

*** CAPITAL CASE ***

No. _____

In The
Supreme Court of the United States

JEFFERY LEE,

APPLICANT,

v.

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

RESPONDENTS.

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

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

EMERGENCY APPLICATION FOR A STAY OF EXECUTION

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September 11, 2026

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Applicant Jeffery Lee respectfully requests that the Circuit Justice, the Honorable Clarence Thomas, or the Court stay his execution—currently scheduled to begin at 12:00 a.m. CDT on September 17, 2026—pending disposition of the petition for a writ of certiorari before judgment that he is filing contemporaneously with this application, or, in the alternative, pending disposition of his appeal now pending in the U.S. Court of Appeals for the Eleventh Circuit, No. 26-12710.

This application and accompanying petition for a writ of certiorari do not challenge Mr. Lee's conviction or sentence. Neither seeks to invalidate or displace Alabama's execution statute, or permanently prevent the State from carrying out Mr. Lee's sentence. The petition asks this Court to determine whether the State may execute Mr. Lee by lethal injection notwithstanding its prior representation that it would execute him by nitrogen hypoxia, and this application seeks to preserve the status quo while the Court resolves that question. A determination that the State is estopped from using lethal injection would not leave the State without a means to carry out Mr. Lee's sentence. Nitrogen hypoxia remains an authorized method of execution in Alabama, and the State could develop a constitutional protocol, or seek legislative authorization for execution by firing squad—the method the district court found feasible and readily implemented.

OPINIONS AND ORDERS BELOW

The order of the U.S. Court of Appeals for the Eleventh Circuit denying Mr. Lee's emergency motion for a stay of execution is unreported and reproduced at Appendix A. That order does not resolve the merits of Mr. Lee's pending appeal; it addresses only the stay motion, and the appeal remains pending. *See* Dkt., *Lee v. Comm'r, Ala. Dep't of Corr.*, No. 26-12710 (11th Cir.).

The decision under review is the order of the U.S. District Court for the Middle District of Alabama denying Mr. Lee's motion to amend the judgment, which is unreported but available at *Lee v. Lovelace*, 2026 WL 2111728 (M.D. Ala. July 22, 2026), and is reproduced at Appendix B.

The Memorandum Opinion and Order of the U.S. District Court for the Middle District of Alabama declaring the State’s nitrogen hypoxia execution protocol unconstitutional and permanently enjoining its use is unreported but available at *Lee v. Lovelace*, 2026 WL 1664095 (M.D. Ala. June 9, 2026), and is reproduced at Appendix C.¹

STATEMENT OF JURISDICTION

This application asks the Circuit Justice, or the Court, to stay Mr. Lee’s execution, which is currently scheduled for September 17, 2026. *See* Sup. Ct. R. 20, 22, 23. Two independent sources of authority support that relief. Mr. Lee asks the Court to grant a stay on the first ground if possible; the second provides an independent basis for the same relief if the Court does not reach the first.

First, Mr. Lee is filing, contemporaneously with this application, a petition for a writ of certiorari before judgment under Sup. Ct. R. 11, asking the Court to review the district court’s July 22, 2026 order before the Eleventh Circuit issues a merits decision in Mr. Lee’s pending appeal from that same order. Certiorari before judgment is available because this Court’s certiorari jurisdiction extends to review “before or after rendition of judgment or decree.” 28 U.S.C. § 1254(1). Once that petition is filed, 28 U.S.C. § 2101(f) and Supreme Court Rule 23 authorize a stay of execution pending its disposition.

Second, and in the alternative, if the Court does not grant certiorari before judgment, or has not acted on that petition before Mr. Lee’s execution date, his appeal from the same July 22, 2026 order remains independently pending in the Eleventh Circuit. The All Writs Act, 28 U.S.C. § 1651(a), authorizes this Court, and the Circuit Justice, to stay execution of a judgment pending

¹ Because Respondents Greg Lovelace, Commissioner of the Alabama Department of Corrections, and Terry Raybon, Warden of the Holman Correctional Facility, are state officials sued in their official capacities, this application will refer to them as “the State.”

disposition of proceedings still before a lower court, in aid of the Court’s own potential future jurisdiction over that proceeding—authority that does not depend on a certiorari petition already being on file. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 603–04 (1966); *Coleman v. PACCAR Inc.*, 424 U.S. 1301, 1304 n.* (1976). If the Eleventh Circuit later rules on Mr. Lee’s pending appeal, this Court would have jurisdiction to review that judgment on a further petition for a writ of certiorari under 28 U.S.C. § 1254(1).

Either basis is sufficient on its own, and this application does not ask the Court to resolve which one governs before granting relief. The reason both are presented is timing: the Eleventh Circuit’s September 9, 2026 order denied only Mr. Lee’s motion for a stay—by its own terms, the panel “address[ed] only the stay motion,” *see* Appendix A at 6, and left Mr. Lee’s appeal from the July 22, 2026 order undecided, *see* Appendix B. Given the compressed schedule between that stay order and the September 17, 2026 execution date, it is uncertain whether the Eleventh Circuit will decide that appeal, or whether this Court will act on the petition, before the execution is carried out. Presenting both bases ensures that a stay is available regardless of the order in which these proceedings unfold, and that a scheduling contingency does not foreclose review of a substantial question on the merits.

STATEMENT OF THE CASE

I. Mr. Lee’s Conviction and Sentence

In April 2000, Mr. Lee was convicted of capital and attempted murder. By a vote of 7 to 5, the jury recommended a sentence of life without parole, but the trial judge overrode that recommendation and sentenced him to death. *Lee v. State*, 898 So. 2d 790, 807 (Ala. Crim. App. 2001). His conviction and sentence were affirmed on direct appeal and have withstood collateral

review. *Id.* at 874; *Lee v. State*, 44 So. 3d 1145 (Ala. Crim. App. 2009); *Lee v. Comm’r, Ala. Dep’t of Corr.*, 726 F.3d 1172 (11th Cir. 2013).

II. Mr. Lee’s Election of Nitrogen Hypoxia and the State’s Representation to a Federal Court

In 2016, before nitrogen hypoxia was an authorized method of execution in Alabama, Mr. Lee challenged the State’s lethal injection protocol in the U.S. District Court for the Southern District of Alabama (“Southern District”). *Lee v. Dunn*, No. 16-473, 2017 WL 1483530 (S.D. Ala. Apr. 24, 2017). While that suit was pending, the Alabama Legislature authorized nitrogen hypoxia as an alternative method of execution and gave condemned prisoners thirty days to elect it. Ala. Code § 15-18-82.1. On June 26, 2018, Mr. Lee timely elected nitrogen hypoxia—years before the State developed any protocol for carrying it out—while expressly reserving “the right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia.” (DE 204-3).²

Based on that election, Mr. Lee and the State jointly moved to dismiss his pending lethal injection lawsuit, representing to the Southern District, without qualification, that “if [Mr. Lee] is to be executed, [the State] will carry out that execution by nitrogen hypoxia,” not lethal injection. (DE 204-4 at 2–3 ¶ 6). The court accepted that representation and dismissed the lawsuit. (DE 204-2).

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

The State took five years to develop a protocol for nitrogen hypoxia (the “Protocol”), releasing it in August 2023 and beginning to use it in January 2024. In August 2025, Mr. Lee filed this action in the U.S. District Court for the Middle District of Alabama, challenging that Protocol

² The notation (DE __) refers to docket entries in *Lee v. Lovelace*, No. 2:25-cv-680-ECM (M.D. Ala.).

under the Eighth Amendment. (DE 1). After a three-day bench trial, the district court found that the Protocol causes one to three minutes of severe air hunger, but concluded that that was not an Eighth Amendment violation. *Lee v. Lovelace*, 2026 WL 1493098, at *22, 25 (M.D. Ala. May 28, 2026).

The Eleventh Circuit reversed, holding that the district court’s own findings established a substantial risk of serious harm, and remanded for the district court to determine whether execution by firing squad—the alternative Mr. Lee proposed—was feasible, readily implemented, and would significantly reduce that risk. *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 answered that question in Mr. Lee’s favor and permanently enjoined the State from executing him using the nitrogen hypoxia protocol. Appendix C at 25.

The State sought emergency relief from that injunction in the district court, the Eleventh Circuit, and this Court. All three declined to intervene. *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) (mem.). The State then voluntarily dismissed its appeal with prejudice.

IV. The State’s Reversal and the District Court’s Denial of Estoppel Relief

Rather than revise the Protocol or proceed by firing squad, the State reversed course. On June 12, 2026—one day after this Court declined to disturb the permanent injunction—the State moved the Alabama Supreme Court for a new execution warrant, announcing for the first time since 2018 that it intended to execute Mr. Lee by lethal injection—the very method it had told the Southern District it would not use. (DE 204-1 at 3).

Mr. Lee moved under Federal Rules of Civil Procedure 52(b) and 59(e) to amend the district court’s judgment to hold the State to its 2018 representation under the doctrines of judicial and equitable estoppel. (DE 204). The district court denied the motion. Appendix B. It assumed, without deciding, that the elements of both judicial estoppel under *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001), and equitable estoppel under *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1326 (11th Cir. 2008), were satisfied, but nevertheless exercised its discretion to decline relief. Appendix B at 9. The court reasoned that Mr. Lee’s own successful challenge to the protocol was a “change in essential facts” that excused the State’s reversal, *id.*, and weighed the State’s and victims’ interest in timely enforcement of the sentence against the equities favoring estoppel, *id.* at 10. That same day, the Alabama Supreme Court granted the State’s motion, (DE 207-1), and the Governor set Mr. Lee’s execution for September 17, 2026.

Mr. Lee timely appealed to the Eleventh Circuit and, on August 12, 2026, moved for a stay of execution pending resolution of that appeal. Briefing on both the stay motion and the merits closed on August 28, 2026, on an expedited schedule set by the court of appeals to permit resolution before Mr. Lee’s execution date.

V. The Eleventh Circuit’s Order Denying a Stay of Execution

On September 9, 2026, a panel of the Eleventh Circuit denied Mr. Lee’s motion to stay his execution. Appendix A. The panel emphasized that it was addressing “only the stay motion,” *id.* at 6, so the appeal remains pending.

In denying the stay, the panel held that Mr. Lee had not shown a substantial likelihood of success. *First*, it reasoned that because Mr. Lee’s amended complaint and trial record addressed only the nitrogen hypoxia protocol, Rules 52 and 59 did not permit him to obtain, post-judgment, an injunction reaching lethal injection—a matter the panel treated as an impermissible attempt to

relitigate old matters. *Id.* at 8–10. **Second**, even assuming a party may seek such equitable relief, the panel held that the district court did not abuse its discretion in declining to apply judicial or equitable estoppel, crediting the district court’s view that the intervening six years—including the State’s development of the Protocol and Mr. Lee’s successful challenge to it—constituted a permissible “change in essential facts,” and that the court was not required to give dispositive weight to Mr. Lee’s reservation of rights on his 2018 election form. *Id.* at 10–13.

The panel expressly reserved the question whether equitable estoppel may be applied against the government at all. *Id.* at 13 n.2. Weighing the remaining factors, the panel concluded that although Mr. Lee’s execution would be irreversible, that alone could not justify a stay where he had not shown a likelihood of success, and that the State and crime victims have an interest in the timely enforcement of the sentence. *Id.* at 13–14 (citing *Hill v. McDonough*, 547 U.S. 573, 584 (2006)).

VI. The Contemporaneous Petition for a Writ of Certiorari Before Judgment

Because the Eleventh Circuit’s disposition of Mr. Lee’s pending appeal may not occur before his scheduled execution, Mr. Lee is filing, together with this application, a petition for a writ of certiorari before judgment under Sup. Ct. R. 11. That petition presents the same judicial and equitable estoppel questions at issue in the pending appeal, on a factual and legal record that is fully developed: the district court assumed the elements of both doctrines were satisfied, and the panel below did not disturb that assumption.

VII. The Related State Court Proceeding

A related but distinct question is separately pending before the Alabama Supreme Court. *See Ex parte Lee*, No. SC-2026-0745 (Ala.). Mr. Lee has petitioned that court for a writ of mandamus and moved to stay his execution on the ground that Alabama Code § 15-18-82.1 does

not permit the State to disregard his timely election of nitrogen hypoxia and execute him by lethal injection instead. That state law question—which the State itself has acknowledged is one of first impression—remains unresolved and bears on the same execution date at issue here, reinforcing the public interest in orderly resolution of the legal questions surrounding Mr. Lee’s execution before an irreversible act forecloses review of any of them.

REASONS FOR GRANTING A STAY

Because Mr. Lee is petitioning for a writ of certiorari before judgment contemporaneously with this application, a stay is warranted if he shows “a reasonable probability that this Court will grant certiorari” and “a fair prospect that the Court will then reverse the decision below.” *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (quotation marks omitted). In the alternative, a stay pending disposition of Mr. Lee’s pending appeal is warranted where he makes “a strong showing that he is likely to succeed on the merits,” will be “irreparably injured absent a stay,” the stay will not “substantially injure the other parties interested in the proceeding,” and “the public interest” favors a stay. *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Mr. Lee satisfies both standards.

I. Mr. Lee Has a Reasonable Probability of Obtaining Certiorari and a Fair Prospect of Reversal

The Eleventh Circuit’s denial of a stay does not resolve Mr. Lee’s appeal; by its own terms, the panel “address[ed] only the stay motion.” Appendix A at 6. But the panel’s reasoning confirms that Mr. Lee’s estoppel claim presents a substantial, unresolved question—one that presents a reasonable probability of certiorari and a fair prospect of reversal.

For the reasons explained below, *see infra* Section II, Mr. Lee has a fair prospect that the district court’s order will be reversed. He also has a reasonable probability of obtaining certiorari. The petition raises important and recurring questions that go beyond the execution context:

whether and when courts and litigants can rely on a government's representations about future conduct. Governments regularly obtain dismissal, a stay, or other judicial relief by representing that they will rescind a challenged policy, refrain from specified conduct, or take a particular future course. Courts and opposing litigants necessarily make consequential decisions in reliance on those representations—whether to dismiss a case, abandon a claim, forgo discovery, or accept a narrower form of relief.

The petition presents an important Rule 10(c) conflict over the circumstances in which a party may avoid judicial estoppel under *New Hampshire v. Maine*—a conflict that has produced divergent applications of its changed-circumstances principle in the lower courts. For example, the Federal Circuit has held that a party's changed interests do not constitute the factual change necessary to avoid judicial estoppel. *Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1354–57 (Fed. Cir. 2010). Similarly, the Eighth Circuit has held that later developments do not constitute a material change if the party possessed the pertinent information when it obtained the benefit of its earlier position. *Spencer v. Annett Holdings, Inc.*, 757 F.3d 790, 797–98 (8th Cir. 2014). The Eleventh Circuit's stay order conflicts with those applications of *New Hampshire*: it permits the State to invoke changed circumstances when a contingency it knew of, and that Mr. Lee expressly reserved the right to litigate, later materialized. Appendix A at 10–13.

II. Mr. Lee Is Substantially Likely to Succeed on the Merits

Mr. Lee is also substantially likely to succeed on the merits of his appeal—and consequently, has a fair prospect of reversal. The panel's threshold rationale—that Mr. Lee's trial record addressed only the nitrogen hypoxia Protocol and therefore could not support relief reaching lethal injection, Appendix A at 9–10—rests on a premise that does not fit an estoppel claim. Judicial and equitable estoppel do not require proof at trial of the fact being estopped; they ask whether the State took a clear, court-accepted position in earlier litigation that it now seeks to

abandon to Mr. Lee’s detriment. *See New Hampshire*, 532 U.S. at 750–51; *Busby*, 513 F.3d at 1326. The State’s about-face on lethal injection did not occur until June 12, 2026—*after* the trial record on the Protocol closed—so Mr. Lee could *not* have tried that issue in April 2026 even had he anticipated it. Had he done so, the State would surely have argued that the lethal injection challenge is unripe because lethal injection is a “method not designated for [him]”—just as it did two weeks ago in another case. Appendix D ¶ 41.³ Treating the absence of trial evidence on a claim that did not yet exist as a bar to post-judgment relief conflates the scope of a party’s trial proof with the legal availability of an equitable remedy for a State’s later change of position.

Apart from that threshold error, Mr. Lee is substantially likely to succeed on his estoppel claim. 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. This 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 supporting each factor are undisputed. The State previously stated that,

³ In *Gobble v. State*, No. CC-2005-299.60, DE 168 (Ala. Cir. Ct. Aug. 28, 2026), although the inmate elected nitrogen hypoxia, she pleaded a lethal-injection challenge in her Rule 32 post-conviction petition to preserve the claim should the State’s nitrogen hypoxia Protocol become unavailable. After the district court enjoined that Protocol in *Lee*, the inmate explained that the anticipated contingency had occurred. The State nevertheless argued that her lethal-injection claim presented no live controversy because she had elected nitrogen hypoxia. Appendix D ¶¶ 40–41.

if Mr. Lee were executed, it would be by nitrogen hypoxia—not lethal injection. (DE 204-4 at 2–3 ¶ 6). The State nonetheless now intends to execute him by lethal injection. (DE 204-1 at 3). Those positions are clearly inconsistent. The Southern District accepted the State’s representation and dismissed Mr. Lee’s lethal injection lawsuit as moot. (DE 204-2). The State thus obtained an unfair advantage: it secured dismissal of a constitutional challenge to its lethal injection protocol without litigating the claim’s merits. Mr. Lee suffered the corresponding detriment: he lost a timely opportunity to litigate that challenge on the merits and now faces execution by lethal injection before ordinary merits review can occur.

The district court’s injunction cannot supply a “change in essential facts” for repudiating the State’s prior representation. The “change in facts essential” exception described in *New Hampshire*, 532 U.S. at 756, requires a material change in the facts or legal conditions underlying the prior determination.⁴ 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, 290 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))). Here, when the State represented that it would use nitrogen hypoxia to execute Mr. Lee, the State *knew* that it had not developed a

⁴ This 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) (explaining that changed facts defeat collateral estoppel only if they are “essential to the judgment” and “of controlling significance” (citations omitted)).

protocol for nitrogen hypoxia, that Mr. Lee had expressly reserved the right to challenge the forthcoming protocol, and that it would have to develop a constitutional protocol in order to be able to use the method. Yet the State placed no conditions on its representation; it stated, without qualification, that Mr. Lee would be executed by nitrogen hypoxia.

But even assuming that Mr. Lee’s successful challenge of the Protocol could be viewed as a change in essential facts, neither the district court nor the Eleventh Circuit considered the State’s role in developing the unconstitutional Protocol in deciding whether its invalidation excused the State’s reversal. 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 the Protocol, the State failed to consult with medical professionals, scientists, or engineers and failed to conduct tests aimed at evaluating pain or suffering. (DE 119-2 at 10 (No. 10); DE 119-3 at 27–29 (Nos. 92–104); DE 146 (4/27/2026 Tr. at 218:3–23; 246:14–17)). Even after prisoners started to challenge the Protocol, the State never investigated whether the Protocol could cause any pain or suffering. (DE 146 (4/27/2026 Tr. at 218:24–219:18)). The State cannot invoke its own constitutional failure to escape its prior litigation position that Mr. Lee would be executed by nitrogen hypoxia, not 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); *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*).

Nor would estoppel leave the State without a lawful path to carry out Mr. Lee’s sentence. Nitrogen hypoxia remains an authorized method of execution in Alabama. Ala. Code § 15-18-

82.1. The injunction prohibits the State from executing Mr. Lee under its existing Protocol; it does not invalidate nitrogen hypoxia as a method or prevent the State from adopting a constitutional protocol to carry it out. Alternatively, the State may seek legislative authorization for execution by firing squad. *See Nance v. Ward*, 597 U.S. 159, 169–70 (2022) (explaining that a State may enact legislation authorizing a method not permitted under current law). The district court found that method feasible, readily implemented, and likely to significantly reduce the risk of severe pain. Appendix C at 24.

The same facts independently support equitable estoppel. The State made an unqualified representation that induced dismissal of Mr. Lee’s lethal-injection action, and he reasonably relied on that representation by forgoing the ordinary litigation of that claim. The State’s reversal now inflicts concrete prejudice. Mr. Lee faces execution by lethal injection after losing the years in which that challenge could have proceeded through discovery, trial, appeal, and this Court’s review in the ordinary course. *See Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 234–35 (1959).

III. Mr. Lee Will Suffer Irreparable Harm Absent a Stay

Absent a stay, the State will execute Mr. Lee by lethal injection before his pending appeal—and any further review this Court might undertake—can be completed. No subsequent decision could restore Mr. Lee’s life or provide any remedy for an execution later determined to have been carried out by a method the State was estopped from using. *See In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) (“We consider the irreparability of the injury that petitioner will suffer in the absence of a stay [of execution] to be self-evident.”).

The panel’s order does not hold otherwise; it recognized that “although his execution is irreparable,” that fact “cannot, on its own, justify a stay” absent a substantial likelihood of success. Appendix A at 14 (citing *Humphreys v. Comm’r, Ga. Dep’t of Corr.*, 161 F.4th 1300, 1312 (11th

Cir. 2025)). That is correct as far as it goes—but it is not a reason to discount irreparable harm once a strong showing of likely success on the merits has been made. *See supra* pp. 9–13. The irreparable-harm and likelihood-of-success factors are not independent hurdles; they operate together, and where—as here—the harm of an erroneous execution is total and permanent, even a substantial (as opposed to certain) likelihood of success on a live legal question warrants preserving the status quo until that question is resolved.

IV. A Stay Will Not Substantially Injure the State

A stay would merely postpone Mr. Lee’s execution long enough for this Court to consider the contemporaneous petition for a writ of certiorari before judgment, or, in the alternative, for the Eleventh Circuit to complete the merits review it has already undertaken on an expedited basis and, if necessary, for this Court to consider a further petition for a writ of certiorari.

A stay would not prevent the State from ultimately carrying out a lawfully imposed sentence. As the Eleventh Circuit already explained in this litigation, there is nothing “magical” about the State’s chosen execution date. *Lee*, 2026 WL 1741802, at *7. If the State ultimately prevails, it may seek a new execution date; if Mr. Lee prevails, the State will simply be required to carry out the sentence by a method it represented would be used—nitrogen hypoxia—or, if necessary, whatever method the courts determine the State may lawfully use. *See supra* pp. 12–13. A delayed execution is a temporary and fully redressable harm; an execution carried out by a method the State represented it would not use is not.

V. The Public Interest Favors a Stay

“[T]he integrity of the judicial process” is precisely what judicial estoppel exists to protect, by preventing litigants—including government litigants—from “deliberately changing positions according to the exigencies of the moment.” *New Hampshire*, 532 U.S. at 749–50. The public has

a substantial interest in ensuring that a State honors its promises. That interest, and the public's interest in the orderly resolution of the substantial and recurring legal questions presented by Mr. Lee's appeal—and by the related, unresolved state-law question currently pending before the Alabama Supreme Court—are not served by allowing an irreversible act to moot review. The State's and crime victims' undoubted interest in the timely enforcement of a lawful sentence, *see Hill*, 547 U.S. at 584, is not disserved by a brief stay to permit that review; it is disserved by a method of execution the courts may ultimately determine the State was not entitled to use.

The public interest is also served by preserving the availability of appellate and, if necessary, certiorari review. Because Mr. Lee's appeal remains pending and may not be decided before September 17, 2026, an execution carried out in the interim would permanently moot that appeal and foreclose review of the estoppel question by either the Eleventh Circuit or this Court—not because the question lacked merit, but because a scheduling contingency outran the litigation. A stay preserves the possibility of orderly review; it does not presuppose the outcome of that review.

VI. This Application Is Timely

This is not the type of last-minute litigation of which courts are understandably skeptical. *See Bucklew v. Precythe*, 587 U.S. 119, 150 (2019). Mr. Lee's estoppel claim did not exist until June 12, 2026, when the State announced for the first time since 2018 that it would abandon its prior representation and execute him by lethal injection.⁵ Mr. Lee promptly moved to amend the

⁵ To counsel's knowledge, this is the first time the State has rescinded an inmate's valid and timely election of nitrogen hypoxia. Prior to this case, the State's position was that it would "honor" an inmate's timely election even if a protocol was unavailable. For example, in 2019—before the State developed the Protocol—the State moved for an execution date for another death-sentenced inmate, Jarrod Taylor. *See State's Mot. to Withdraw Mot. to Set an Execution Date* ¶ 1, *Ex parte Taylor*, No. 1991307 (Ala. Aug. 2, 2019). When the State learned that he had timely elected nitrogen hypoxia, rather than proceed by lethal injection, the State withdrew its motion because it "intend[ed] to honor that election." *Id.* ¶¶ 4–5; *see also Woods v. Dunn*, 2020 WL 1015763, at *7

judgment on July 7, 2026, and timely appealed the district court's July 22, 2026 order denying that relief. He then complied with the Eleventh Circuit's expedited briefing schedule, and filed this application and petition immediately after the court of appeals denied the stay.

Nor did Mr. Lee delay in bringing his underlying challenge to the Protocol. He filed his Eighth Amendment challenge to the Protocol in August 2025, *five months before* the State announced that it would seek an execution date for him. The Eleventh Circuit already has rejected the State's characterization of that litigation history as dilatory, explaining that "[a]ny delay in obtaining relief after the State moved to set the execution date is not attributable to Mr. Lee." *Lee*, 2026 WL 1741802, at *7.

Whatever compression exists in the current schedule was created by the State's June 12, 2026 decision to repudiate its assurance to a federal court that it would execute Mr. Lee by nitrogen hypoxia, not by any delay on Mr. Lee's part.

CONCLUSION

For the foregoing reasons, Mr. Lee respectfully requests that the Circuit Justice, or the Court, stay his execution pending disposition of the petition for a writ of certiorari before judgment that he is filing contemporaneously with this application.

In the alternative, Mr. Lee respectfully requests that his execution be stayed pending disposition of his appeal now pending in the U.S. Court of Appeals for the Eleventh Circuit, No.

(M.D. Ala. Mar. 2, 2020), *aff'd*, 951 F.3d 1288 (11th Cir. 2020) (describing the State's practice of not seeking execution dates for inmates who elected nitrogen hypoxia while it lacked a finalized protocol for carrying out that method). A similar issue came up in 2022. At a hearing, a federal court asked the State whether it would honor an inmate's timely election form. The State's counsel responded: "Absolutely we would. Yes, Your Honor. Same situation with Mr. Taylor, we would honor that." Hr'g Tr. at 147–48, *Miller v. Hamm*, No. 2:22-cv-506-RAH (M.D. Ala. Sept. 15, 2022) (ECF No. 58).

26-12710, and, should that court rule against him, pending the timely filing and disposition of a further petition for a writ of certiorari and this Court's disposition of that petition.

This request does not depend on the Court's disposition of the contemporaneous certiorari petition, or the Eleventh Circuit's disposition of the pending appeal, occurring on any particular schedule. Should both remain pending when this application is decided, Mr. Lee respectfully requests, in the further alternative, that his execution be stayed pending further order of the Circuit Justice or the Court, in aid of this Court's potential future jurisdiction over the questions presented.

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Respectfully submitted,

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