

*** CAPITAL CASE ***

Nos. 26-5541 and 26A337

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

JEFFERY LEE,

PETITIONER-APPLICANT,

v.

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

RESPONDENTS.

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

**REPLY BRIEF IN SUPPORT OF CERTIORARI AND
EMERGENCY APPLICATION FOR A STAY OF EXECUTION**

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INTRODUCTION

This Court should grant certiorari before judgment and stay Mr. Lee’s execution.¹ The Petition presents an important question about when courts and litigants may rely on a State’s unqualified representation about future conduct after it has obtained a judicial benefit through that representation. Immediate review is necessary because, unless this Court intervenes, Mr. Lee will be executed before the Eleventh Circuit can resolve his fully briefed appeal on the merits. This is not a last-minute claim Mr. Lee could have raised earlier. Opp’n at 10. The present dispute arose on June 12, 2026, when the State announced that it would abandon its prior position and execute Mr. Lee by lethal injection.

The district court nevertheless allowed the State to abandon its representation that Mr. Lee would be executed by nitrogen hypoxia because his successful challenge to the Protocol supposedly constituted a “change in essential facts.” App. 23a.² The Opposition confirms the flaw in that reasoning: the State identifies no essential *fact* that changed. In 2018, Mr. Lee timely elected nitrogen hypoxia and expressly reserved the right to challenge any protocol that the State might adopt. The State then represented to the Southern District that, “if [Mr. Lee] is to be executed,” it “*will* carry out that execution by nitrogen hypoxia.” App. 172a–173a ¶ 6 (emphasis added). Relying on that representation, the Southern District dismissed the lawsuit.

The later injunction realized a known contingency; it did not change the facts underlying the representation the State made. When the State made its representation to the Southern District, it lacked a protocol by which it could lawfully execute Mr. Lee. Now, eight years later and due to the State’s own failure to develop a constitutional protocol, there is still no nitrogen hypoxia

¹ This Reply adopts the Petition’s abbreviations and definitions.

² “App.” refers to the appendix attached to the Petition.

protocol that the State may lawfully use to execute him. The parties are thus exactly where they were when the State made its representation. The State should be held to that representation: it can execute Mr. Lee by nitrogen hypoxia after it develops a constitutional protocol.

Mr. Lee, consequently, has a fair prospect of reversal and is likely to succeed on the merits of his judicial and equitable estoppel claims. The State benefited from dismissal of Mr. Lee's lethal injection action without litigating its merits, while he lost the opportunity to litigate that claim in the ordinary course based on the State's now-abandoned representation. The State's delay and hardship arguments do not alter that result. A stay would preserve meaningful review without preventing the State from ultimately carrying out Mr. Lee's sentence, including—if not by a constitutional nitrogen hypoxia protocol—by a feasible alternative method already established in the underlying litigation. To be clear: Mr. Lee does not challenge the State's ability to execute him by nitrogen hypoxia using a protocol that does not violate the Eighth Amendment; nor does he challenge the State's ability to execute him by firing squad in a constitutionally sufficient manner. This appeal is not about preventing an execution. It is about holding a State to its word.

ARGUMENT

I. THIS CASE WARRANTS CERTIORARI BEFORE JUDGMENT

The impending execution, coupled with the Eleventh Circuit's stay-order ruling, warrants certiorari before judgment. Pet. 10–11. The Eleventh Circuit denied Mr. Lee's stay motion after concluding that he had not shown a substantial likelihood of success on his estoppel claims. App. 8a–13a. The panel did not formally reach the merits. Unless this Court intervenes, Mr. Lee will be executed before the Eleventh Circuit can enter a merits judgment on his fully briefed appeal.

Barefoot v. Estelle, 463 U.S. 880, 887 (1983)—in which this Court granted certiorari before judgment because of an impending execution—supports immediate review.³

Granting review would not mean that every impending execution warrants certiorari before judgment, as the State suggests. Opp’n at 11. The question presented is not simply whether the State may execute Mr. Lee on September 17. It is whether a government may obtain dismissal through an unqualified representation about its future conduct, then retain the benefit of that dismissal while repudiating its representation when a known contingency makes compliance less advantageous. That question affects the integrity of judicial proceedings whenever courts and litigants act in reliance on a government’s commitment to future conduct. Pet. 11–15.

The Eleventh Circuit’s reasoning in denying the stay, moreover, conflicts with decisions in the Eighth and Federal Circuits. Pet. at 16–17. Those cases applied *New Hampshire v. Maine*, 532 U.S. 742 (2001), to reject a changed-circumstances defense based on facts known when the party obtained the benefit of its earlier position. *Spencer v. Annett Holdings, Inc.*, 757 F.3d 790, 797–98 (8th Cir. 2014); *Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1355–57 (Fed. Cir. 2010).⁴ The Eleventh Circuit applied the opposite rule—that a known contingency may qualify as changed circumstances because its precise future details were unknown. App. 11a–12a.

³ Neither *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), nor *Dames & Moore v. Regan*, 453 U.S. 654 (1981), see Opp’n at 11, limits Rule 11 to wartime seizure or hostage cases, and the State cites no decision that does.

⁴ The State’s factual distinctions do not eliminate the doctrinal conflict. Neither *Spencer* nor *Trustees* turns on the precise form of the later event; both distinguish a genuine change in essential facts from the materialization of a contingency or information known when the party obtained the benefit of its earlier position. *Spencer* expressly concluded that federal law would not produce a different result. 757 F.3d at 798. And *Trustees* is additional authority bearing on the preserved *New Hampshire* issue, not a distinct claim raised for the first time in this Court. See *ECB USA, Inc. v. Chubb Ins. Co. of N.J.*, 113 F.4th 1312, 1320–21 (11th Cir. 2024); *Sec’y, U.S. Dep’t of Labor v. Preston*, 873 F.3d 877, 883 n.5 (11th Cir. 2017).

This case is an exceptionally clean vehicle to resolve that question because the relevant facts are undisputed. Pet. at 18. When the State obtained dismissal of Mr. Lee’s lethal injection action, it knew that it had no nitrogen hypoxia protocol, that he had expressly reserved the right to challenge any future protocol, and that he could not be lawfully executed by nitrogen hypoxia unless it developed a constitutional protocol. Yet the State represented, without qualification, that if Mr. Lee were executed, it would do so by nitrogen hypoxia—not lethal injection. App. 172a–173a ¶ 6. Nothing about the record will change if this Court waits; Mr. Lee’s ability to obtain an answer will.

The State’s post-injunction position in *Gobble* illustrates the need for immediate review. Even *after* the district court enjoined the current Protocol, the State argued that another death-row inmate’s lethal injection claim was not a live controversy. According to the State, lethal injection was “a method not designated for her” because she had elected nitrogen hypoxia. App. 282a. Thus, when it serves the State’s litigation interests, the State maintains that a nitrogen hypoxia election precludes lethal injection. But when honoring that premise would constrain the State, as in Mr. Lee’s case, its position is that the same election may be disregarded. This shifting position leaves courts and litigants unable to know whether a governmental representation supplies a genuine limitation or merely a temporary litigation position.⁵

II. MR. LEE HAS A FAIR PROSPECT OF REVERSAL AND IS LIKELY TO SUCCEED ON THE MERITS

Mr. Lee also has a fair prospect of reversal and is likely to succeed on the merits. The State’s June 12, 2026 decision to execute Mr. Lee by lethal injection, despite its prior

⁵ That Mr. Lee has not re-challenged lethal injection, *see* Opp’n at 11, is a consequence of the State’s representation, not a reason to withhold review. His lethal injection action was dismissed because the State represented it would use nitrogen hypoxia. App. 174a. The State cannot invoke the dismissal it secured to show the question is unimportant.

representation to the Southern District and to Mr. Lee that he will be executed by nitrogen hypoxia, satisfies each of *New Hampshire*'s considerations for judicial estoppel, establishes equitable estoppel, and falls within no exception to either doctrine.

A. The State's Positions Are Clearly Inconsistent

The State claims that its litigation positions are not inconsistent because "[t]here was never a representation that the State would perpetually abstain from executing Lee by lethal injection." Opp'n at 21. That argument cannot be squared with what the State actually said. The State told the Southern District in no uncertain terms that "*if* he is to be executed, Defendants *will* carry out that execution by nitrogen hypoxia." App. 172a–173a ¶ 6 (emphases added). There were no qualifications even though the State admits that it could have "phrased [its representation] more obviously predictively." Opp'n at 25. Despite the State's prior representation that the State "will" execute Mr. Lee by nitrogen hypoxia ("if he is to be executed" at all), it now intends to "execute Lee via lethal injection." App. 6a. Those positions are plainly inconsistent.

The State's suggestion that it cannot be required to spell out every "caveat" misses the mark. Opp'n at 22. When the State made its representation to the Southern District and to Mr. Lee, it knew that Mr. Lee had expressly reserved his right to challenge whatever protocol the State would later adopt. That Mr. Lee might succeed in challenging the Protocol was hardly unforeseen, as the State admits. *See id.* at 24 n.5 ("*Of course*, federal litigation can thwart the State's intentions." (emphasis added)). The State attempts to circumvent this by inserting a subjective intent to deceive requirement, *see id.* at 23, but nothing in *New Hampshire* suggests that the State must have acted in bad faith for judicial estoppel to apply.

B. The Southern District Accepted the State's Prior Position

The State is also wrong that the Southern District did not "accept" its prior position. Opp'n 22–24. The dismissal order *expressly* relied on the State's representation in concluding that the

lethal injection challenge was moot. App. 174a (“[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) (emphasis added)). For purposes of the judicial-acceptance inquiry, the party need not have prevailed on the merits; it is enough that the court adopted the position “either as a preliminary matter or as part of a final disposition.” *Mahdesian v. Joseph T. Ryerson and Son, Inc.*, 986 F.2d 1421, at *1–2 (6th Cir. 1993) (tbl.). Thus, even if the Southern District independently determined that the case was moot, *see* Opp’n at 23, the State’s representation supplied the factual premise for that determination.⁶

C. The State Benefited from Its Prior Representation

The State obtained an unfair advantage *and* imposed an unfair detriment, either of which satisfies the third *New Hampshire* consideration. 532 U.S. at 751 (asking whether a party “would derive an unfair advantage *or* impose an unfair detriment on the opposing party if not estopped” (emphasis added)). The State obtained the judicial benefit it sought in 2018—the dismissal of Mr. Lee’s then-pending lethal injection lawsuit without litigating the merits. *See* Opp’n at 21 (conceding that its representation was “enough to moot the case”). That benefit does not disappear because the dismissal was without prejudice. *Id.* at 24.

The dismissal deprived Mr. Lee of the opportunity to litigate his lethal injection claim in the ordinary course, with discovery, expert development, trial, and appellate review. He could not

⁶ The State’s cited cases are inapposite. Opp’n at 23. Those cases declined to apply estoppel to a party’s view of a court’s own subject matter jurisdiction because the court must determine that *legal* question independently. *See, e.g., Whiting v. Krassner*, 391 F.3d 540, 544 (3d Cir. 2004). Here, by contrast, the Southern District’s independent mootness determination rested on the parties’ *factual* representation about future conduct: the method the State will use to execute Mr. Lee.

pursue that claim while the State’s representation made it moot. And the compressed timeline that followed was of the State’s making, not an accident of litigation: the day after this Court denied the State’s motion to stay or vacate the permanent injunction, the State moved for a new execution date seeking lethal injection. DE 204-1 at 3; *see infra* pp. 15. Mr. Lee thus had only “three months (rather than years)” to begin new litigation before execution. Opp’n at 25. That is the very detriment equitable estoppel addresses: inducing a party to forego a timely pursuit of legal rights and then seeking to profit from that forbearance. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232–35 (1959).

The State’s counterfactual argument—that had it appropriately caveated its prior representation, Mr. Lee would “likely” be in the same position he is in today, Opp’n at 25—does not alter the result. Mr. Lee stipulated to dismissal *because* of the State’s unqualified assurances that his execution would be by nitrogen hypoxia, not lethal injection. App. 172a–173a ¶ 6. Accordingly, had the State reserved the option to execute Mr. Lee by lethal injection if a future nitrogen hypoxia protocol were enjoined, he would *not* have agreed to the dismissal. The Southern District, therefore, would have had to decide whether that reservation left a sufficient prospect of lethal injection to keep the case live. *See Dow Jones & Co. v. Kaye*, 256 F.3d 1251, 1254 (11th Cir. 2001) (mootness requires assurance that there is no reasonable expectation of recurrence); Opp’n at 25 (arguing only that the “lethal injection claim would *likely* have been moot until now” had the State included reservation language (emphasis added)).

The State’s characterization of Mr. Lee’s prior lethal injection claim as “frivolous” is neither established nor relevant. Opp’n at 24–25 (citing *Glossip v. Gross*, 576 U.S. 863 (2015)). The action was dismissed as moot based on the State’s representation that it would not execute Mr. Lee by lethal injection, before the claim’s merits were litigated or adjudicated. The State

cannot obtain dismissal on that basis and then invoke the absence of a merits decision as proof that the claim lacked merit. In any event, *New Hampshire* does not make estoppel turn on the likelihood that the abandoned claim would have prevailed. 532 U.S. at 750–51; *Smith v. Haynes & Haynes P.C.*, 940 F.3d 635, 646 (11th Cir. 2019) (judicial estoppel operates “regardless of the claim’s merits”); *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 319 (3d Cir. 2003) (similar).

D. The Later Injunction Did Not Change the Essential Facts Underlying the State’s Representation

Although the district court assumed that Mr. Lee had satisfied all three *New Hampshire* factors, it nevertheless allowed the State to repudiate its prior representation because the “essential facts” underlying that representation had supposedly changed. That was an error. When the State obtained the dismissal of Mr. Lee’s lethal injection lawsuit, it knew that (1) no nitrogen hypoxia protocol existed, (2) Mr. Lee expressly reserved his right to challenge a future protocol, and (3) the State could execute him by nitrogen hypoxia only if it developed a constitutional protocol. The State’s Opposition disputes none of these facts. And the later injunction against use of the Protocol did not alter any of these facts; the State may *still* execute Mr. Lee by nitrogen hypoxia if it develops a constitutional protocol.

The State responds that there is no evidence that it foresaw the precise injunction, concealed a plan to return to lethal injection, or acted in bad faith. Opp’n at 23. But as explained in the application for stay of execution, the changed-circumstances exception does not require the State to have predicted the precise form of the contemplated future event. *See* Stay App. at 11 (citing cases). Moreover, the State’s post-injunction position in *Gobble* confirms that the injunction did not alter an essential fact underlying its prior representation. In 2018, the State obtained dismissal of Mr. Lee’s lethal injection action by representing that his nitrogen hypoxia

election foreclosed lethal injection. Now, with *full knowledge* that the current Protocol has been found facially unconstitutional, the State *still* tells courts that a nitrogen hypoxia election means lethal injection is “not designated for” that inmate and that a lethal injection claim is not ripe. App. 282a (Aug. 28, 2026). The State thus continues to take the same position it took in 2018. At most, the injunction changed the State’s litigation calculus—a change in “interests,” not essential facts. *Trustees*, 593 F.3d at 1355; Third Appeal Doc. 24 at 29–30 (“[The] permanent injunction absolutely constitute[s] 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.” (emphasis added)).

Nor may the State attribute any changed circumstance to Mr. Lee because he prevailed in challenging the Protocol. Opp’n at 29 (claiming that the Protocol became unavailable “through Lee’s actions”). Mr. Lee expressly reserved the right to challenge a future Protocol. In fact, in 2018, the State distributed the same 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). Mr. Lee’s exercise of that reserved constitutional right is neither inequitable conduct nor a new essential fact.

The State’s role in developing the Protocol further undermines its changed circumstances defense. The State developed the Protocol to carry out its representation, without taking basic steps to ensure that it could be implemented constitutionally. Pet. at 6–7. Under the State’s theory, its own failure releases it from its prior representation and permits it to revert to lethal injection. The worse the State’s implementation, the easier it becomes for the State to escape its prior position. Equity does not permit the State to benefit from that neglect. *See 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).

E. The State’s Remaining Arguments Do Not Justify Denial of Relief

None of the State’s remaining arguments justifies denial. *First*, the State’s general interest in enforcing Mr. Lee’s sentence, avoiding delay, and serving crime victims—Opp’n at 31—does not permit it to retain the benefit of a representation it later repudiates. Judicial estoppel protects “the integrity of the judicial process” against parties who change positions “according to the exigencies of the moment.” *New Hampshire*, 532 U.S. at 749–50.⁷ Nor should any delay in carrying out Mr. Lee’s sentence be attributed to him. Opp’n at 14, 20, 26, 30–32; *see infra* at pp. 14–15; *Lee v. Comm’r, Ala. Dep’t of Corr.*, 2026 WL 1741802, at *7–8 (11th Cir. June 10, 2026) (rejecting the State’s effort to attribute delay to Mr. Lee as “not well taken”). The State’s own account confirms where the delay lies: “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.” Opp’n at 6 (emphasis added).⁸

Second, the State overstates the consequences of estoppel—suggesting that it could not carry out Mr. Lee’s sentence unless it uses lethal injection and complaining that Mr. Lee has provided no “pathway forward.” Opp’n at 15. But Mr. Lee *has* provided a pathway forward.⁹ To

⁷ None of the cases that the State cites in support, *see* Opp’n at 14–15 (citing *Nance*, *Ramirez*, *Bucklew*, *Nelson*, *Gomez*, and *Blodgett*), concerns judicial estoppel.

⁸ Mr. Lee did not, as the State claims, Opp’n at 20, receive a “windfall” from that timeline. He relinquished a pending lawsuit in reliance on the State’s representation and now faces execution by the very method he stopped challenging. If anything, the district court’s order would give *the State* a 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. Heads, the State wins by nitrogen hypoxia; tails, it wins by lethal injection—either way, Mr. Lee loses the claim he gave up to get here.

⁹ Because there is a “pathway forward,” the State is wrong that Mr. Lee’s request to amend the scope of the injunction is “cognizable only in habeas.” Opp’n at 16.

prevail on his Eighth Amendment claim, he was required to—and did—prove a feasible and readily implemented alternative: firing squad. App. 54a–55a; *see also Lee*, 2026 WL 1741802, at *5.¹⁰ If the State is not inclined to develop a constitutional nitrogen hypoxia protocol to execute him by the method it promised, it may instead execute Mr. Lee by his proposed alternative, firing squad.¹¹ Estoppel therefore would **not** prevent the State from enforcing Mr. Lee’s sentence; it would preclude only execution by lethal injection based on the State’s representation in 2018.

Third, the State’s objection to the form of Mr. Lee’s request misses the point. Opp’n at 11–13. Mr. Lee does not assert a new Eighth Amendment challenge to lethal injection or seek relief based on lethal injection’s constitutionality. His estoppel claim instead arose **after** judgment, when the State repudiated its prior representation. Mr. Lee then timely invoked Federal Rules of Civil Procedure 52(b) and 59(e), and sought equitable relief based on estoppel. The absence of lethal injection evidence in the trial below is, therefore, immaterial. Neither *Gilmour*, the narrow-tailoring cases (*Lewis*, *Milliken*, and *Califano*), nor the Prison Litigation Reform Act requires a different result. Opp’n at 12–14. Mr. Lee seeks relief tailored to the State’s post-judgment change in positions—not an unpled constitutional ruling about lethal injection or the scope of prison conditions.

Fourth, the State is wrong that estoppel “would make no difference” because there was “nothing for the district court to estop.” Opp’n at 16. Estoppel has operative consequences: a court holds the party to its prior position **and** adjudicates the parties’ rights accordingly.

¹⁰ Once the district court decided to rely on delay and hardship in balancing the equities, it should **also** have considered its own firing squad finding. Third Appeal Doc. 21 at 24–25 (citing cases).

¹¹ The State complains that Mr. Lee “never pleaded another hypoxia protocol” that would allow the State to use that method. *See, e.g.*, Opp’n at 16. 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* DE 40 at 10–12.

Otherwise, a party could be estopped from repudiating its representation while remaining free to do the very thing that it foreswore. *New Hampshire* illustrates the point. After the State of 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. This 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 755–56.¹²

Fifth, the State’s reliance on *New Hampshire*’s observation that estoppel is “ordinarily” not applied to States, *see* Opp’n at 20, does not establish a categorical exemption. *New Hampshire* itself applied judicial estoppel against a State; its observation instead confirms that courts must consider countervailing public interests. 532 U.S. at 755–56. Here, holding the State to its representation would not invalidate Mr. Lee’s sentence or prevent the State from pursuing a lawful means of execution.

The State is right that this case may impact the State’s enforcement of laws, *see* Opp’n at 26 (citation and quotation marks omitted), but not the consequences it suggests. If the Court grants a stay, future states can avoid Alabama’s predicament by honoring their representations—full stop. On the other hand, if the State is permitted to execute Mr. Lee by lethal injection tomorrow, future

¹² Other courts also give estoppel dispositive effect. *See, e.g., Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285–88 (11th Cir. 2002) (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 finding the case moot 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).

litigants are on notice that a State's representations about methods of executions can be reneged on without consequence, and courts will not intervene. The takeaway will be: preserve and litigate every claim, or become the next Mr. Lee who regrets trusting that a government would keep its promises on a matter concerning life and death.

Finally, Mr. Lee's requested relief would not interfere with Alabama's courts. The State's state-court filing—seeking a warrant in the Alabama Supreme Court—is relevant only because it confirms that the State is taking an inconsistent position. Mr. Lee is not asking a federal court to prohibit the State from making inconsistent arguments in state court or to review the Alabama Supreme Court's order granting the execution warrant. Opp'n at 17. Indeed, the order granting the warrant authorizes an execution without specifying lethal injection or any other method. Relief directed to State officials prohibiting lethal injection, accordingly, would leave the Alabama Supreme Court's order intact. Nor would estoppel require any ongoing federal supervision of state criminal proceedings. The State's citations to *O'Shea* and *Younger*, *see id.*, are therefore inapposite.

III. THE REMAINING STAY FACTORS FAVOR RELIEF

The remaining stay factors favor relief. Without a stay, Mr. Lee will be executed before an appellate court can resolve the estoppel question; by contrast, a short stay would preserve meaningful review without preventing the State from ultimately enforcing his sentence. The State's contrary arguments concerning unclean hands and delay rest on a mistaken characterization of Mr. Lee's conduct.

Mr. Lee does not have “unclean hands” merely because he seeks to hold the State to its prior representation. Opp'n at 30. Nor is his election of nitrogen hypoxia inconsistent with his successful challenge to the Protocol. *Id.* Mr. Lee elected nitrogen hypoxia as a *method* of execution, while challenging the unconstitutional *Protocol* the State developed to carry out that

method. DE 1; App. 55a; App. 169a–170a. To obtain Eighth Amendment relief, Mr. Lee was required to identify and prove a feasible, readily implemented alternative method of execution that would substantially reduce the risk of severe pain caused by the existing Protocol—and he did. App. 55a. The State cannot fault Mr. Lee for making that required showing while declining to proceed with the alternative he proved at trial. Had the State developed a constitutional Protocol, nothing about Mr. Lee’s litigation would have prevented the State from honoring its representation to carry out his execution by nitrogen hypoxia. Neither *Stewart v. LaGrand*, 526 U.S. 115 (1999), nor *Middlebrooks v. Parker*, 22 F.4th 621 (6th Cir. 2022), says otherwise. Opp’n at 30. *Stewart* involved an inmate whose claim was deemed waived because it attacked the very execution *method* he elected, 526 U.S. at 119—not, as Mr. Lee did, the protocol implementing the elected method. And *Middlebrooks* involved an inmate who—unlike Mr. Lee—never prevailed on the merits of his constitutional challenge to the execution procedure at issue. 22 F.4th at 628–29 (Thapar, J., statement).

Mr. Lee’s irreparable injury is plain. Stay App. at 13. The harm is not that he may be executed; it is that he will be executed by a method the State represented it would not use. No subsequent decision could provide any remedy for an execution later determined to have been carried out by a method the State was estopped from using. A stay, by contrast, would impose no comparable injury on the State. *Id.* at 14. It would postpone the execution only long enough for this Court to consider the Petition, or, in the alternative, for the Eleventh Circuit to complete the merits review it has already undertaken. A stay would not prevent the State from carrying out Mr. Lee’s sentence. As the Eleventh Circuit found, and the State agrees, there is nothing “magical” about the selected execution date. *Lee*, 2026 WL 1741802, at *7; Opp’n at 31.

Finally, the emergency setting in which the parties now find themselves results from the

State’s reversal, not any delay by Mr. Lee. Stay App. at 15–16. The estoppel controversy did not exist until June 12, 2026, when the State announced for the first time that it would abandon its prior position and execute Mr. Lee by lethal injection. Before then, the State had repeatedly represented that it would execute him by nitrogen hypoxia. 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. Opp’n at 25; *see also* App. 282a. Once the State reversed course, Mr. Lee timely sought post-judgment relief and timely appealed under expedited schedules.

Nor is there merit to the State’s suggestion that Mr. Lee delayed in moving to amend the judgment and in filing this appeal. Opp’n at 7–8. The circumstances confronting Mr. Lee are unprecedented. The district court entered the first permanent injunction holding this 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 few 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. After that ruling, he promptly pursued an expedited appeal. That measured response to an unprecedented event is not the manipulation or unjustified delay that *Bucklew* and its progeny address. Opp’n at 10, 14.

CONCLUSION

The Court should grant certiorari and stay Mr. Lee’s September 17, 2026 execution.

DATED: September 16, 2026

Respectfully submitted,

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