the "changed circumstances must be significant and must create new legal conditions") (internal quotations omitted); *EEOC v. Am. Airlines, Inc.*, 48 F.3d 164, 168 (5th Cir. 1995) (changed facts defeat collateral estoppel only if they are "essential to the judgment" and "of controlling significance" (citations omitted)). Developments that a party anticipates do not suffice. *See, e.g.*, *Monahan v. NYC Dep't of Corr.*, 214 F.3d 275, 289–90 & n.14 (2d Cir. 2000) (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384–85 (1992)).

Here, when the State represented to the Southern District that it would use nitrogen hypoxia to execute Mr. Lee, it had already accounted for the possibility of

the changed circumstance the district court identified. The State ***knew*** that ADOC had not developed a protocol for nitrogen hypoxia and that Mr. Lee had expressly reserved the right to challenge the constitutionality of whatever protocol ADOC might later adopt. A746 (Doc. 204-3). Yet the State placed no conditions on its representation to the Southern District. It stated, without qualification, that Mr. Lee would be executed by nitrogen hypoxia. The district court never addressed the State's understanding of Mr. Lee's reservation of rights.

Nor did Mr. Lee's successful challenge alter any facts material to the State's representation. To the extent the district court understood the purported "change in essential facts" to be that Mr. Lee no longer seeks execution by nitrogen hypoxia, that premise is incorrect. Whatever Mr. Lee's personal views about nitrogen hypoxia, the ***legal*** position he took—and the position the State represented to the Southern District and benefitted from—is a formal statutory election that remains on file and has never been rescinded. His lawsuit challenged only the State's implementation of nitrogen hypoxia through the current Protocol, not the constitutionality of nitrogen hypoxia as a method of execution in the abstract. A71–A73 (Doc. 40 at 20–22). Had the State adopted a constitutional protocol for carrying out executions by nitrogen hypoxia, Mr. Lee's election would have remained fully operative—and his lawsuit would have been unnecessary.

Second, even assuming that Mr. Lee's successful challenge of the Protocol could be viewed as a change in essential facts, the district court failed to account for the State's role in creating that change. The injunction did not result from some external event beyond the State's control, but from its failure to implement a constitutional protocol for nitrogen hypoxia. Despite spending five years developing a protocol, the State failed to consult with medical professionals, scientists, or engineers and failed to conduct tests aimed at evaluating pain or suffering. *See supra* pp. 8–9. Even after prisoners started to challenge the Protocol, the State never investigated whether the Protocol could cause any pain or suffering. *See id*.

The State cannot invoke its own constitutional failure to escape its prior litigation position that Mr. Lee would be executed by lethal injection. Equity has long recognized that a party may not "take advantage of [its] own wrong." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119 (1991) (quoting the longstanding equitable maxim). Consistent with that principle, courts have rejected attempts to characterize a party's own intervening conduct as the "changed circumstance" that *New Hampshire* contemplates. *See Abernathy v. Becon Constr. Co.*, 2016 WL 11384340, at *6 (E.D. Tex. June 22, 2016) (rejecting defendant's argument that its own termination of an arbitration agreement constituted the "changed circumstance" under *New Hampshire*).

The district court's approach instead creates a one-way arrangement: the State obtains a dismissal of litigation by representing that it will use nitrogen hypoxia; it honors that representation if its Protocol survives constitutional review; but if its Protocol is held unconstitutional, it invokes that failure as grounds for abandoning the representation. The State thus bears none of the litigation consequences of its earlier representation. That is precisely the sort of change in positions based on "the exigencies of the moment" that judicial estoppel exists to prevent. *New Hampshire*, 532 U.S. at 749–50.

B. The District Court Improperly Substituted Execution-Related Injunction Factors for Judicial Estoppel's Institutional Inquiry

The district court also abused its discretion by citing execution delay, the victims' interests, and the State's interest in enforcing its criminal judgment. A785–A787 (Doc. 209 at 10–12). In doing so, the court relied on *Hill v. McDonough*, 547 U.S. 573 (2006), and *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006)—cases addressing stays of execution and permanent injunctions, not judicial estoppel.

Judicial estoppel serves a different purpose: to protect the integrity of the judicial process by preventing litigants from obtaining judicial benefits through inconsistent positions. *New Hampshire*, 532 U.S. at 749–51. That inquiry concerns the relationship between the litigant and the judicial system, not the comparative hardships facing the parties. *See Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002) ("The doctrine of judicial estoppel protects the integrity of the

judicial system, not the litigants."), *overruled in part on other grounds*, *Slater v. U.S. Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017) (en banc). By focusing on the delay in carrying out Mr. Lee's sentence, the district court effectively replaced the judicial estoppel inquiry with the equitable balancing applicable to stays of execution. That was an abuse of discretion.

What is more, the district court's delay analysis penalized Mr. Lee for exercising his statutory and constitutional rights. The Legislature provided prisoners with one opportunity to elect nitrogen hypoxia, *see* Ala. Code § 15-18-82.1, and Mr. Lee took it. Not knowing the details of how he would be executed, he expressly reserved his right to challenge the State's implementation of that method. When the State failed to develop a constitutionally valid protocol, he successfully challenged the Protocol in court. As this Court recognized, the public has "an interest in ensuring that executions are carried out consistently with the Constitution." *Lee*, 2026 WL 1741802, at *8. Yet the district court held these facts ***against*** Mr. Lee. It reasoned that because Mr. Lee's statutory election and successful challenge of the Protocol had already delayed his execution, requiring the State to revise that Protocol or proceed by firing squad would result in additional delay in justice. A786–A787 (Doc. 209 at 11–12).

None of that delay, in any event, reflects inequitable conduct ***by Mr. Lee***. *See Lee*, 2026 WL 1741802, at *7–8 ("[T]he State's arguments concerning delay [by Mr.

Lee], on this record, are not well taken. . . . The equities, we believe, favor Mr. Lee. And even if they do not favor Mr. Lee, they do not favor the Commissioner."). The State—not Mr. Lee—spent more than five years developing the Protocol, which was ultimately determined to be unconstitutional. Had the State adopted a constitutional Protocol in the first place, no injunction would have prevented the State from honoring its commitment to execute Mr. Lee by nitrogen hypoxia. Equity cannot attribute to Mr. Lee the consequences of the State's implementation choices merely because he successfully proved the Protocol unconstitutional.

Even if the *eBay*/*Hill* factors the district court imported bore on the estoppel inquiry, they favor Mr. Lee, not the State. Courts weighing equitable relief do not ignore what the record already establishes; they treat previously adjudicated determinations as important, if not conclusive, factors in shaping that relief. *Cf. Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1254 (11th Cir. 2002) (equitable relief "is neither dependent on nor bound by existing legal rights," but "existing legal entitlements are important factors in formulating an equitable decree" (quoting *Idaho v. Oregon*, 462 U.S. 1017, 1025 (1983))); *Oriental Fin. Grp., Inc. v. Cooperativa de Ahorro y Crédito Oriental*, 832 F.3d 15, 37 (1st Cir. 2016) (remanding for the district court to reassess the equitable factors governing an expanded injunction in light of the law-of-the-case finding that the marks infringed).

Here, in weighing execution delay, the district court observed that Mr. Lee had met the second prong of *Glossip* in showing that firing squad is a "feasible and readily implemented" alternative. A787 (Doc. 209 at 12 n.9); *see also Nance v. Ward*, 597 U.S. 159, 170 (2022) (explaining that a proposed alternative can be feasible and readily implemented even if it would require "a change in state law" or "changing an agency protocol"). That adjudicated finding is strong, if not dispositive, evidence of how little hardship the State would actually bear from estoppel. The State has an available, already-litigated path to carry out Mr. Lee's sentence without resorting to a method that the State committed it would not use for him. Weighed against that finding, the State's asserted interest in the flexibility to switch to lethal injection amounts to little more than a preference for administrative convenience over a path it has simply declined to take—not the kind of hardship that should tip the balance in the State's favor, let alone excuse the State's inconsistent positions. To be clear, Mr. Lee does not contend that *Glossip* automatically entitles a prevailing plaintiff to execution by the alternative method he proposed. But once the district court found that firing squad satisfied *Glossip*'s demanding alternative method requirement, that adjudicated finding should have been weighed heavily in deciding whether equity permitted the State to abandon its prior representation.

II. EQUITABLE ESTOPPEL INDEPENDENTLY BARS THE STATE FROM TAKING INCONSISTENT POSITIONS.

Equitable estoppel provides an independent basis for relief. The doctrine protects parties who reasonably rely on another's representations to their detriment. *Busby*, 513 F.3d at 1326. Courts applying the equitable estoppel consider whether:

> (1) the party to be estopped misrepresented material facts; (2) the party to be estopped was aware of the true facts; (3) the party to be estopped intended that the misrepresentation be acted on or had reason to believe the party asserting the estoppel would rely on it; (4) the party asserting the estoppel did not know, nor should it have known, the true facts; and (5) the party asserting the estoppel reasonably and detrimentally relied on the misrepresentation.

Id.

The district court questioned whether the State misrepresented a material fact or knew the "true facts," reasoning that the State did not know in 2018 that it would later seek to execute Mr. Lee by lethal injection. A784 (Doc. 209 at 9 n.8). But equitable estoppel does not require the State to foresee every future litigation development. The relevant inquiry is whether the State "was aware of the true facts" underlying the representation it chose to make. *Busby*, 513 F.3d at 1326.

Here, the "true facts" were that ADOC had not yet developed a protocol for nitrogen hypoxia and that Mr. Lee had expressly reserved the right to challenge whatever protocol ADOC might later adopt. Despite knowing these facts, the State made an unqualified representation that, "if [Mr. Lee] is to be executed," the method would be nitrogen hypoxia. A749–A750 (Doc. 204-4 at 2–3 ¶ 6). It did not say, for

example, that Mr. Lee would be executed by nitrogen hypoxia only if he declined to challenge the future protocol or only if he lost that challenge.[9]

The remaining elements are likewise satisfied. The State plainly intended its representation to be acted upon or, at minimum, reasonably believed it would be. Indeed, that was the entire purpose of the State's representation: to establish mootness and secure dismissal of Mr. Lee's pending lethal injection action. Mr. Lee agreed to dismiss his lawsuit, and the Southern District dismissed it as moot. Nor was the State's commitment to execute Mr. Lee by nitrogen hypoxia confined to the Southern District litigation. The parties litigated Mr. Lee's nitrogen hypoxia case in the district court on the same premise, with the State objecting to discovery on lethal injection on the ground that he had elected nitrogen hypoxia.[10] *See, e.g.*, A772–A773 (Doc. 204-6 at 21–22, Nos. 30, 31).

[9] The district court suggests that intervening events caused the State to deviate from its "prior intentions." A784 (Doc. 209 at 9 n.8). That explanation does not help the State. Whatever the State's subjective intent in 2018, the representation it actually made contained no qualification, and Mr. Lee was entitled to rely on the representation as made—not on a hedge the State could have included but chose not to.

[10] Mr. Lee served discovery about lethal injection because, at the time, he also had proposed medical-aid-in-dying ("MAID") as an alternative under *Glossip*, and documents related to the IV team were relevant to the feasibility of MAID. He dropped MAID as an alternative before trial. *See* Stip., *Lee v. Hamm*, No. 2:25-cv-680-ECM (M.D. Ala. Mar. 24, 2026) (ECF No. 98); Order, *Lee v. Lovelace*, No. 2:25-cv-680-ECM (M.D. Ala. May 26, 2026) (ECF No. 172).

Mr. Lee's reliance on the State's representation that he would be executed by nitrogen hypoxia was therefore objectively reasonable.[11] Before the judgment, he had no reason to know that the State would renege on its agreement and seek to execute him by lethal injection if the Protocol failed constitutional scrutiny. As a result, Mr. Lee lost years during which his lethal injection challenge could have proceeded through discovery, expert development, trial, and appeal before an execution became imminent. *See supra* pp. 6–7. This detriment—inducing Mr. Lee to refrain from asserting his legal rights—is precisely the type of reliance that equitable estoppel protects. *See Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232–35 (1959) (applying equitable estoppel where the defendant's representations induced the plaintiff to refrain from timely filing suit).

Having induced Mr. Lee's reliance and obtained dismissal of his lethal injection lawsuit, the State cannot avoid the consequences of its representation simply because honoring it later became inconvenient. The district court therefore abused its discretion in declining to apply equitable estoppel.

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[11] The reasonableness of Mr. Lee's reliance is reinforced by the fact that other prisoners challenging lethal injection also dismissed their lawsuits based on their election of nitrogen hypoxia after similar representations from the State. *See* Jt. Mot. to Dismiss ¶ 5, *In re Ala. Execution Protocol Litig.*, No. 2:12-cv-316-WKW (M.D. Ala. July 10, 2018) (ECF No. 427) (the parties jointly represented that "Plaintiffs have elected to be executed by nitrogen hypoxia, rather than lethal injection . . . . Plaintiffs' claims and causes of action are now moot because ***their executions will be carried out at the appropriate time by nitrogen hypoxia***" (emphasis added)).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's July 22, 2026 Memorandum Opinion and Order, *see* A776 (Doc. 209), with instructions to amend the June 9, 2026 Opinion, *see* A679 (Doc. 187), and Judgment, *see* A705 (Doc. 188), to permanently enjoin the State from executing Mr. Lee by lethal injection.

Dated: August 12, 2026

Respectfully submitted,

/s/ Paige H. Sharpe

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4, this brief contains 7069 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in Times New Roman 14-point font.

Dated: August 12, 2026

By: */s/ Paige H. Sharpe*
Paige H. Sharpe

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 12, 2026, a true copy of the foregoing brief has been filed electronically using the Court's CM/ECF system. All parties are represented by registered CM/ECF users and will be served by the appellate CM/ECF system.

By: */s/ Paige H. Sharpe*
Paige H. Sharpe

TAB J

No. 26-12710

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JEFFERY LEE,

Plaintiff and Appellant,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, AND WARDEN, HOLMAN CORRECTIONAL FACILITY,

Defendants and Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama
No. 2:25-cv-680-ECM (Hon. Emily Coody Marks)

PLAINTIFF-APPELLANT'S EMERGENCY MOTION FOR STAY OF EXECUTION

Capital Case – Execution Scheduled for September 17, 2026

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 26.1-2, Plaintiff-Appellant Jeffery Lee hereby submits a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal:

1. Alabama Department of Corrections – Government agency involved in the underlying proceedings;
2. American Thoracic Society – Amicus curiae in prior appeal;
3. Antognini, Joseph F. – Defendants-Appellees' expert witness in the underlying proceedings;
4. Arnold & Porter Kaye Scholer LLP – Law firm representing Plaintiff-Appellant in the underlying proceedings and on appeal;
5. Bastarache, Julie A. – Plaintiff-Appellant's expert witness in the underlying proceedings;
6. Bickler, Philip E. – Plaintiff-Appellant's consulting expert witness in the underlying proceedings;
7. Bowdre, Alexander Barrett – Defendants-Appellees' counsel in the underlying proceedings and on appeal;
8. Bredar, Thomas – Counsel for amicus curiae American Thoracic Society in prior appeal;

9. Butts, Talmadge – Defendants-Appellees' counsel in the underlying proceedings and on appeal;

10. Ciliberti, Angelique – Plaintiff-Appellant's counsel in the underlying proceedings;

11. Cline, Kevin A. – Plaintiff-Appellant's counsel in the underlying proceedings and on appeal;

12. Hamm, John – Former Commissioner, Alabama Department of Corrections, Defendant-Appellee in the underlying proceedings;

13. Heath, Mark J. – Plaintiff-Appellant's consulting expert witness in the underlying proceedings;

14. Huynh, Tommy – Plaintiff-Appellant's counsel in the underlying proceedings;

15. Jones, R. Stanton – Counsel for amici curiae Professor John F. Stinneford and Professor Stephen I. Vladeck in prior appeals;

16. Kenny, Polly – Defendants-Appellees' counsel in the underlying proceedings and on appeal;

17. Lee, Jeffery – Plaintiff-Appellant in the underlying proceedings and on appeal;

18. Lovelace, Greg – Commissioner, Alabama Department of Corrections, Defendant-Appellee in the underlying proceedings and on appeal;

19. Marks, Hon. Emily Coody – United States District Judge for the Middle District of Alabama, judge in the underlying proceedings;

20. Marshall, Steve – Alabama Attorney General and Defendants-Appellants' counsel in the underlying proceedings and in prior appeals;

21. Overing, Robert – Defendants-Appellees' counsel in the underlying proceedings and in prior appeals;

22. Raybon, Terry – Warden, William C. Holman Correctional Facility, Defendant-Appellee in the underlying proceedings and on appeal;

23. Reichman, Dylan S. – Counsel for amicus curiae American Thoracic Society in prior appeal;

24. Schwartzstein, Richard M. – Plaintiff-Appellant's expert witness in the underlying proceedings;

25. Schoenfeld, Alan E. – Counsel for amicus curiae American Thoracic Society in prior appeal;

26. Sharpe, Paige H. – Plaintiff-Appellant's counsel in the underlying proceedings and on appeal;

27. Simpson, Lauren – Defendants-Appellees' counsel in the underlying proceedings and on appeal;

28. Stinneford, John F. – Amicus curiae in prior appeal;

29. Thompson, Anna K. – Plaintiff-Appellant's counsel in the underlying proceedings and on appeal;

30. Thompson, Brenton – Defendants-Appellees' counsel in the underlying proceedings and on appeal;

31. Thompson, Caleb – Plaintiff-Appellant's counsel in the underlying proceedings;

32. Trial Lawyers for Justice – Law firm representing amici curiae Professors John F. Stinneford and Stephen I. Vladeck in prior appeals;

33. Tutt, Andrew T. – Counsel for amici curiae Professor John F. Stinneford and Professor Stephen I. Vladeck in prior appeals;

34. Uria, Alejandra C. – Plaintiff-Appellant's counsel on appeal;

35. Vigeland, Sophie – Counsel for amicus curiae American Thoracic Society in prior appeal;

36. Vladeck, Stephen I. – Amicus curiae in prior appeal;

37. Weeks, Paxton – Defendants-Appellees' counsel on appeal;

38. Wiesner, Jocelyn A. – Plaintiff-Appellant's counsel in the underlying proceedings and on appeal;

39. Williams, James S. – Plaintiff-Appellant's expert witness in the underlying proceedings; and

40. Wilmer, Cutler, Pickering, Hale & Dorr LLP – Law firm representing amicus curiae American Thoracic Society in prior appeal.

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

/s/ Paige H. Sharpe
Paige H. Sharpe

Pursuant to Federal Rule of Appellate Procedure 8(a)(2)(A)(i), Plaintiff-Appellant Jeffery Lee ("Mr. Lee") hereby moves for an emergency stay of his execution, currently scheduled for September 17, 2026, pending resolution of this appeal.

This is the second time in three months that Mr. Lee has been required to seek appellate review under the pressure of a scheduled execution. The first appeal concerned whether the State's nitrogen hypoxia Protocol (the "Protocol") violated the Eighth Amendment.[1] On appeal after a full merits trial, this Court reversed the district court's judgment for the State. *See Lee v. Comm'r, Ala. Dep't of Corr.*, 2026 WL 1651147, at *6, 8 (11th Cir. June 8, 2026). On remand, the district court held that the Protocol violates the Eighth Amendment and permanently enjoined the State from using it to execute Mr. Lee. *See* A702–A703 (Doc. 187 at 24–25); A705 (Doc. 188).

The State then changed course. Rather than revise the Protocol or continue defending it on appeal, the State voluntarily dismissed its appeal with prejudice and announced that it would execute Mr. Lee by lethal injection instead. A735 (Doc. 204-1 at 3); Stip. of Dismissal, *Lee v. Comm'r, Ala. Dep't of Corr.*, No. 26-12027

[1] Defendants-Appellees are the Commissioner of the Alabama Department of Corrections ("ADOC") and the Warden of William C. Holman Correctional Facility. Because they are state officials sued in their official capacities, this Motion refers to them and their predecessors as "the State."

(11th Cir. June 15, 2026) (ECF No. 19); Order, *Lee v. Comm'r, Ala. Dep't of Corr.*, No. 26-12027 (11th Cir. June 23, 2026) (ECF No. 20). That position contradicts the State's prior representation to Mr. Lee and to the U.S. District Court for the Southern District of Alabama ("Southern District") that, "if [Mr. Lee] is to be executed," the State "will carry out that execution by nitrogen hypoxia." A749–A750 (Doc. 204-4 at 2–3 ¶ 6). The State made the representation to establish that Mr. Lee's then-pending lethal injection lawsuit in the Southern District was moot. The Southern District accepted that representation and dismissed the lawsuit. A744 (Doc. 204-2).

In his challenged to the nitrogen hypoxia Protocol, Mr. Lee moved under Federal Rules of Civil Procedure 52(b) and 59(e) to amend the district court's opinion and judgment, arguing that judicial and equitable estoppel preclude the State from abandoning its prior commitment not to execute him by lethal injection. A707 (Doc. 204). The district court denied the motion. A776 (Doc. 209). Although the district court assumed that the factors ordinarily supporting judicial and equitable estoppel were satisfied, it concluded that Mr. Lee's successful constitutional challenge to the Protocol constituted a "change in essential facts" that permitted the State to reverse positions. A784–A785 (Doc. 209 at 9–10). The district court also relied on execution delay, the victims' interests, and the State's interest in carrying out Mr. Lee's sentence. A785–A787 (Doc. 209 at 10–12).

Mr. Lee timely appealed that decision. On August 5, 2026, this Court established an expedited briefing schedule designed to permit resolution of the merits before Mr. Lee's September 17 execution, denying the State's request to adjudicate the merits after Mr. Lee's execution date. *See* Order, ECF No. 20. Contemporaneously with this Motion, Mr. Lee is filing his Opening Brief. A stay is necessary to preserve the Court's ability to resolve this appeal before the State executes Mr. Lee by the very method at issue.

ARGUMENT

I. MOVING FIRST IN THE DISTRICT COURT WOULD BE IMPRACTICABLE

Rule 8 ordinarily requires a party seeking a stay pending appeal to move first in the district court, but expressly permits an application directly to this Court where "moving first in the district court would be impracticable." Fed. R. App. P. 8(a)(2)(A)(i). That is the situation here.

The district court has ***twice*** rejected requests for relief that would preclude the State from executing Mr. Lee by lethal injection. In entering the permanent injunction, the district court declined Mr. Lee's request to enjoin execution by any method other than firing squad and found that lethal injection and electrocution remain available options to the State. A702–A703 (Doc. 187 at 24–25). Then, after the State announced that it would execute Mr. Lee by lethal injection, the district court rejected his judicial and equitable estoppel arguments and declined to bar the

State from using that method. A776 (Doc. 209). In denying Mr. Lee's post-judgment motion to amend, the district court relied on equitable considerations—including execution delay, the victims' interests, and the State's interest in carrying out his sentence—and concluded that those considerations weighed against relief. A785–A787 (Doc. 209 at 10–12).

The State's objection to proceeding directly in this Court in the prior appeal was that doing so deprived the district court of an opportunity to "opine on the equities." Appellees' Br. 49, *Lee v. Lovelace*, No. 26-11864 (11th Cir. June 3, 2026) (ECF No. 29). The district court has now done precisely that. Requiring Mr. Lee nevertheless to seek a stay from the district court would serve no practical purpose and would consume valuable time needed to resolve the appeal. This Court has already established an expedited merits schedule so that it can resolve this appeal before Mr. Lee's September 17 execution. The limited time before that date should be devoted to that merits process, not to asking the district court to reconsider issues it has twice decided.

II. THE STAY FACTORS FAVOR MR. LEE

To grant a stay pending appeal, this Court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested

in the proceeding; and (4) where the public interest lies. *See Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). Each of these factors favors a stay.

First, contemporaneous with the filing of this Motion, Mr. Lee is filing his Opening Brief, which describes the reasons why the district court abused its discretion in denying Mr. Lee's motion to amend based on judicial and equitable estoppel. In other words, the Opening Brief explains why Mr. Lee is likely to succeed on the merits of this appeal, and, in the interest of efficiency, he incorporates that brief by reference here.

Second, the irreparable harm Mr. Lee will suffer without a stay is plain: there are only three weeks between the close of briefing and Mr. Lee's execution date. Further appeal to the U.S. Supreme Court is likely. There is, accordingly, a significant risk that the State will execute Mr. Lee by lethal injection before the resolution of appeals, irrevocably extinguishing both Mr. Lee's life and any further review. No subsequent judgment could remedy an execution carried out by a method that this Court ultimately determines the State was estopped from using.

The State argued in the prior appeal that "execution alone cannot count as an irreparable harm" because carrying out a lawful death sentence inflicts no legally cognizable injury. *See* Appellees' Br. 52, *Lee v. Lovelace*, No. 26-11864 (11th Cir. June 3, 2026). But that formulation, if the State repeats the argument here, assumes

the very question presented by this appeal: whether the State may execute Mr. Lee by lethal injection notwithstanding the representation on which it obtained dismissal of his prior lethal injection lawsuit. A stay does not challenge the validity of Mr. Lee's conviction or death sentence; it merely preserves appellate review to decide whether the State may carry out that sentence by lethal injection.

Third, a stay will not substantially injure the State. A stay would merely postpone Mr. Lee's execution only long enough for appellate review. As this Court previously concluded, there is nothing "magical" about the State's planned execution date, *Lee*, 2026 WL 1741802, at *7, here September 17.

This Court, moreover, has already rejected the State's delay arguments in this litigation, concluding that they were "not well taken" and that the equities favored Mr. Lee or, at minimum, "do not favor the Commissioner." *Lee v. Comm'r, Ala. Dep't of Corr.*, 2026 WL 1741802, at *7–8 (11th Cir. June 10, 2026). Nor can the State invoke the presumption against last-minute execution litigation. The present estoppel claim could not have been brought earlier: it arose only after the State announced on June 12, 2026—one day after the Supreme Court denied its request for emergency relief—that it would abandon its prior position and execute Mr. Lee by lethal injection. A735 (Doc. 204-1 at 3). Mr. Lee promptly sought relief, moving to amend on July 7 and timely appealing the district court's July 22 denial. A707 (Doc. 204); A776 (Doc. 209).

Finally, the public interest favors preserving this Court's ability to decide whether the State may obtain a judicial benefit through one litigation position and then adopt the opposite position when the first becomes disadvantageous. Judicial estoppel exists precisely to protect the public's interest in "'the integrity of the judicial process'" by preventing litigants from "deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001) (citations omitted).

Those concerns are particularly acute here. The State obtained dismissal of Mr. Lee's lethal injection lawsuit by representing that he would instead be executed by nitrogen hypoxia. A744, A749–A750 (Docs. 204-2, 204-4). It now seeks to reverse that position based on what the district court characterized as a changed circumstance—Mr. Lee's successful constitutional challenge to a Protocol that the State itself developed. The public has a substantial interest in ensuring that the State cannot obtain dismissal of litigation through one representation and then invoke the constitutional failure of its own implementation choices as justification for abandoning it.

CONCLUSION

For these reasons, this Court should issue a stay of Mr. Lee's execution pending resolution of his appeal.

Dated: August 12, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4, this brief contains 1661 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in Times New Roman 14-point font.

Dated: August 12, 2026

By: */s/ Paige H. Sharpe*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 12, 2026, a true copy of the foregoing brief has been filed electronically using the Court's CM/ECF system. All parties are represented by registered CM/ECF users and will be served by the appellate CM/ECF system.

By: */s/ Paige H. Sharpe*
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TAB K

No. 26-12710

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JEFFERY LEE, Plaintiff-Appellant,

v.

COMMISSIONER, Alabama Department of Corrections, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the
Middle District of Alabama (Case No. 2:25-cv-00680-ECM)

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the undersigned counsel certifies that the following listed persons and parties may have an interest in the outcome of this case:

1. Alabama Department of Corrections (State agency)
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19. Marks, Hon. Emily C. (district judge)

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Undersigned also certifies that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

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STATEMENT REGARDING ORAL ARGUMENT

Lee should not receive the benefit of an emergency oral argument after his inexcusable delay in challenging the district court's June 9, 2026, injunction. He filed a motion for injunction pending appeal on August 12, 2026, nearly two months after the challenged order and after significant delay in moving the district court to expand its injunction (on July 7, 2026) and delay in filing for emergency relief (on August 12, 2026). Oral argument would likely add further delay, potentially reducing the time available to the Supreme Court to consider the matter before the September 17, 2026, execution date.

Oral argument would not significantly aid the decisional process. *See* FED. R. APP. P. 34(a)(2). In declining to expand its injunction against Lee's execution by nitrogen hypoxia to cover lethal injection too, the district court reasonably declined to award relief more intrusive than necessary and declined to grant injunctive relief on state-law grounds. The Court is highly unlikely to rule that the district court abused its discretion.

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INTRODUCTION

Jeffery Lee was sentenced to death in 2000. At the time, Alabama's sole method of execution was electrocution. Two years later, the State made lethal injection the default, and Lee did not object. Then, after Alabama adopted its current three-drug protocol, Lee waited until the limitations period was about to expire to bring a federal lawsuit challenging the method. When nitrogen hypoxia became available, Lee chose that as his preferred method, mooting his lethal-injection case. He then waited until the limitations period was about to expire and brought this lawsuit, challenging the very method he elected.

Lee succeeded. *See* DE187.[1] Alabama was permanently enjoined from executing him with its nitrogen-hypoxia protocol and forced to cancel his scheduled execution in June 2026. As both Lee and the district court predicted, the State then moved to carry out Lee's sentence by lethal injection, which is the only other method Alabama has used since 2003. Alabama's current three-drug protocol is the same one approved by the Supreme Court in *Glossip v. Gross*, 576 U.S. 863 (2015).

Now Lee seeks an injunction against his execution by lethal injunction, too, arguing that the State can *only* execute him by nitrogen hypoxia, the method he sued to stop. There are more than a few problems with this latest request for extraordinary relief. For one, Lee's complaint has no claim or factual allegation about lethal

1. "DE" citations, without more, refer to filings in the case below.

injection whatsoever. It is bedrock civil procedure that a plaintiff cannot amend his complaint through argument, especially not *after trial*. Lee long ago forfeited any challenge to lethal injection in this case, and the court correctly tailored its injunction to the violation Lee alleged. *See* DE187:22-23 ("[B]ecause Lee has not established that Alabama's other statutorily authorized methods violate the Eighth Amendment, he is not entitled to an injunction barring the State from … using one of those methods."), 24 ("[Lee] challenged only the ADOC's nitrogen hypoxia protocol, not its electrocution or … lethal injection protocol."), 25 ("The result is that the State of Alabama cannot execute Lee by nitrogen hypoxia—no more, no less.").

For another, Lee's appeal rests on the idea that the State should be "estopped" from executing him. But estoppel (whether judicial or equitable) is a *defense* to a claim or an argument. The State's plan to execute Lee by lethal injection is neither a claim nor an argument. Lee needs *an injunction*, but the relief he seeks—foreclosing the State from taking a legal position in this litigation—is not an injunction. In other words, even if the Court were convinced that the State should be estopped from *advancing an argument* about the lawfulness of Lee's execution by lethal injection, it would not at all justify the further step of enjoining his execution by lethal injection. Lee's position is a complete non sequitur.

If the Court gets past those conceptual problems, it still should not deem the State estopped. It is entirely consistent for the State to plan to execute Lee by

nitrogen hypoxia in 2018 and then plan to execute him by lethal injection in 2026: as the district court found, the State's plans changed after a significant "change in essential facts," namely that Lee secured a permanent injunction against using Alabama's hypoxia method. DE209:9. If anything, Lee should be estopped from advancing the *flagrant* contradiction that (1) nitrogen hypoxia is unconstitutional because it poses a "risk of suffocation," *e.g.*, DE1 ¶ 64, yet (2) the State "cannot avoid … honoring" its prior plan to use that method, Blue Br. 42.

For Lee to square the circle, he would need an alternative hypoxia protocol that would avoid the constitutional problem this Court identified. That way, the State could lawfully "honor" his election. But Lee pleaded no such alternative, and this Court has no basis in the record to devise one. Consequently, an injunction to enforce Lee's election would spell indefinite delay as the State guesses how to devise a new hypoxia protocol that would satisfy Lee and the federal judiciary. DE209:12. But an injunction of that sort sounds in habeas, not § 1983, *see Nance v. Ward*, 597 U.S. 159, 169-75 (2022), and Lee's refusal to name a "pathway forward," *id.*, that would comport with both his constitutional claim and his estoppel claim reveals his greater "interest[ ] in delaying [his] execution[ ] than in avoiding unnecessary pain," *Middlebrooks v. Parker*, 22 F.4th 621, 628 (6th Cir. 2022) (Thapar, J., statement); *Bucklew v. Precythe*, 587 U.S. 119, 140 (2019).

No equitable relief should issue, and the Court should affirm.

STATEMENT OF THE ISSUES

After electing nitrogen hypoxia as his preferred method of execution in 2018, Lee won a permanent injunction barring his execution by that method. One month later, he asked the district court to amend its order "to foreclose execution by lethal injection" on the ground that "he [ ] elected nitrogen hypoxia." DE204:3-4.

The issues are:

1. Whether the district court abused its discretion when it denied Lee's motion to expand the scope of injunctive relief.

2. Whether Lee is entitled to an injunction pending appeal.

STATEMENT OF THE CASE

The State will not belabor the Court with the full facts and procedural history of the case because the Court is familiar with them. *See Lee v. Comm'r, Ala. Dep't of Corr.*, No. 26-11864, 2026 WL 1651147, at *1-5 (11th Cir. June 8, 2026). In short, Lee is scheduled to be executed by lethal injection on September 17, 2026, for the murders of Jimmy Ellis and Elaine Thompson. What follows are the facts most pertinent to this appeal.[2]

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

The Alabama Department of Corrections (ADOC) amended its lethal injection protocol on September 10, 2014, to use midazolam instead of pentobarbital 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, on September 8, 2016, Lee filed a 42 U.S.C. § 1983 complaint in the Southern District of Alabama raising, among other

2. Lee's statement of facts contains a variety of attacks on the nitrogen hypoxia protocol that are irrelevant to the instant appeal, *e.g.*, Blue Br. 22-23, and often false. The State will not address them all, but the Court should not be misled. *E.g.*:
   - Lee falsely suggests (at 22) that no state employee testing the system had ever inhaled nitrogen gas. *Contra* 2 Tr. 158:2-23.
   - Lee falsely suggests (at 22, 27) that the State did not consider whether the method causes suffering or when a prisoner would lose consciousness. *Contra* 2 Tr. 157-58.
   - Lee falsely reports (at 23) that the district court *found* "that a prisoner would consciously experience severe air hunger for one to three minutes." *Contra* DE176:28 n.26 ("assum[ing] without deciding that the level of air hunger is the same throughout").

claims, an Eighth Amendment challenge to the midazolam protocol. The district court dismissed that claim as untimely, *Lee v. Dunn*, 1:16-cv-00473 (S.D. Ala. Apr. 24, 2017), DE23, but this Court vacated the dismissal, *Lee v. Comm'r, Ala. Dep't of Corr.*, F. App'x 885 (11th Cir. 2018).

While Lee's appeal was pending, the Alabama Legislature amended the execution statutes to add nitrogen hypoxia as a third method of execution, maintaining lethal injection as the default and primary method. *See* ALA. CODE §§ 15-18-82, 15-18-82.1(a). Inmates like Lee whose convictions and sentences became final prior to the act had a thirty-day period after June 1, 2018, to elect hypoxia personally and in writing. *Id.* § 15-18-82.1(b)(2).

Before the district court could consider the merits of Lee's claim on remand, the parties informed the court that the new hypoxia legislation could affect the case—and it did, as Lee elected hypoxia on June 26, 2018. The complaint was thereafter dismissed without prejudice on the parties' joint motion in July 2018. Order, *Lee*, 1:16-cv-00473 (S.D. Ala. July 20, 2018), DE37. 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 of nitrogen hypoxia. Indeed, although Lee exhausted his conventional appeals in 2014, *see Lee v. Thomas*, 572 U.S. 1015 (2014) (mem.), 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.

II. Lee's second § 1983 action challenging nitrogen hypoxia

This Court is well aware of the trajectory of Lee's second § 1983 action, initiated in the Middle District of Alabama on August 22, 2025 (three days before the statute of limitations ran on challenges to the hypoxia protocol).

On February 9, 2026, the State moved for Lee's execution. The Alabama Supreme Court granted the motion on April 2, and Governor Ivey scheduled Lee's execution for June 11. The State won at trial, but this Court reversed on June 8. On remand, the Middle District granted Lee a permanent injunction prohibiting ADOC from executing him via its nitrogen hypoxia protocol. *See* DE187 (Mem. Opinion and Order) & DE188 (Final Judgment). The district court stated that its "decision does not disturb the State's ability to administer capital punishment" because "Lee successfully challenged only the ADOC's nitrogen hypoxia protocol, not its electrocution or (this time) its lethal injection protocol." DE187:24. The equities favored this injunction, the court held, because "the State will be prohibited *only* from executing Lee using nitrogen hypoxia." *Id.* at 23 n.15 (emphasis added).

In a split decision, this Court denied the State's motion to stay the district court's injunction. *Lee v. Comm'r, Ala. Dep't of Corr.*, 26-12027, 2026 WL 1741802 (11th Cir. June 10, 2026). When the Supreme Court likewise denied a stay of the injunction, *Lovelace v. Lee*, 25A1381, 2026 WL 1694504 (June 11, 2026) (mem.), the State called off Lee's execution.

III. Developments since June 11, 2026

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 following the Middle District's permanent injunction. *See* State of Ala.'s Expedited Renewed Mot. to Set an Execution Date, *Ex parte Jeffery Lee*, No. 1021971 (Ala. June 12, 2026).

Four weeks after securing permanent injunctive relief against nitrogen hypoxia, Lee tried to forestall his execution by lethal injection, too. First, on the very last day to file under Rule 52, Lee moved "to amend [the] order on [the] scope of injunctive relief and final judgment." DE204 (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 2-4.

Minutes later, 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 nitrogen hypoxia protocol. Respondent's Opp. to Expedited Renewed Mot., *Ex parte Jeffery Lee*, *supra* (Ala. July 7, 2026).

The State replied on July 9, *see* Reply, *Ex parte Jeffery Lee*, *supra* (Ala. July 9, 2026), and objected to Lee's federal motion on July 17, DE206. 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, DE206:13-15). 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, and that Lee had unclean hands. DE206:8-13, 15-17.

The Alabama Supreme Court granted the State's execution motion on July 22 without any dissent or special writing. Order, *Ex parte Jeffery Lee*, *supra* (Ala. July 22, 2026). The State immediately notified the district court of this development. DE207. The district court then denied Lee's motion, explaining its reasoning in a sixteen-page opinion. DE209.

Estoppel. First, the district court considered Lee's estoppel theory. As to judicial estoppel, the court looked to *New Hampshire v. Maine*, 532 U.S. 742 (2001), as Lee was a party to the prior § 1983 action. DE209:6; *but see Keathley v. Buddy*

Ayers Constr., Inc., 146 S. Ct. 1532, 1542 (2026) (Thomas, J., joined by Gorsuch, J., concurring) (doubting *New Hampshire*'s application to "many of the cases in which lower courts now apply it"). The district court set forth this test:

> (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."

DE209 at 7 (quoting *New Hampshire*, 532 U.S. at 750-51). The court noted the test's flexibility: "these factors do not amount to 'inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel.'" *Id.* (quoting *New Hampshire*, 532 U.S. at 751). And it observed that judicial estoppel is an equitable remedy left to the court's discretion. *Id.* at 7-8.

As for equitable estoppel, the district court recited these elements:

> (1) the party to be estopped misrepresented material facts; (2) the party to be estopped was aware of the true facts; (3) the party to be estopped intended that the misrepresentation be acted on or had reason to believe the party asserting the estoppel would rely on it; (4) the party asserting the estoppel did not know, nor should it have known, the true facts; and (5) the party asserting the estoppel reasonably and detrimentally relied on the misrepresentation.

Id. at 8 (quoting *Busby v. JRHBW Realty*, 513 F.3d 1314, 1326 (11th Cir. 2008)).

The district court "doubt[ed]" that Lee had satisfied the elements for either form of estoppel. *Id.* at 9 & n.8. But it assumed without deciding that he had and still

declined to estop the State. As the court explained, "the change in the State's position" about which method would be used "is a result of a change in essential facts." *Id.* at 9. In 2018, when the parties jointly moved to dismiss the first § 1983 action, Lee had indicated that would prefer nitrogen hypoxia. Years later, after ADOC released its hypoxia protocol, Lee challenged it and won, thereby preventing the State from using ADOC's "sole protocol for carrying out nitrogen hypoxia executions." *Id.* at 9-10. The court concluded, "Under these circumstances, the change in the State's position is attributable to a change in essential facts and does not amount to an 'improper use of the judicial machinery,' thereby counseling against the application of estoppel." *Id.* at 10 (citation modified).

Because Lee sought equitable relief, the district court considered that "Lee's interests are not the only interests at stake here" and weighed the State's interest in enforcing its criminal judgments as well as the interests of Lee's victims. *Id.* The court repeated that its injunction against Lee's execution by hypoxia was appropriately "tailored to remedy the specific harm at issue" while avoiding "further delay … in carrying out Lee's lawfully imposed death sentence." *Id.* at 11. As to estoppel, the court concluded:

> The need to avoid further delay is particularly salient here given Lee's litigation history. While his lethal injection lawsuit was pending, Lee elected execution by nitrogen hypoxia as provided by Alabama statute. Because the ADOC did not at that time have a nitrogen hypoxia protocol, Lee's election had the practical effect of delaying his execution until such protocol was adopted.

> In this challenge …, Lee's proposed alternative method of execution was the firing squad, and he requested a permanent injunction prohibiting his execution by any means other than the firing squad. If the Court had granted his request, it would have had the practical effect of further delaying his execution because the ADOC is not currently prepared to use the firing squad.
>
> 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. If Lee were correct, it would also have the practical effect of delaying his execution because the ADOC would need time to develop a new nitrogen hypoxia protocol.

Id. at 11-12 (footnote omitted; paragraph breaks added). "Considering the totality of the circumstances," the court concluded that "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.* at 12.

State Law. Second, the district court correctly declined to wade into questions of state law. Lee had claimed that section 15-18-82.1 of the Code of Alabama prohibited his execution by lethal injection or electrocution; the State argued that this claim was barred by *Penhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). DE209:13. The court agreed with the State because Lee "plainly does not request relief on the basis that executing him by lethal injection or electrocution would violate *federal* law." *Id.* at 14. "Granting Lee the relief he seeks would, in substance, require this Court to determine that the State's actions violate state law and to order the State to comply with state law, which the Court lacks the authority

to do." *Id.* at 14-15. Identifying the state-law "gravamen" of Lee's claim, the district court saw through the attempt to "disguise[ ]" it, and concluded that "the Eleventh Amendment plainly bars such relief." *Id.*

On July 29, Governor Ivey scheduled Lee's execution for September 17. Lee noticed his appeal on August 4 and filed his first emergency motion for stay of execution on August 12, over two months after the district court's injunction.

STANDARDS OF REVIEW: MERITS BRIEF

"A district court's 'decision to alter or amend judgment is committed to the sound discretion of the district judge and will not be overturned on appeal absent an abuse of discretion.'" *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1343 n.20 (11th Cir. 2010) (quoting *Lawson v. Singletary*, 85 F.3d 502, 507 (11th Cir. 1996); *Am. Home Assurance Co. v. Glenn Estess & Assocs.*, 763 F.2d 1237, 1238-39 (11th Cir. 1985)). "A district court's denial of a motion for leave to amend is reviewed under the same abuse of discretion standard." *Id.*

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in denying Lee's motion, which rests on fundamental errors. First, Lee has not pleaded any claim nor proven any facts about lethal injection, so it was proper for the district court to decline to enjoin his execution by that method. Second, Lee's estoppel argument makes no sense because the State has not advanced any claim or position in this litigation about lethal

injection that could be estopped. Third, even if the State could be "estopped" from executing Lee by lethal injection, the district court reasonably exercised its equitable discretion when it considered the change in circumstances since 2018 and the need to avoid further delay and concluded there was no unfairness whatsoever in declining Lee's request for extraordinary relief. This Court should affirm.

ARGUMENT

I. 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." DE187:24. 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, or by any method other than his pleaded alternatives, DE40:23, or by any method other than an unknown unspecified hypoxia protocol, DE204:18-22 (asserting that his hypoxia election renders other methods unavailable).

This lawsuit was only about nitrogen hypoxia, not lethal injection. As Lee has conceded, he did "not challenge[ ] lethal injection or electrocution in bringing his case," Blue Br. 15, 24, he raised no claims about those methods, DE40 (Amended Complaint), he waived any effort to add such claims, DE204:18 n.9, and "no expert

testimony or facts were developed concerning lethal injection in this action," DE204:17. He now seeks to do what he "may not" do: "amend [his] complaint through argument." *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004). Without any foundation in his complaint, the lawfulness of Lee's execution by lethal injection was not "properly before" the district cour, nor is it properly before this Court. *Id.* (citing "[e]fficiency and judicial economy" as reasons to disallow "new claims" once "discovery has commenced"). Although Lee requested a broad injunction in his prayer for relief, he failed to press any claims about lethal injection at trial. *See, e.g.*, DE132:22 (Lee's Trial Brief) (requesting declaration and injunction against "ADOC's method of executing inmates by nitrogen" and not mentioning any other relief). Whether seen as a failure of proof—Lee admittedly offered no evidence to support a broader injunction—or a matter of forfeiture, it was not an abuse of discretion to decline to fashion such a broad remedy.

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

nitrogen hypoxia, it enjoined the violative conduct—"no more, no less." DE187:25. 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. § 3626(a)(1)(A). A court must give "substantial weight to any adverse impact on … the operation of a criminal justice system." *Id.* Enjoining Lee's execution by other methods would have expanded relief beyond his claims and proof. It would have had no relation to any irreparable harm—a term that goes unmentioned in Lee's opening brief. *See* Blue Br. Such relief would also be highly intrusive, requiring that Alabama officials guess at what new protocol would satisfy Lee or the courts, DE204:22 (suggesting State could "devise a [new] means" of executing him by hypoxia); *see Nance*, 597 U.S. at 174 (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 a pathway forward to carrying out Lee's lawful sentence. *See* DE187:22-25 & n.15. An injunction against all of Alabama's authorized methods would "disturb the State's ability to administer capital punishment." *Id.* at 24. The district court reasonably predicted that if the State adopted a new method or new protocol, it "would likely be challenged as well." *Id.* at 25; *accord* DE209:11 ("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, DE209:11-12 & n.9, it is a sound reason to deny Lee's request for broader injunctive relief. For one, the Supreme Court and this Court have 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 v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 650 (2004); *Gomez v. U.S. District Court*, 503 U.S. 653, 653-54 (1992); *In re Blodgett*, 502 U.S. 236, 240 (1992); *Walls v. Sec'y, Dep't of Corr.*, 161 F.4th 1281, 1285 (11th Cir. 2025); *Mills v. Hamm*, 102 F.4th 1245, 1251 (11th Cir. 2024); *Woods v. Comm'r*, 951 F.3d 1288, 1293 (11th Cir. 2020); *Bowles v. Desantis*, 934 F.3d 1230, 1248 (11th Cir. 2019); *Thompson v. Wainwright*, 714 F.2d 1495, 1507 (11th Cir. 1983) (Godbold, C.J.). 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; if anything, the opposite is true.

For another, granting Lee's request would mean enjoining all of the methods Alabama "is presently able to use" to carry out Lee's sentence. DE209:12. This result should be intolerable in this § 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*, this Court 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). The Supreme 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 omitted). 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 suggests that *the State* must "devise a constitutional means" of implementing "his statutory election" of nitrogen hypoxia. DE204:22; *accord* Blue Br. 18 (criticizing the State for declining to "revise the current Protocol"), 37 (similar). But this is backward. Lee won a permanent injunction

against the use of the nitrogen hypoxia protocol on the premise that the State could proceed to execute him with a firing squad. Now he argues that the State must "honor[ ] its commitment to execute Mr. Lee by nitrogen hypoxia," *id.* at 38, 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").

II. Estoppel cannot justify the injunction Lee requests.

Estoppel is not an independent claim or cause of action on which the Court can grant relief. Estoppel is a defense. *See, e.g., Millennium Funding, Inc. v. 1701 Mgmt. LLC*, 576 F. Supp. 3d 1192, 1219 (S.D. Fla. 2021). But this case is over, and the State is not presently asking the federal judiciary to adopt *any* position on the lawfulness of its plan to execute Lee by lethal injection. Accordingly, there is nothing for this Court to estop. Put differently, this 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 forthcoming execution, which does not depend on this Court agreeing with the State on any issue.

To be sure, the State took the position *in state court* that it could execute Lee by lethal injection, *see* Motion, *Ex parte Jeffery Lee*, *supra* (Ala. June 12, 2026), and the Alabama Supreme Court did not object, *see* Order, *Ex parte Jeffery Lee*, *supra*

(Ala. July 22, 2026). But this Court has no power to police the State's litigation position *in state court*, especially not in a criminal proceeding. The very notion that this 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) (refusing "an injunction aimed at controlling or preventing the occurrence of specific events that might take place" in "state criminal proceedings" as "intrusive and unworkable" "interference," "antipathetic to established principles of comity," and "a major continuing intrusion"). It is one thing for a federal court to enjoin the enforcement of a State's criminal sentence; it is 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).

But this is the only way to read Lee's appeal: he seeks an injunction against "the State's [allegedly] inconsistent litigation positions" that resulted "when the State moved to execute Mr. Lee by lethal injection." Blue Br. 18. Again, the State *moved* in state court; the State took no "litigation position[ ]" on the lawfulness of Lee's execution by lethal injection in *this* proceeding, *id.*, at least not until *after* Lee raised estoppel. So, Lee must mean that the State should have been estopped from taking a position *in state court*, which is preposterous. If the state court felt that it "had been misled," *id.* at 30, that has nothing to do with this litigation about nitrogen

hypoxia and nothing to do with this Court.[3] Lee cites no authority—and the State is aware of none—that would support such an intrusion into the state judicial system. The Court need proceed no further to deny Lee's request and affirm.

III. The district court did not abuse its equitable 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 in this concluded lawsuit about nitrogen hypoxia, it should still affirm because the district court did not abuse its discretion. 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 serves "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 a permanent injunction against one

3. Lee suggests in a sentence that the parties "litigated [this] case … on the same premise … that he had elected nitrogen hypoxia," Blue Br. 41, but the State never represented to the courts in this case that it would pursue nitrogen hypoxia regardless of the outcome, and Lee cites nothing to support the supposed shared understanding.

of its authorized methods of execution by moving forward with another. *Id.* at 750. Second, because the State changed its plans after the permanent 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 method he vigorously and successfully *opposed* in litigation for nearly a year and after he received an eight-year delay in the execution of his sentence.

Even if Lee could satisfy the doctrine, which "ordinarily … is not applied to [S]tates," *id.* at 755, he should not receive any equitable relief—whether in the form of judicial estoppel, equitable estoppel, or an injunction—because *Lee* is the one 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 blames the State for still-unspecified "implementation choices," Blue Br. 27, and demands the State still "honor" his election of the permanently enjoined method. 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 sentence.

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

Lee cannot show any inconsistency between any of 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 nitrogen hypoxia, which rendered his claims moot. Order, *Lee*, 1:16-cv-00473 (S.D. Ala. July 20, 2018), DE37. 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 nitrogen hypoxia. There's no contradiction in changing plans in response to a federal court order.

Lee's contrary 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." *Id.* at 2-3; *see* Blue Br. 33-34. In Lee's view, that was an irrevocable promise by the State to the district court that it would execute Lee by nitrogen hypoxia or not at all. Blue Br. 33-34.

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 nitrogen hypoxia, and it fully intended to honor that request. Things changed after Lee challenged nitrogen hypoxia and secured a permanent injunction against the State's only protocol for using it. Even Lee concedes that things could change, as revealed by his own understanding of the state statutes. In his state-law argumentation below (abandoned on appeal, *see* Blue Br. 25 n.4), Lee conceded that certain events could "trigger a return to lethal injection." DE204:20 (discussing ALA. CODE §§ 15-18-

82.1(a), (c)). If that's true, then Lee must concede too that the joint motion cannot be read as a permanent promise not to use lethal injection. The parties disagree about how to read state law, to be sure, but they *agree* that the State's intent was not set in stone. There was never a representation that the State would perpetually abstain from executing Lee by lethal injection.

Lee's hyper-literal interpretation of the joint motion should be read against the background assumption that the State wishes to retain its discretion over the means of carrying out state sentences. State law contemplates various ways in which the methods of execution may change, and they *have* changed many times in recent decades—by statute, regulation and judicial decree. Most notably, Lee ignores the catchall provision in section 15-18-82.1(i), which provides that a convict's election "shall at no time supersede the means of execution available to the Department of Corrections." This Court need not conclude that the Southern District of Alabama would be powerless if, say, the State had moved to execute Lee by lethal injection at the same time it represented that he would be executed by nitrogen hypoxia; the foregoing simply demonstrates the background assumption that methods are subject to change due to intervening events, especially litigation. The State was not required to identify every possible event or changed circumstance that could alter its plans. *Contra* Blue Br. 33-34.

There's another, more plausible reading of the joint motion, which is not to

read it as a *commitment* by the State but a *prediction* that if Lee were executed, he would be executed by nitrogen hypoxia. No more would be required to moot the lethal injection case, for if the parties agreed that "there is no reasonable expectation that the alleged violation" would occur "at the present time," there would be no Article III case or controversy. *See, e.g.*, *Dow Jones & Co. v. Kaye*, 256 F.3d 1251, 1254 (11th Cir. 2001). Given the State's interest in preserving its sovereignty and discretion—and the key fact that the parties did not enter a settlement or consent decree—this is the most plausible reading of the motion. There's no reason to believe the State would agree to more than it needed to moot the case. On this reading, there's no contradiction between the State's prediction in 2018 and the State's plan to use lethal injection in 2026; the State's expectation simply turned out to be wrong because of Lee's later litigation and the district court's injunction.

For similar reasons, Lee cannot show that the Southern District of Alabama "accepted" any position advanced by the State and was therefore misled. Many federal courts have held that even "settlements … do not require the judicial acceptance of either party's position, and judicial estoppel is therefore not warranted in a later proceeding." *See Prideaux v. Tyson Foods, Inc.*, 387 F. Appx. 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 own independent determination that Lee's

method-of-execution challenge was moot. 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) ("[C]ourts have generally refused to resort to principles of judicial estoppel to prevent a party from 'switching sides' on the issue of jurisdiction.") (citing *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358 (2d Cir. 2000)); *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) (same).

While Lee insists that the district court was misled, Blue Br. 30, he presents no evidence, only speculation about what the district court must have believed at the time of the joint motion. And the best evidence, what district court actually *did*, is evidence for the State. Its order dismissing *without prejudice* suggests the district court believed that it could regain jurisdiction over Lee's challenge lethal injection—the very possibility Lee argues was impossible after his election.[4]

4. For these reasons, too, Lee is 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*, 513 F.3d at 1326. If there was no inconsistency, then there was no misrepresentation, either.

B. There's no unfairness in executing Lee by lethal injection.

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 unfair advantage in the form of a "dismissal of a constitutional challenge to its lethal injection protocol without litigating the claim's merits." Blue Br. 31. But first, as just discussed, 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 challenged lethal injection on constitutional grounds 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. The Supreme Court has already addressed and sustained "the very same protocol" for lethal injection that Alabama will use on Lee, *see Brooks*, 810 F.3d 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 timing—i.e., the fact that Lee believes it would be "impractical" to restart his lethal injection suit now, DE204:16 n.8—would not have been cured had the State avoided 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. 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 2026, 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" (Blue Br. 31, 42) 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.[5]

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

C. Even if Lee had shown the elements for estoppel, he should not receive 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, he should not receive an expanded injunction against his execution by lethal injection too.

1. The district court reasonably assessed the totality of the circumstances, including (1) that "the change in the State's position is a result of a change in essential facts," (2) that the State and Lee's victims have an "important interest in the timely enforcement of his sentence," and (3) that Lee's "litigation history" suggests there would be significant delay in carrying out his sentence if the court were to grant the requested relief. DE209:9-12 (citation modified). In response, Lee cites a few nonbinding authorities, none of which establish an abuse of discretion, and some of which help the State. For example, in Lee's own telling, the Eighth Circuit decided in *Spencer v. Annett Holdings* that changed circumstances did not counsel against estoppel "*where the later [ ] position rested on facts known earlier*." Blue Br. 33 (quoting 757 F.3d 790, 797-98 (8th Cir. 2014); emphasis added). But Lee does not explain how the State could have known in 2018 that its 2023 hypoxia protocol would become unenforceable against Lee in 2026. This Court's reversal and the district court's permanent injunction absolutely constitute "a material differentiating fact" that would alter the State's calculus as to which method of

execution it should use to carry out Lee's sentence. Blue Br. 33.

The State may have known in 2018 that "Lee had expressly reserved the right to challenge" hypoxia, *id.* at 34, but that's very different from knowing that state officials would be *forbidden* by federal decree to use hypoxia on Lee. The State could not have known that fact in 2018. And that fact is material. For one, using nitrogen hypoxia on Lee today would require devising an entirely new protocol that would avoid the alleged constitutional deficiencies in the current one. But Lee has not proposed any such protocol, and the State has legitimate penological interests—namely, timely enforcement of its punishments—not to guess what would satisfy him and the federal courts. *Accord* DE209:10-12 (weighing the State's interest in using its "default execution method and one which it is presently able to use"); *supra* § I (collecting authorities on delay as an equitable factor). For another, as the district court recognized, Lee would in all likelihood object to any revised hypoxia protocol. After all, he argued that oxygen deprivation—whether the inmate is conscious or unconscious, *see* Opening Brief, *Lee v. Comm'r, Ala. Dep't of Corr.*, No. 26-11864 (11th Cir. June 1, 2026), DE20:35, 60—creates unconstitutional pain and suffering. The State could reasonably change course in appreciation of the litigation risk.

Lee blames the State for its "role in creating" the changed circumstances, Blue Br. 35, but whether the State is blameworthy or not for the permanent injunction has no bearing on whether the State has now engaged in an "improper use of judicial

machinery," *New Hampshire*, 532 U.S. at 750. Just because, on Lee's telling, the State "fail[ed] to implement a constitutional protocol for nitrogen hypoxia," Blue Br. 35, does not mean it acts improperly when it decides to use another method instead. Lee would have the State revise a protocol he said was akin to "horrid modes of torture," *Bucklew*, 587 U.S. at 131, rather than one litigated and approved by the Supreme Court in *Glossip*. There's nothing "wrong" or inequitable about the State preferring the latter course. Blue Br. 35.

2. 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 "interest in enforcing the law"—is wholly inapposite. *Id.* at 755-56; *accord Keathley*, 146 S. Ct. at 1542 (Thomas, J., joined by Gorsuch, 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").

Here, where the State's interest in timely enforcement of its criminal sentence is paramount, where the district court found a high likelihood of further delay if Lee's request were granted (a finding Lee has not shown to be clearly erroneous), and where the State is not advancing any claim or legal position in this action that could be estopped (*supra* § II), the Court should not extend *New Hampshire* to enjoin Lee's execution by lethal injection.

3. In balancing the equities, the Court should consider Lee's own conduct. He elected nitrogen hypoxia, challenged nitrogen hypoxia successfully, and now seeks to enforce his election of nitrogen hypoxia. In his view, the state-law election process should be enforceable only against the State and never against the inmate, and if it means the State cannot carry out his execution for an indefinite length of time, so be it. But at some point, the "constant [ ] litigation" must end. DE187:25; *see Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (deeming challenge waived where inmate elected the challenged method); *Middlebrooks*, 22 F.4th at 628-29 (Thapar, J., statement) (suggesting estoppel in similar circumstances). Lee proposes now—only after securing a permanent injunction against hypoxia—that the State could make different "implementation choices" (Blue Br. 27) and still use hypoxia. But he has never identified those choices. 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 precisely what would make his execution by

nitrogen hypoxia consistent with the permanent injunction he acquired. Absent some explanation of how the State can thread that needle, Lee's demand for hypoxia, after a year opposing hypoxia, should be taken for the contradiction that it is. Even if Lee's latest position is not deemed forfeited, waived, or estopped, any equitable relief at this late stage to enforce the very method he challenged should be strongly disfavored.

STANDARDS OF REVIEW: MOTION FOR INJUNCTION PENDING APPEAL

To receive a preliminary injunction, Lee must have made a clear showing that: "(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." *Brooks*, 810 F.3d at 818 (citation modified).

"When considering a request for injunctive relief pending appeal, we consider the same factors, but the bar is harder to clear." *Bos. Parent Coal. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 44 (1st Cir. 2021). The movant has an "extremely high burden," *Florida v. H.H.S.*, 19 F.4th 1271, 1286 (11th Cir. 2021), when seeking "intervention that has been withheld" below, *Respect Maine PAC v. McKee*, 562 U.S. 996 (2010) (mem.) (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 specifically, 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*, 547 U.S. at 584. "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).

ARGUMENT

I. Lee violated Rule 8 by failing to seek relief in the district court.

For the second time in this litigation, Lee has bypassed the rule requiring him to move first the district court for a stay.

Rule 8(a)(1)(C) of the Federal Rules of Appellate Procedure provides that "[a] party must ordinarily move first in the district court" for "an injunction while an appeal is pending." This procedure may be excused only upon a showing that "moving first in the district court would be impracticable." Rule 8(a)(2)(A)(i).

Lee claims impracticality, Motion 3-4, but he had ample time to move the district court, and to the extent that he did not, his time constraints were his own fault for delaying twenty-eight days (until the deadline) to move the district court to alter or amend its injunction. The challenged order on motion to amend, DE209, was entered on July 22. Lee waited three weeks until August 12 to ask this Court for an injunction pending appeal. He could have moved the district court at any time during

that window or even at the same time. *See, e.g.*, Order, *Ala. State Conf. NAACP v. Sec'y of State for the State of Ala.*, No. 25-13007 (11th Cir. May 11, 2026), DE72-2 ("There is no reason why the Secretary could not, for example, have moved for a stay simultaneously in the district court and in this court, making the same arguments in both places."). Lee had no problem moving the district court for emergency relief on June 8. DE185.

Lee's failure matters. Although he correctly notes that the district court had a chance to opine on various equitable factors because he was seeking equitable relief, Motion 10, the district court did not consider the propriety of *emergency* relief, which would have included an analysis of whether Lee improperly delayed in waiting two months to seek another emergency injunction pending appeal. Lee's speculation that abiding by this Court's rules "would [have] consume[d] valuable time needed to resolve the appeal" (Motion 10) is belied by (1) the fact that the district court is more than capable of ruling rapidly, as it demonstrated in the days preceding Lee's June execution date, and (2) the fact that if Lee wished to save time, he could have cross-appealed in June; instead, he delayed in raising his estoppel theory for months.

II. Lee is not substantially likely to succeed on the merits.

As set forth above, Lee failed to show a substantial likelihood of success, let alone an indisputably clear right to relief. The district court's analysis is sound, and

that court did not abuse its discretion in denying his motion.

III. The equities favor denial of emergency injunctive relief.

The Court must evaluate whether Lee will suffer irreparable harm without the requested injunction and whether such injunction would substantially harm the State and the public interest. *Brooks*, 810 F.3d at 818. The balance of the equities favors the State. Lee has delayed, he has not shown a substantial threat of irreparable harm, and preventing his execution would be adverse to the public interest.

First, Lee has once again unreasonably delayed in seeking relief. The State moved for his execution to be reauthorized on June 12, yet he waited more than three weeks until July 7 to file the motion at issue in the district court. That court denied relief on July 22, and Lee waited three weeks until August 12 to file his emergency motion for stay of execution in this Court.

As the Supreme Court has explained, "[a] court considering a stay must also apply a strong equitable presumption against granting relief where the claim could have been brought at such a time as to allow consideration of the merits without requiring a stay." *Hill*, 547 U.S. at 574-75. This is precisely the scenario Lee has created. *Cf. Walls*, 161 F.4th at 1285 ("Walls's admission that his suit could have been filed four months earlier dooms his motion."); *Mills*, 102 F.4th at 1251 (similar); *Woods*, 951 F.3d at 1293. Especially given that Lee pleaded for a broad injunction against all methods of execution other than his alternatives in DE1, his

present emergency "aris[es] from [a] long-known fact[ ]"—or at least the long-predicted fact—that the State may move to execute him by another method. *Ramirez*, 595 U.S. at 434. Lee could have cross-appealed two months ago and significantly reduced the chance that this Court be called upon to resolve his execution on an expedited timeline.

Second, the equities further disfavor Lee because the positions he now takes are inconsistent with positions taken earlier in this litigation. *Supra* § III.C.3. When Lee and seven other death-row inmates filed their last-minute hypoxia challenges in August 2025, some offered revisions to ADOC's nitrogen-hypoxia protocol, but Lee did not. He pleaded as his alternatives MAID (a drug cocktail) and firing squad. It is contradictory—or at least too late—for Lee to assert now that the State must "honor" his election of hypoxia without offering any way to do it consistent with the permanent injunction and his constitutional arguments.

As one jurist opined in a recent Sixth Circuit case where an inmate demanded a method of execution he challenged:

> In future cases, states might consider arguing that judicial estoppel bars inmates from making inconsistent claims in order to delay proceedings. Rooted in equity, the rule of judicial estoppel "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). And it may prove a useful tool for identifying inmates who are more interested in delaying their executions than in avoiding unnecessary pain. *See Bucklew*, 139 S. Ct. at 1129.

> […]
>
> To be sure, Middlebrooks never convinced the state courts that pentobarbital violated the Constitution. But judicial estoppel's equitable roots mean these factors are not "inflexible prerequisites or an exhaustive formula" for determining the doctrine's limits. [*New Hampshire*, 532 U.S.] at 751. Instead, we apply the doctrine with the understanding that its purpose is "to protect the integrity of the judicial process." *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982). In other words, judicial estoppel aims to stop parties from "playing fast and loose with the courts." And for the reasons I discuss above, a case like this one might comfortably fit within the doctrine's elastic scope. After all, Middlebrooks's gamesmanship evinces an utter disregard for our "entire criminal justice system." *Coleman* [*v. Balkcom*, 451 U.S. 949, 959 (1981)] (Rehnquist, J., dissenting from denial of certiorari).

Middlebrooks, 22 F.4th at 628-29 (Thapar, J., statement respecting denial of reh'g en banc) (citation modified). While the Court may conclude that Lee should "not be estopped from advancing his current position, his change in position, although not dispositive, [should] bolster[ ] the Court's conclusion that the equities do not favor injunctive relief on this record." *Frazier v. Hamm*, 2:24-cv-00732, 2025 WL 361172, at *38-39 (M.D. Ala. Jan. 31, 2025); *accord LaGrand*, 526 U.S. at 119.

Third, Lee has not shown irreparable harm. Execution by lethal injection, a method not challenged in this litigation, is presumptively constitutional. His execution alone cannot count as an irreparable harm, moreover, because the State inflicts no cognizable harm when it carries out a lawful and just sentence. To the contrary, punishing the guilty is the fulfillment of the public's "moral judgment." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

Preventing the State from carrying out Lee's long overdue sentence would also frustrate the public interest. *Baze v. Rees*, 553 U.S. 35, 61 (2008) (declining to remand in part because of delay since Baze's 1994 sentence). Lee has been on death row since 2000, and his sentence was rightly imposed. As this Court has explained:

> Stays of executions where the conviction and sentence are valid impose a cost on the State and the family and friends of the murder victim. As we have stated many times, "[e]ach delay, for its span, is a commutation of a death sentence to one of imprisonment." *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir. 1983) [.]

Bowles, 934 F.3d at 1248 (collecting cases). Lee's conventional appeals ended in 2014. He has been represented by competent counsel for decades. Lee's present claims do not satisfy his high burden, and further delay would not serve a public benefit.

Any unpunished murder is an intrinsic and ongoing harm to the interests of the State, the public, and the victims of crime in timely enforcement of sentences, and to the rule of law. "Only with real finality" can we "move forward knowing the moral judgment will be carried out." *Calderon*, 523 U.S. at 556. "To unsettle those expectations" in this case would "inflict a profound injury to … the State and the victims of crimes alike." *Id.*

CONCLUSION

This Court should affirm the district court's denial of Lee's motion and deny an injunction pending appeal.

Respectfully submitted,

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August 21, 2026

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations set forth in FED. R. APP. P. 32(a)(7)(B)(i) because it contains 10,074 words, including all headings, footnotes, and quotations, and excluding the parts of the brief exempted under FED. R. APP. P. 32(f) and 11th Cir. R. 32-4.

2. In addition, this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2026, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will serve electronic notice upon counsel of record.

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TAB L

No. 26-12710

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JEFFERY LEE,

Plaintiff and Appellant,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, AND WARDEN, HOLMAN CORRECTIONAL FACILITY,

Defendants and Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama
No. 2:25-cv-680-ECM (Hon. Emily Coody Marks)

PLAINTIFF-APPELLANT'S REPLY BRIEF AND REPLY IN SUPPORT OF MOTION TO STAY EXECUTION

Capital Case – Execution Scheduled for September 17, 2026

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 26.1-2, Plaintiff-Appellant Jeffery Lee hereby submits a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal:

1. Alabama Department of Corrections – Government agency involved in the underlying proceedings;
2. American Thoracic Society – Amicus curiae in prior appeal;
3. Antognini, Joseph F. – Defendants-Appellees' expert witness in the underlying proceedings;
4. Arnold & Porter Kaye Scholer LLP – Law firm representing Plaintiff-Appellant in the underlying proceedings and on appeal;
5. Bastarache, Julie A. – Plaintiff-Appellant's expert witness in the underlying proceedings;
6. Bickler, Philip E. – Plaintiff-Appellant's consulting expert witness in the underlying proceedings;
7. Bowdre, Alexander Barrett – Defendants-Appellees' counsel in the underlying proceedings and on appeal;
8. Bredar, Thomas – Counsel for amicus curiae American Thoracic Society in prior appeal;

9. Butts, Talmadge – Defendants-Appellees' counsel in the underlying proceedings and on appeal;

10. Ciliberti, Angelique – Plaintiff-Appellant's counsel in the underlying proceedings;

11. Cline, Kevin A. – Plaintiff-Appellant's counsel in the underlying proceedings and on appeal;

12. Hamm, John – Former Commissioner, Alabama Department of Corrections, Defendant-Appellee in the underlying proceedings;

13. Heath, Mark J. – Plaintiff-Appellant's consulting expert witness in the underlying proceedings;

14. Huynh, Tommy – Plaintiff-Appellant's counsel in the underlying proceedings;

15. Jones, R. Stanton – Counsel for amici curiae Professor John F. Stinneford and Professor Stephen I. Vladeck in prior appeals;

16. Kenny, Polly – Defendants-Appellees' counsel in the underlying proceedings and on appeal;

17. Lee, Jeffery – Plaintiff-Appellant in the underlying proceedings and on appeal;

18. Lovelace, Greg – Commissioner, Alabama Department of Corrections, Defendant-Appellee in the underlying proceedings and on appeal;

19. Marks, Hon. Emily Coody – United States District Judge for the Middle District of Alabama, judge in the underlying proceedings;

20. Marshall, Steve – Alabama Attorney General and Defendants-Appellees' counsel in the underlying proceedings and in prior appeals;

21. Overing, Robert – Defendants-Appellees' counsel in the underlying proceedings and in prior appeals;

22. Raybon, Terry – Warden, William C. Holman Correctional Facility, Defendant-Appellee in the underlying proceedings and on appeal;

23. Reichman, Dylan S. – Counsel for amicus curiae American Thoracic Society in prior appeal;

24. Schoenfeld, Alan E. – Counsel for amicus curiae American Thoracic Society in prior appeal;

25. Schwartzstein, Richard M. – Plaintiff-Appellant's expert witness in the underlying proceedings;

26. Sharpe, Paige H. – Plaintiff-Appellant's counsel in the underlying proceedings and on appeal;

27. Simpson, Lauren – Defendants-Appellees' counsel in the underlying proceedings and on appeal;

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34. Uria, Alejandra C. – Plaintiff-Appellant's counsel on appeal;

35. Vigeland, Sophie – Counsel for amicus curiae American Thoracic Society in prior appeal;

36. Vladeck, Stephen I. – Amicus curiae in prior appeal;

37. Weeks, Paxton – Defendants-Appellees' counsel on appeal;

38. Wiesner, Jocelyn A. – Plaintiff-Appellant's counsel in the underlying proceedings and on appeal;

39. Williams, James S. – Plaintiff-Appellant's expert witness in the underlying proceedings; and

40. Wilmer, Cutler, Pickering, Hale & Dorr LLP – Law firm representing amicus curiae American Thoracic Society in prior appeal.

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

/s/ Paige H. Sharpe
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INTRODUCTION

The district court allowed the State to abandon its prior representation that Mr. Lee would be executed by nitrogen hypoxia because his successful challenge to the Protocol supposedly constituted a "change in essential facts." A784 (Doc. 209 at 9).[1] The Answering Brief confirms the flaw in that reasoning: it identifies no essential ***fact*** that changed. When the State represented to the Southern District that it would execute Mr. Lee by nitrogen hypoxia, the State knew that no protocol existed and that he had expressly reserved the right to challenge the future protocol. Yet the State placed no conditions on its representation to execute him by nitrogen hypoxia, not lethal injection. The thing that has changed since that representation, according to the State, is its "***calculus*** as to which method of execution it should use." Answering Br. 29–30 (emphasis added). That is a change in preferences, not facts. The State's remaining arguments do not cure that error.

First, the State cannot avoid judicial estoppel by now claiming that its positions are actually consistent. Answering Br. 22–26. The State told the Southern District that, "if [Mr. Lee] is to be executed," it "***will*** carry out that execution by nitrogen hypoxia." A749–A750 (Doc. 204-4 at 2–3 ¶ 6) (emphasis added). It now intends to execute him by lethal injection. Calling the first representation a mere

[1] This Reply adopts the Opening Brief's abbreviations and definitions.

"prediction" to use nitrogen hypoxia, *see* Answering Br. 24–25, does not make the State's positions consistent.

Second, the State cannot invoke the constitutional failure of its own Protocol to excuse its inconsistent positions. Opening Br. 21, 23; Answering Br. 30–31. ADOC developed that Protocol ***without*** consulting medical professionals or undertaking any meaningful scientific investigation. Equity does not permit the State to obtain the benefit of its representation, fail to take basic steps to carry it out constitutionally, and then invoke that failure to repudiate it.

Third, execution delay and hardship rationales do not answer judicial estoppel's central concern of protecting the integrity of the judicial process. Opening Br. 22–25; Answering Br. 29, 31–32. In any event, the State overstates the consequences of estoppel. If estopped, the State still has a "pathway forward" to carry out Mr. Lee's sentence. Answering Br. 3, 16–18. The district court adjudicated firing squad as a "feasible and readily implemented" alternative by which the State can carry out the execution. A702 (Doc. 187 at 24).

Fourth, equitable estoppel independently supports relief. Opening Br. 26–28. Mr. Lee relinquished his pending lethal-injection lawsuit in reliance on the State's representation and now faces execution by the very method challenged in that lawsuit. The State's suggestion that he could simply have revived the dismissed lethal-injection suit, *see* Answering Br. 27–28, is illusory. The suit remained moot

as long as the State's representation stood; only after the State announced on June 12 that it would use lethal injection did any live controversy over that method reemerge. Had Mr. Lee re-filed an Eighth Amendment challenge to lethal injection, the State would surely have branded it exactly the kind of last-minute litigation *Bucklew* condemns. Answering Br. 35. And the State's suggestion that he received a "windfall" because ADOC spent years developing the Protocol—thus delaying his execution, *see* Answering Br. 28—gets the equities backwards. The State benefited from the dismissal of Mr. Lee's lethal-injection lawsuit; it should not retain that benefit while repudiating the representation that produced it.

Fifth, the State's alternative grounds for affirmance fail. Answering Br. 14–21. They rest on a mischaracterization of the relief Mr. Lee seeks. He does not ask this Court to hold lethal injection unconstitutional, to direct Alabama's courts, or to prevent the State from carrying out his sentence. He instead asks that the State be held to the representation that it previously made to him and the Southern District.

Finally, a stay of execution is necessary to preserve this Court's ability to decide the appeal. Pl.-Appellant's Emergency Mot. for Stay of Execution (ECF No. 23). This is not last-minute litigation over a claim Mr. Lee could have brought earlier. Answering Br. 37–38. The present dispute did not exist until the State announced on June 12 that it would execute him by lethal injection, and he pursued

relief soon after. The State should not be permitted to moot the appeal by carrying out the execution before appellate review is complete.

For these reasons, the Court should stay Mr. Lee's September 17 execution pending completion of appellate review, and upon review, reverse the order denying his motion to amend and instruct the district court to amend the judgment to permanently enjoin the State from executing him by lethal injection.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DECLINING TO APPLY JUDICIAL ESTOPPEL

A. The Facts Underlying the State's Prior Representation Did Not Change

The "essential facts" underlying the State's prior representation never changed. Opening Br. 18–20. The State does not dispute that in 2018, it ***knew*** that no nitrogen hypoxia protocol existed and that Mr. Lee expressly reserved his right to challenge a future protocol.[2] Mr. Lee's subsequent challenge to that Protocol—and his success in doing so—therefore did not alter the factual premise underlying the State's representation.

[2] In fact, in 2018, ADOC distributed substantially similar election forms—with ***identical*** reservation language—to "every inmate on Holman's death row." *Reeves v. Dunn*, 580 F. Supp. 3d 1060, 1066 (M.D. Ala. 2022), *vacated sub nom. Hamm v. Reeves*, 142 S. Ct. 743 (2022).

The State instead argues that it could not have predicted in 2018 that "its 2023 hypoxia protocol would become unenforceable against Lee in 2026." Answering Br. 29. That is not the relevant inquiry. The "change in facts essential" exception described in *New Hampshire v. Maine*, 532 U.S. 742, 756 (2001), requires a material change in the facts or legal conditions underlying the prior determination. Opening Br. 18–19 (citing cases). It does not require a party to correctly predict the outcome of a future event that was expressly contemplated when the earlier position was taken. *See Monahan v. N.Y.C. Dep't of Corr.*, 214 F.3d 275, 289–90 n.14 (2d Cir. 2000) (explaining that changed conditions ordinarily do not justify relief where the events "actually were anticipated" (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384–85 (1992))).

The State's own description of the change confirms that distinction. According to the State, the injunction was a "material differentiating fact" because it "alter[ed] the State's ***calculus*** as to which method of execution it should use to carry out Lee's sentence." Answering Br. 29–30 (emphasis added); *id.* at 24 (discussing the State's change in "***intent***" (emphasis added)). But a change in the State's calculus is a change in its preferences, not facts.

The State's attempt to attribute the "changed circumstances" to Mr. Lee, *see* Answering Br. 30, 32, identifies ***no*** inequitable conduct by him. Mr. Lee exercised the statutory right that Alabama gave him to elect nitrogen hypoxia, *see* Alabama

Code § 15-18-82.1(a), (b)(2), and expressly reserved his right to challenge whatever Protocol ADOC later adopted. Answering Br. 30. He then exercised that right and successfully established that the Protocol violated the Eighth Amendment. *Id.* at 32. There is nothing inequitable about preventing the State from executing a person through an unconstitutional procedure. The State cannot convert Mr. Lee's successful exercise of his statutory and constitutional rights into an equitable reason to excuse the State's changed positions.

Nor is Mr. Lee's "demand for hypoxia[] after a year of opposing hypoxia" a "contradiction." Answering Br. 33. To characterize it as such conflates his statutory election of nitrogen hypoxia as a ***method*** of execution (which he never withdrew) with his challenge to the ***Protocol*** implementing that method (a right he reserved in his election form). Had ADOC developed a constitutional Protocol, nothing about Mr. Lee's election or his litigation would have prevented the State from honoring its representation to carry out his execution by nitrogen hypoxia.[3]

[3] The State complains that Mr. Lee never identified "different 'implementation choices'" that would allow the State to use hypoxia. Answering Br. 32. Not true. The First Amended Complaint includes a list of "safeguards" needed, at a minimum, to prevent conscious suffocation during a nitrogen hypoxia execution. *See* A61–A63 (Doc. 40 at 10–12).

B. The State Cannot Invoke the Constitutional Failure of Its Own Protocol as the Changed Circumstance That Releases It from Its Prior Position

Even if Mr. Lee's successful challenge to the Protocol qualified as a change in essential facts, the source of that change matters. Opening Br. 21–22. The injunction prohibiting the Protocol's use did not result from some external event beyond the State's control. The State failed to take basic steps to ensure that the Protocol could be implemented constitutionally: ADOC developed the Protocol ***without*** consulting physicians or investigating whether it would cause pain or suffering. *Id*. at 8–9, 21.[4]

[4] The State's accusation that Mr. Lee made "false" statements is unfounded. Answering Br. 5 n.2. The Opening Brief accurately stated that ADOC's testing did not involve human volunteers inhaling nitrogen gas. 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. A563 (4/28/2026 Tr. at 138:22–139:8). The State instead points to a single episode in which Mr. Houts himself briefly breathed nitrogen, but he did not fully secure the mask and then "quickly" removed it. A583 (4/28/2026 Tr. at 158:5–23). That brief exposure is not proof that ADOC conducted "human volunteer" testing of nitrogen hypoxia. The Opening Brief also correctly described ADOC's failure to investigate suffering or loss of consciousness. Former Commissioner Hamm testified that, before approving the Protocol, he took no steps to determine whether nitrogen hypoxia would cause "pain or suffering," "terror," or "psychological trauma," A380 (4/27/2026 Tr. at 218:24–219:10), and that he undertook no investigation even after inmates raised concerns. A381 (4/27/2026 Tr. at 219:11–18). Mr. Houts confirmed that ADOC's testing did not expose anyone to nitrogen to determine time to unconsciousness, and that his own assessment was not "to study air hunger." A581, A583 (4/28/2026 Tr. at 156:10–13, 157:25–158:4). That he also reviewed literature on accidental nitrogen deaths does not make the Opening Brief's statements false. Nor is it inaccurate to state that the district court ***found*** "that a prisoner would consciously experience severe air hunger for one to three minutes." That is a finding taken directly from the

Estoppel prevents the State from benefiting from that failure. The State represented that Mr. Lee would be executed by nitrogen hypoxia, controlled the development of the Protocol needed to carry out that representation, and produced a Protocol that failed constitutional review. According to the State, its own failure releases it from its prior representation and permits it to revert to lethal injection. In other words, the worse the State's implementation, the easier it becomes for the State to escape its prior position.

The State's rule creates perverse litigation incentives, too. The incentive to defend the Protocol going forward[5] or cure constitutional defects is diminished if an adverse judgment simply frees the State to use lethal injection instead. If the Protocol survives, the State may use nitrogen hypoxia; if it does not, the State gets the method it now prefers. Either way, the State avoids the consequence of the representation that induced dismissal of Mr. Lee's prior lawsuit.

The State nevertheless insists that "whether the State is blameworthy or not for the permanent injunction has no bearing" on judicial estoppel. Answering Br. 30–31. Equity says otherwise. A party may not "take advantage of his own wrong."

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district court's June 9, 2026 opinion. A679 (Doc. 187 at 1) ("After a three-day bench trial, ***the Court found that the Protocol causes one to three minutes of severe air hunger*** . . . ." (emphasis added)).

[5] The State is defending the Protocol in the consolidated nitrogen hypoxia litigation, *In re Alabama Nitrogen Hypoxia Protocol Litigation*, No. 2:24-cv-00111-ECM (M.D. Ala.).

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 119 (1991); *Abernathy v. Becon Constr. Co.*, 2016 WL 11384340, at *4–6 (E.D. Tex. June 22, 2016) (rejecting defendant's own termination of an arbitration agreement as the "changed circumstance" under *New Hampshire*). The State does not address this authority or explain why the source of the asserted changed circumstance is irrelevant to estoppel.

C. The State's Positions Are Clearly Inconsistent

The State argues for the first time that its litigation positions are not actually inconsistent. Answering Br. 22–26. The State did not raise this argument below, and the district court did not consider it. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331–32 (11th Cir. 2004) ("[A]n issue not raised in the district court and raised for the first time in an appeal will not be considered by this court." (quotation marks and citations omitted)). Even if the Court does consider it, the argument fails.

The State claims that its litigation positions are not inconsistent because its representation to the Southern District should be read as "a ***prediction*** that if Lee were executed, he would be executed by nitrogen hypoxia." Answering Br. 24–25 (emphasis in original). That characterization cannot be squared with what the State actually said. The State did not say it expected or anticipated that Mr. Lee would be executed by nitrogen hypoxia. *See* Answering Br. 27 (conceding that its

representation could have been "phrased more obviously predictively—to say that the State expects Lee will be executed by nitrogen hypoxia"). It told the Southern District in no uncertain terms that "if he is to be executed, Defendants ***will*** carry out that execution by nitrogen hypoxia." A749–A750 (Doc. 204-4 at 2–3 ¶ 6) (emphasis added). It now intends to "execute Lee via lethal injection." A735 (Doc. 204-1 at 3). Those positions are plainly inconsistent.

The State's reliance on the possibility that execution methods might change because of "intervening events, especially litigation"—or its insistence that it never promised to "perpetually abstain" from lethal injection—does not help. Answering Br. 23–24. Mr. Lee does not contend that the State could ***never*** revert to lethal injection. Alabama law itself provides for that result if nitrogen hypoxia as a ***method*** of execution is "held unconstitutional" by the Alabama Supreme Court, U.S. Supreme Court, or this Court (if certiorari is denied). *See* Ala. Code § 15-18-82(a); *id.* § 15-18-82.1(c); *see also* A725–A728 (Doc. 204 at 19–22). Those conditions did not occur. The district court held only that the ***Protocol*** is unconstitutional, without further appellate review. *See, e.g.*, A702 (Doc. 187 at 24) ("Lee has shown that the ADOC's nitrogen hypoxia execution ***protocol*** violates the Eighth Amendment. Consequently, the Court will enter judgment in Lee's favor and enjoin the State from executing Lee pursuant to the ***Protocol***." (emphases added)); Order, *Lee v. Comm'r,*

Ala. Dep't of Corr., No. 26-12027 (11th Cir. June 23, 2026) (ECF No. 20) (dismissing the appeal).[6]

The litigation that did occur was hardly unforeseen. When the State made its representation to the Southern District, Mr. Lee had expressly reserved his right to challenge whatever protocol ADOC later adopted. His successful pursuit of the very challenge he expressly reserved does not transform the State's present position into one consistent with its prior representation. The State's own conduct confirms that understanding. From 2018 to 2023, ADOC had no nitrogen hypoxia protocol and therefore could not carry out executions by that method. Yet the State did ***not*** treat the absence of a protocol as permitting it to revert to lethal injection for inmates who had elected nitrogen hypoxia. As this Court recognized in *Woods*, inmates who elected nitrogen hypoxia "cannot be executed yet" because no protocol existed, while the State continued to seek execution dates for inmates who had not made that election. *Woods v. Comm'r, Ala. Dep't of Corr.*, 951 F.3d 1288, 1292 (11th Cir. 2020).[7] The State offers no reason why the constitutional inadequacy of its current Protocol should produce a different result now.

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[6] Mr. Lee cites Alabama law here only to answer the State's characterization of his estoppel argument; he does not seek federal relief on this basis. The meaning of Alabama Code § 15-18-82.1 is the subject of a pending Montgomery County action.

[7] *See also Woods v. Dunn*, 2020 WL 1015763, at *7 (M.D. Ala. Mar. 2, 2020) (describing the State's "custom of moving for executions when an inmate's appeals are exhausted," but "not mov[ing] for an execution date" for inmates who elected

Finally, the State is wrong that the Southern District did not "accept" its prior position. Answering Br. 25–26. The dismissal order ***expressly*** cited the joint motion and the State's representation to conclude that the lethal-injection challenge was moot. A744 (Doc. 204-2) ("[T]he 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. The Court agrees that this action is now moot." (citation omitted)). That the Southern District independently determined that the case was moot, *see* Answering Br. 26, does not change the point: the State's representation supplied the factual premise for that determination.[8]

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nitrogen hypoxia "because there is no finalized protocol for that method of execution").

[8] The State's cases concerning inconsistent jurisdictional positions are therefore inapposite. Answering Br. 26. Those cases hold that estoppel does not apply to a party's position on a court's own subject-matter jurisdiction because the court itself—not the parties—must determine jurisdiction independently. *See, e.g.*, *Whiting v. Krassner*, 391 F.3d 540, 544 (3d Cir. 2004). That rule is inapposite: the Southern District's mootness determination rested on the parties' representation about a future, non-jurisdictional fact—which method the State intended to use—not on a legal question the court was required to resolve independently of that representation. Nor does the Southern District's dismissal of the lethal-injection lawsuit without prejudice suggest otherwise. Answering Br. 26. That disposition left the merits unresolved; it did not alter the factual premise on which the Southern District found the case moot.

II. THE DISTRICT COURT'S REMAINING EQUITABLE CONSIDERATIONS DO NOT JUSTIFY THE STATE'S REVERSAL

A. Execution-Related Interests Do Not Answer the Judicial Estoppel Inquiry

The district court's reliance on execution-related interests cannot save its decision. Answering Br. 16–18. Although courts may consider delay, victims' interests, and the State's interest in enforcing a criminal judgment when deciding whether to stay or enjoin an otherwise lawful execution, those considerations do not address the purpose of judicial estoppel: to protect "the integrity of the judicial process" against parties who change positions "according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 749–50 (internal quotation marks omitted); *see also Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002), *overruled in part on other grounds by Slater v. U.S. Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017) (en banc). The State never explains why its general interest in carrying out Mr. Lee's sentence permits it to change litigation positions.

The State's cited cases do not answer that question either. Answering Br. 16–18. None involves judicial estoppel. They address the traditional equitable considerations governing stays or injunctions—particularly whether an inmate unnecessarily delayed in bringing a claim.[9] By contrast, here, the estoppel dispute

[9] *See, e.g.*, *Bucklew v. Precythe*, 587 U.S. 119, 149–50 (2019) (addressing inmate who filed his challenge days before his scheduled execution); *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (addressing inmate who filed his challenge four days

did not exist until the State announced on June 12 that it would execute Mr. Lee by lethal injection. The district court erred in treating those execution-related considerations as a basis for permitting the State's otherwise inconsistent position.

Nor can the delay that the district court identified fairly be attributed to Mr. Lee. Answering Br. 31–32. He timely exercised the statutory election Alabama afforded him, expressly reserved his right to challenge any future protocol, and ultimately established that the Protocol violated the Eighth Amendment. That is not inequitable conduct. *See supra* at 5–6. Indeed, this Court has already rejected the State's effort to attribute delay to Mr. Lee as "not well taken," concluding that the equities favored Mr. Lee or, at a minimum, "do not favor the Commissioner." *Lee v. Comm'r, Ala. Dep't of Corr.*, 2026 WL 1741802, at *7–8 (11th Cir. June 10, 2026).

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before his scheduled execution); *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004) (addressing inmate who filed his challenge three days before his scheduled execution); *Gomez v. U.S. Dist. Ct.*, 503 U.S. 653, 653–54 (1992) (per curiam) (denying last-minute equitable relief where inmate could have brought challenge more than a decade earlier and timing suggested an "obvious attempt at manipulation"); *Woods v. Comm'r, Ala. Dep't of Corr.*, 951 F.3d 1288, 1290, 1293 (11th Cir. 2020) (addressing inmate who filed his challenge three months after the State sought an execution date); *Mills v. Hamm*, 102 F.4th 1245, 1250–51 (11th Cir. 2024) (addressing inmate who filed his challenge a month after his execution date was set); *Ramirez v. Collier*, 595 U.S. 411, 434 (2022) (addressing "last-minute claims arising from long-known facts").

The State's own account confirms where the delay lies. It acknowledges that, although Mr. Lee timely elected to be executed by nitrogen hypoxia in 2018, "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." Answering Br. 7 (emphasis added). That Protocol was then found unconstitutional. Mr. Lee should not be charged in equity with the time the State spent developing an unconstitutional Protocol.

B. The District Court's Firing Squad Finding Undermines the Claimed Delay and Hardship

The State substantially overstates the consequences of estoppel—suggesting that it cannot carry out Mr. Lee's sentence unless it uses lethal injection and claiming that he has provided no "pathway forward." Answering Br. 3 (citing *Nance v. Ward*, 597 U.S. 159, 169 (2022)); *id*. at 18–19. But Mr. Lee ***has*** provided a pathway forward.[10] To prevail on his Eighth Amendment claim, he was required to prove a feasible and readily implemented alternative. He proposed execution by firing squad, and following a three-day trial, the district court concluded that he had satisfied his constitutional burden.[11] A702 (Doc. 187 at 24); *see also Lee*, 2026 WL

[10] Because there is a "pathway forward," the State is wrong that Mr. Lee's request to amend the scope of the injunction "sounds in habeas, not § 1983." Answering Br. 3, 18. *Nance* holds that § 1983 remains available where the requested relief would not "necessarily prevent" the State from carrying out the execution. 597 U.S. at 169.

[11] Firing squad is not the only pathway forward. As noted above, the district court's injunction does not prohibit ADOC from developing a constitutional nitrogen

1741802, at *5 (concluding that the district court's findings were "amply supported by the evidence"). Once the district court decided to rely on delay and hardship in balancing the equities, it should have considered its firing squad finding. Opening Br. 24–25 (citing cases). The State does not respond to that argument or explain how the district court could properly assess the hardship of estoppel without accounting for its own finding about the feasibility of firing squad.

The fact that the State is a party does not preclude application of judicial estoppel. Answering Br. 31–32. *New Hampshire* itself applied judicial estoppel to a State while distinguishing cases in which estoppel would "compromise a governmental interest in enforcing the law." 532 U.S. at 755–56. The district court's firing squad finding answers that concern here. Estoppel would not prevent the State from enforcing Mr. Lee's death sentence; it would foreclose only its use of lethal injection, consistent with its prior representation.

The State's reliance on Justice Thomas's concurrence in *Keathley v. Buddy Ayers Construction, Inc.*, 146 S. Ct. 1532 (2026), does not counsel a different result. Answering Br. 9–10, 31. That concurrence questioned whether *New Hampshire*'s test should be extended to cases far removed from this one; it did not purport to disturb *New Hampshire*'s holding that estoppel may apply to a government litigant

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hypoxia protocol and carrying out the method the State represented it would use. *See supra* at 10.

where, as here, estoppel would not compromise the State's ability to enforce the law. 146 S. Ct. at 1542.

Nor does *Middlebrooks v. Parker*, 22 F.4th 621 (6th Cir. 2022), support the State. Answering Br. 32, 39. That case involved a solitary statement respecting the denial of rehearing *en banc*, not a holding, and an inmate who—unlike Mr. Lee—never prevailed on the merits of his constitutional challenge to the execution procedure at issue. *Middlebrooks*, 22 F.4th at 628–29 (Thapar, J., statement). Mr. Lee's success on the merits is precisely what distinguishes his position from the "gamesmanship" that Judge Thapar described. *Id.* at 629. *Frazier v. Hamm*, 2025 WL 361172 (M.D. Ala. Jan. 31, 2025), is not to the contrary, *see* Answering Br. 34; that unpublished order applied ordinary stay-factor balancing, not judicial estoppel, and did not address a State's own change in litigation position of the kind at issue here.

III. EQUITABLE ESTOPPEL INDEPENDENTLY SUPPORTS RELIEF

The State does not meaningfully dispute the equitable estoppel elements addressed in the Opening Brief. It does not dispute that its representation was intended to induce Mr. Lee to dismiss his lethal-injection lawsuit or that he reasonably understood the representation to mean what it said—he would be executed by nitrogen hypoxia. *See also supra* at 1, 4–6 (explaining why there was no "change in essential facts" that would allow the State to avoid estoppel).

The State instead claims that Mr. Lee received a "windfall" while ADOC developed the Protocol. Answering Br. 28. Not so. Mr. Lee relinquished a pending lawsuit in reliance on the State's representation and now faces execution by the very method he stopped challenging. *Glus v. Brooklyn Eastern District Terminal*—which the State does not address—recognizes that inducing a party to forgo the timely pursuit of legal rights is precisely the type of detrimental reliance that equitable estoppel protects. 359 U.S. 231, 232–35 (1959). The State's observation that "[t]here was no live controversy" after Mr. Lee's lethal-injection lawsuit was dismissed, *see* Answering Br. 28, confirms the point. There was no controversy because the State represented that lethal injection would not be used.

If anything, the State's position would give ***it*** the windfall. Had the Protocol survived constitutional review, the State could have executed Mr. Lee by nitrogen hypoxia while retaining the benefit of the 2018 dismissal. Because it did not, the State now claims the right to execute him by lethal injection—the very method Mr. Lee stopped challenging in reliance on its representation. On the State's theory, it retains the benefit of the dismissal either way, while Mr. Lee bears the consequences of the State's reversal.

IV. THE STATE'S ALTERNATIVE GROUNDS FOR AFFIRMANCE DO NOT SAVE THE DISTRICT COURT'S DECISION

The State offers several alternative grounds for affirmance that the district court did not adopt. Answering Br. 14–21. None saves the decision below.

A. Mr. Lee Does Not Assert a New Eighth Amendment Claim Against Lethal Injection

The State's argument that Mr. Lee "has not pleaded any claim nor proven any facts about lethal injection," Answering Br. 13–15, misconstrues the basis for his post-judgment relief. Mr. Lee does not contend that lethal injection violates the Eighth Amendment. His request to amend the scope of the injunction arose ***after*** judgment, when the State repudiated the representation through which it obtained dismissal of his prior lethal-injection lawsuit. He timely invoked Federal Rules of Civil Procedure 52(b) and 59(e), and sought equitable relief based on judicial and equitable estoppel. The State's citation to *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312 (11th Cir. 2004), is therefore inapposite. Answering Br. 14–15. Mr. Lee did not use briefing to add an unpleaded claim.

The State's narrow-tailoring cases, *see* Answering Br. 15–17, address a different question. They hold that injunctive relief based on a particular legal violation must be narrowly tailored to remedy that violation. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 357–59 (1996) (holding that a systemwide injunction could not remedy prison-access deficiencies beyond those actually shown to have injured inmates); *Milliken v. Bradley*, 433 U.S. 267, 280–82 (1977) (requiring desegregation relief to address the effects of the constitutional violation found, rather than unrelated conditions); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (explaining that injunctive relief should be no broader than necessary to provide complete relief).

Mr. Lee does not seek to extend the district court's Eighth Amendment ruling to lethal injection or establish that lethal injection is itself unconstitutional. Rather, his request to amend the injunction rests on equitable principles arising from the State's post-judgment repudiation of its prior representation.

Nor does the Prison Litigation Reform Act require a different result. Answering Br. 16. The applicable provision, 18 U.S.C. § 3626(a)(1)(A), governs the scope of relief in a civil action with respect to prison conditions; it does not speak to a court's equitable authority to hold a party to the representation that produced dismissal of an entirely separate lawsuit. For the same reason, the State's suggestion that Mr. Lee forfeited this relief by not proving a lethal-injection claim at trial, *see* Answering Br. 15, fails. A claim that did not exist until the State repudiated its representation on June 12 could not have been tried in proceedings that concluded before that date.

B. Applying Estoppel Requires Holding the State to Its Prior Position

The State argues that estoppel "would make no difference" because there is "nothing for this Court to estop." Answering Br. 19. Its theory appears to be that estoppel could prevent the State from ***arguing*** that it may execute Mr. Lee by lethal injection, but could not prevent the execution itself. *Id.* That misunderstands the consequence of estoppel. When a party is estopped from taking a position, courts hold the party to its prior position and adjudicate the parties' rights accordingly.

Otherwise, a party could be estopped from repudiating its representation while remaining free to do the very thing that repudiates it. That makes no sense.

New Hampshire illustrates the point. After New Hampshire took the position in earlier boundary litigation that "Middle of the River" meant the middle of the Piscataqua River's main navigational channel, it brought a new lawsuit claiming that the inland boundary actually runs along the Maine shore. *See New Hampshire*, 532 U.S. at 745–48. The Supreme Court did not merely prohibit New Hampshire from ***arguing*** for the new boundary; it judicially estopped New Hampshire from asserting the inconsistent position and then dismissed the complaint. *Id.* at 756.

Other courts likewise give estoppel dispositive effect. *See, e.g.*, *Burnes*, 291 F.3d at 1285–88 (barring monetary claims inconsistent with plaintiff's position in prior bankruptcy proceedings); *Murray v. Silberstein*, 882 F.2d 61, 66–67 (3d Cir. 1989) (estopping plaintiff from obtaining damages inconsistent with position through which he obtained preliminary injunctive relief and dismissing case because no relief remained); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419–20 (3d Cir. 1988) (holding judicial and equitable estoppel barred further litigation of previously undisclosed claims and affirming dismissal). Estoppel thus has operative consequences; it does not merely regulate what a party may argue.

The fact that the State announced its inconsistent position in the Alabama Supreme Court does not change the analysis. Answering Br. 19–20. Judicial

estoppel applies across separate proceedings and courts. *See, e.g.*, *Burnes*, 291 F.3d at 1285–88 (applying judicial estoppel in federal employment action based on position taken in separate bankruptcy proceedings). Otherwise, the doctrine would be easily evaded if a party could obtain a judicial benefit through one position and avoid estoppel simply by taking the opposite position in a different proceeding.

C. The Requested Relief Does Not Interfere with Alabama's Courts

The State also argues that applying estoppel would improperly "police the State's litigation position ***in state court***." Answering Br. 20 (emphasis in original).[12] But Mr. Lee does not ask this Court to regulate the State's arguments or the Alabama Supreme Court's consideration of them. He asks that this Court hold State officials to the State's prior representation by enjoining them from executing him by lethal injection. That relief runs against the State officials (not the Alabama Supreme Court), and it neither dictates the state court's decision nor requires federal supervision of its proceedings.[13] *See O'Shea v. Littleton*, 414 U.S. 488, 500–02 (1974) (rejecting relief requiring ongoing federal oversight of state criminal proceedings); *Younger v. Harris*, 401 U.S. 37, 40–41, 43–45 (1971) (addressing

[12] The State did not raise this federalism argument in the district court below, and this Court need not consider it. *See supra* at 9.

[13] The Alabama Supreme Court's July 22 order does not direct ADOC to use lethal injection; it authorizes execution without specifying a method. The requested amendment to the injunction therefore would not contradict any state court ruling.

federal injunction of a pending state criminal prosecution); *see also* Answering Br. 20 (relying on those cases). Neither *O'Shea* nor *Younger* bars the relief sought here.

V. THE STAY FACTORS FAVOR PRESERVING THIS COURT'S ABILITY TO RESOLVE THE APPEAL

The State's opposition to a stay of execution largely repackages its merits arguments and again attributes the timing of this litigation to Mr. Lee. Answering Br. 35–40. Neither is a reason to moot this appeal by carrying out the very execution this appeal challenges.

The State emphasizes that an injunction pending appeal requires an "indisputably clear" showing. Answering Br. 34. That standard is met here. The district court did not merely decline discretionary relief; it misapplied judicial estoppel's settled elements by treating the State's own litigation-driven, wholly foreseeable change of position as a "change in essential facts." *See supra* at 4–5, 10–11. Where the legal error is clear and the remaining equitable factors favor a stay, the demanding standard governing injunctions pending appeal is satisfied.

As an initial matter, moving first in the district court was impracticable. Answering Br. 35–36 (citing Fed. R. App. P. 8). The district court ***twice*** rejected the very injunction at issue and, in the order now on appeal, expressly considered the same equities relevant to a stay: delay, the victims' interests, and the State's interest in carrying out the sentence. A785–A787 (Doc. 209 at 10–12). Requiring another round of district court briefing on those same issues, with an execution date

approaching, would have consumed time needed for appellate review without serving Rule 8's purpose of obtaining the district court's views. Those views were already clear. Indeed, the State's objection to proceeding directly in this Court during the prior appeal was that the district court had not yet had an opportunity to "opine on the equities." Pl.-Appellant's Emergency Mot. for Stay of Execution 4 (ECF No. 23). The district court now has.

Nor was the intervening time unreasonable. *See* Answering Br. 35 (counting twenty-eight days between the State's June 12 motion and Mr. Lee's July 7 motion to amend, and three weeks between the July 22 denial and the August 12 motion in this Court). The circumstances confronting Mr. Lee were unprecedented. The district court entered the first permanent injunction holding the ADOC's Protocol unconstitutional, and the State responded by doing something it had never done before: repudiating a nitrogen hypoxia election and seeking to revert to lethal injection. Mr. Lee then took a matter of weeks—not months or years—to determine the appropriate procedural response, brief the issue, and obtain a reasoned sixteen-page decision from the district court on the estoppel theory now before this Court. After that ruling, he promptly pursued this expedited appeal. That measured response to an unprecedented event is not the manipulation or unjustified delay that *Bucklew* and its progeny address. Answering Br. 35.

Nor could Mr. Lee have raised the estoppel argument earlier. That controversy did not exist until June 12, when the State announced for the first time that it would abandon its prior position and execute him by lethal injection. Before then, the State had repeatedly represented that it would execute him by nitrogen hypoxia. *See* Opening Br. 27 (describing the State's position on lethal injection in this litigation). Had Mr. Lee challenged lethal injection when he filed this lawsuit, the State would have had the same answer on which it obtained dismissal of the prior lawsuit: there was "no live controversy" because the State did not intend to execute him by that method. Answering Br. 28. Once the State reversed course, Mr. Lee timely sought post-judgment relief, timely appealed, and complied with this Court's expedited schedule.[14] The present timing results from the State's reversal, not delay by Mr. Lee. *Cf. Lee*, 2026 WL 1741802, at *7–8 (concluding that Mr. Lee timely brought this lawsuit and that the balance of the equities does "not favor the Commissioner").

The remaining stay factors favor relief. ***First***, for the reasons stated above and in the Opening Brief, Mr. Lee is likely to succeed on the merits. ***Second***, his irreparable injury is plain. Without a stay, the State will execute him by the very

[14] Mr. Lee proposed a shorter briefing schedule, but the State objected. Pl.-Appellants' Emergency Mot. for Expedited Briefing (ECF No. 9); Resp. in Opp'n to Expedited Merits Briefing (ECF No. 19).

method at issue in this appeal before appellate review can be completed. No subsequent decision could undo that execution or restore the appeal. ***Third***, a stay, by contrast, would postpone the execution only long enough for this Court to complete the expedited appellate review it has already scheduled. It would not prevent the State from ultimately carrying out Mr. Lee's sentence. As this Court previously explained, there is nothing "magical" about the State's selected execution date. *Lee*, 2026 WL 1741802, at *7. ***Finally***, the public interest favors preserving that review. Judicial estoppel exists to protect the integrity of the judicial process. *New Hampshire*, 532 U.S. at 749–50. That interest is served by allowing this Court to decide whether the State may abandon the representation that produced dismissal before it irrevocably acts on the opposite position.

CONCLUSION

For the foregoing reasons, this Court should stay Mr. Lee's September 17, 2026 execution pending completion of appellate review and reverse the district court's July 22, 2026 Memorandum Opinion and Order, *see* A776 (Doc. 209), with instructions to amend the June 9, 2026 Opinion, *see* A679 (Doc. 187), and Judgment, *see* A705 (Doc. 188), to permanently enjoin the State from executing Mr. Lee by lethal injection.

Dated: August 28, 2026

Respectfully submitted,

/s/ Paige H. Sharpe

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4, this brief contains 6,493 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in Times New Roman 14-point font.

Dated: August 28, 2026

By: */s/ Paige H. Sharpe*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 28, 2026, a true copy of the foregoing brief has been filed electronically using the Court's CM/ECF system. All parties are represented by registered CM/ECF users and will be served by the appellate CM/ECF system.

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