NO. 24-5603 & 24A284
CAPITAL CASE

In The Supreme Court of the United States

FREDDIE E. OWENS,

Petitioner,

v.

BRYAN P. STIRLING, in his official capacity as Director of the South Carolina Department of Corrections; SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; and HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT AND EMERGENCY MOTION FOR STAY OF EXECUTION

RESPONSE TO EMERGENCY MOTION FOR STAY OF EXECUTION AND PETITION FOR A WRIT OF CERTIORARI

(Execution scheduled for September 20, 2024, at 6:00 PM)

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INTRODUCTION

"Last-minute stays should be the extreme exception, not the norm." *Bucklew v. Precythe*, 587 U.S. 119, 150 (2019). In the past three days, two federal courts have already rejected Owens's demand for another delay of his execution. This Court should do the same.

Nothing is exceptional about Owens's case. He has fully litigated his direct and collateral appeals, and now South Carolina is prepared to execute him using a one-drug lethal injection protocol that not only mirrors how the federal government and other States have carried out executions in recent years but also is the one-drug protocol that Owens has admitted is "the most reliable and humane way to conduct a lethal injection." R. p. 113, No. 2022-001280 (S.C. Oct. 27, 2022). Even before Owens elected lethal injection, the pentobarbital that will be used for Owens's execution was tested by the Forensic Services Lab at the S.C. Law Enforcement Division and confirmed to be "of sufficient potency, purity, and stability to carry out an execution successfully." Resp.Appendix4.

Yet Owens demands a stay for still more information about the pentobarbital. Electrocution is South Carolina's default execution method, but the State permits a condemned inmate to elect the firing squad or lethal injection, if those methods are available. *See* S.C. Code Ann. § 24-3-530(A). Owens declared in earlier state court litigation that lethal injection by a single dose of pentobarbital is the most humane way to carry out an execution, and he has already elected that method. But now Owens contends that he needs more information about the pentobarbital "to make an

informed decision" about which method to elect, despite the S.C. Supreme Court having already rejected this argument. *See* Resp.Appendix19.

Owens offers no compelling reason to stay his execution, particularly after the S.C. Supreme Court has rejected the same argument he makes here. Owens seeks to take the S.C. General Assembly's act of legislative grace in giving him a choice of execution methods and morph it into a weapon to delay his sentence for the brutal murder of a single mother in an early-morning convenience store robbery 27 years ago. No caselaw supports Owens's position. In fact, courts have repeatedly rejected attempts to obtain more information about execution drugs as a reason to halt scheduled executions.

"The people of [South Carolina], the surviving victims of Mr. [Owens]'s crimes, and others like them deserve better" than additional delay. *Bucklew*, 587 U.S. at 149. The State has a "significant interest in enforcing its criminal judgments," *Nelson v. Campbell*, 541 U.S. 637, 650 (2004), and this Court should deny Owens's motion so that his execution may proceed.

STATEMENT OF THE CASE

A. Owens brutally murders a store clerk during an early-morning robbery.

Freddie Owens and another man robbed a convenience store at 4:00 AM on November 1, 1997, hours after trick-or-treating would have ended. The store clerk, "a single mother of three who was working as many jobs," gave the men the $37.29 in the register. But she did not know the combination to the safe. When she couldn't open it, Owens shot her in the head, killing her instantly. *Owens v. Stirling*, 967 F.3d

396, 404 (4th Cir. 2020).

A jury convicted Owens, and the S.C. Supreme Court affirmed his conviction. *See State v. Owens*, 552 S.E.2d 745 (S.C. 2001). In the hours between his conviction and first sentencing, Owens killed his cellmate, stabbing him in the right eye with a pen and then burning him around the eye, choking him, and stomping him. *Id.* at 755. The S.C. Supreme Court eventually affirmed his death sentence. *State v. Owens*, 664 S.E.2d 80 (S.C. 2008).

B. Owens elects lethal injection but still demands more information.

When the S.C. Supreme Court first issued an execution notice for Owens, he (joined by other death row inmates) challenged the constitutionality of electrocution and the firing squad under state law. The S.C. Supreme Court stayed his execution, and after three years of litigation, that court ultimately rejected Owens's claims. *See Owens v. Stirling*, 904 S.E.2d 580 (S.C. 2024). The S.C. Supreme Court then issued another execution notice for Owens. *See* Resp.Appendix1.

Since 2021, South Carolina has authorized three methods of execution: electrocution, the firing squad, and lethal injection. *See* 2021 S.C. Acts No. 43. The default method is electrocution, but a condemned inmate may elect "firing squad or lethal injection, if it is available at the time of election." S.C. Code Ann. § 24-3-530(A). The director of the Department of Corrections must certify for each execution which methods are available. *Id.* § 24-3-530(B).

South Carolina also has a Shield Statute, which the General Assembly passed in 2023 to facilitate the Department of Corrections obtaining lethal injection drugs.

See 2023 S.C. Acts No. 16. That law protects any entity that "manufactures" or "compounds" the "drugs . . . utilized in the execution of a death sentence" from having its identity disclosed, as well as protecting the identity any person who "participates in the planning or administration of the execution of a death sentence." *Id.* § 24-3-580(A)(1). "[A]ny identifying information" about that entity "shall be confidential." *Id.* § 24-3-580(B). "[I]dentifying information" is a "broad[]" term that includes "any record or information that reveals a name, date of birth, social security number, personal identifying information, personal or business contact information, or professional qualifications." *Id.* § 24-3-580(A)(2). The General Assembly declared the Shield Statute "shall be broadly construed by the courts of this State so as to give effect to the General Assembly's intent to ensure the absolute confidentiality of the identifying information of any person or entity directly or indirectly involved in the planning or execution of a death sentence within this State." *Id.* § 24-3-580(I).

Director Stirling certified that all three methods were available for Owens's scheduled execution. *See* Resp.Appendix3–5. Tracking the S.C. Supreme Court's "extreme" illustration of a more-than-sufficient explanation that the court "doubt[ed] there could be any legitimate legal basis on which to mount a challenge," *Owens*, 904 S.E.2d at 605, the Director explained that the S.C. Law Enforcement Division's Forensic Services Lab tested the pentobarbital that would be used if Owens elected lethal injection. That lab, he noted, is "an internationally accredited forensic laboratory . . . that . . . used widely accepted testing protocols and methodologies" with testing performed by "experienced, qualified, and duly authorized personnel."

Resp.Appendix4. The testing "confirmed the concentration of the solution provided is consistent with the vial labeling of pentobarbital, 50 milligrams per milliliter, and acknowledged the substance's concentration in terms of its purity and stability." Resp.Appendix4–5.

Owens signed a power of attorney for one of his lawyers to make his election, which the S.C. Supreme Court held state law allowed. *See* Resp.Appendix16, 21. Owens's agent then elected lethal injection by a single dose of pentobarbital—the exact method Owens had insisted during the state court litigation was the most humane way to carry out an execution. *See* Resp.Appendix20.

Despite this information from the Director's certification, the Shield Statute, and his own election, Owens demanded to know more about the pentobarbital. *See* Resp.Appendix6–10. He sought additional details about the drug's creation, the "Beyond Use Date," actual test results, and storage conditions, attempting to bolster his request with an affidavit from the same expert on whom he relies here.

The S.C. Supreme Court rejected Owens's arguments. The certification "adequately explain[ed]" how the Director determined that the pentobarbital was sufficiently "poten[t], pur[e], and stab[le]" and provided Owens "sufficient detail" "to make an informed election." Resp.Appendix18–19.

Undeterred by his loss in the S.C. Supreme Court, Owens eventually ran to federal court, where he asserted a procedural due process right to know more about the pentobarbital and execution team members. The district court denied Owens's preliminary injunction motion. *See* Resp.Appendix22–38. The Fourth Circuit denied

his emergency motion for an injunction pending appeal. *See* Resp.Appendix39–40.

Now, just two hours before his execution, Owens seeks a stay from this Court.

STANDARD OF REVIEW

A stay of an execution "should be the extreme exception, not the norm," *Barr v. Lee*, 591 U.S. 979, 981 (2020) (vacating stay), because a State has a "strong interest in enforcing its criminal judgments without undue interference from the federal courts," *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

A stay pending disposition of a petition for a writ of certiorari requires an applicant to show "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). The Court may also consider the equities and relative harms. *Id.*; *see also Nken v. Holder*, 556 U.S. 418, 434 (2009) (four traditional stay factors).

REASONS FOR DENYING THE APPLICATION

Owens cannot meet any of the factors for a stay. He has two distinct merits problems that undercut both the likelihood of this Court granting certiorari and Owens's likelihood of prevailing on the merits. First, he already raised his due process-based demand for more information in the S.C. Supreme Court, where he lost. And second, his procedural due process claim is based on a trio of defects: He overreads what his statutory right of election includes, speculates that more information would change his election, and discounts the State's interests in

protecting the identity and security of its supplier of lethal injection drugs and execution-team members.

As for the equities, they favor the State. The State has a "significant interest in enforcing its criminal judgments." *Nelson*, 541 U.S. at 650. As do victims and their families. *Bucklew*, 587 U.S. at 149. More delay undermines those interests. Owens offers no "exception[al]" reason to cast aside those interests in favor of further delay. *Id.* at 150.

I. Owens's claim is barred because he already lost in state court.

As a threshold obstacle, Owens invoked due process in the S.C. Supreme Court to demand the exact information he now seeks in federal court. *See* Resp.Appendix6, 7 9. That court rejected his demand, so he cannot prevail on the same argument now.

In its decision resolving Owens's state-law method-of-execution challenge, the S.C. Supreme Court explained that the Director "must explain . . . the basis for his determination" that lethal injection is available. *Owens*, 904 S.E.2d at 604. The upper "extreme" example the S.C. Supreme Court gave for how the Director might determine whether lethal injection is available is that the drug had been tested by "the Forensic Services Lab of the South Carolina Law Enforcement Division." *Id.* at 605.

That's exactly how Director Stirling determined that lethal injection is available for Owens's execution. *See* Resp.Appendix3–5. He explained that the "accredited" lab used "widely accepted testing protocols" and "experienced, qualified, and duly authorized personnel" to confirm the drug's "purity and stability."

Resp.Appendix4–5. (Given what Director Stirling did provide in his certification, the Court need not engage with Owens's hypotheticals about what basis a director might theoretically provide for determining that lethal injection is available. *See* Stay Mot. 8. Owens's emergency motion must deal with the facts as they are, not as they might be.)

Owens complained to the S.C. Supreme Court that the Director's certification wasn't good enough. He demanded to know the same information he seeks here, using the same affidavit from the same expert. *Compare* Resp.Appendix11–15, *with* Dist. Ct. ECF No. 1-6. In lodging his objection, Owens explicitly invoked due process as a basis for needing more information to "make an adequately informed election." *See* Resp.Appendix6, 7, 9.

The S.C. Supreme Court disagreed that Owens was entitled to anything further. The Director had "adequately explain[ed]" how he concluded that the pentobarbital was sufficiently "poten[t], pur[e], and stab[le]," so Owens already had "sufficient detail" "to make an informed election," Resp.Appendix18–19, which was precisely what the S.C. Supreme Court required the Director to do, *Owens*, 904 S.E.2d at 604.

Owens nevertheless maintains that the S.C. Supreme Court didn't decide anything about due process. *See* Stay Mot. 14–15. But that's wrong. Had the S.C. Supreme Court thought due process required that Owens receive the information he sought, that court could not have issued the order it did. *See id.* (noting a "Due Process Clause component" to what the certification had to provide).

Owens implicitly admits as much when he alleges (three times, no less) that his procedural due process claim stems from "the state supreme court's refusal to provide" the information he demanded. Dist. Ct. ECF No. 1, at 13–16. And that's where Owens runs directly into *Rooker-Feldman*. *See Exxon Mobil Corp. v. SaudiBasic Indus. Corp.*, 544 U.S. 280, 284 (2005) (the doctrine forbids "state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced [from] inviting district court review and rejection of those judgments"). Owens seeks to avoid this conclusion by comparing his claims to *Skinner v. Switzer*, 562 U.S. 521 (2011), and claiming that he is challenging the law generally, not its application. *See* Stay Mot. 17–18. But his complaint belies that argument. His claims are based on "the state supreme court's refusal to provide the requested material." Dist. Ct. ECF No. 1, at 13. That is the application of South Carolina law to Owens, and he cannot reinvent his claim on appeal to avoid the consequences of the claim he pleaded.

But even if Owens has somehow asserted an "independent claim" here, *Exxon Mobil Corp.*, 544 U.S. at 293, he still cannot prevail because of preclusion. He insists that due process was not actually decided here because the S.C. Supreme Court did not mention it. *See* Stay Mot. 14. True, that court didn't use "due process" in its order on Owens's objection. Resp.Appendix18–19. But Owens draws the wrong conclusion from that omission. The S.C. Supreme Court had recognized that there was a "Due Process Clause component" involved, *Owens*, 904 S.E.2d at 604, so the court's decision not to discuss due process must mean that this court did not see any due process

problems with the Director's certification. If the certification did raise those concerns, the S.C. Supreme Court would have had to address it. *See* U.S. Const. art. VI, cl. 2. The briefing in the S.C. Supreme Court was expedited, and arguments may not have been developed as robustly as they are during typical merits briefing, but there's no denying that due process was at issue. *Cf. Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 684 S.E.2d 779, 782 (S.C. Ct. App. 2009) (collateral estoppel elements: "(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment"); *Plum Creek Dev. Co. v. City of Conway*, 512 S.E.2d 106, 109 (S.C. 1999) (res judicata elements: "(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit").

To come at the preclusion question another way, consider a counterfactual. Owens could have first brought his due process claim in federal court. Had he done so, a federal court would have had the first crack at whether the Due Process Clause entitled Owens to additional information. But Owens didn't do that. So the state court's decision controls now. *See Exxon Mobil Corp.*, 544 U.S. at 293 (even if *Rooker-Feldman* doesn't apply, preclusion can).

II. Owens is not likely to prevail on the merits.

Even if Owens could avoid having raised (and lost) his due process claim in state court first, he is not entitled to a stay. Procedural due process is "flexible," accounting for the facts of a case. *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005). What process is due in any situation considers the private interest involved, the risk of an erroneous deprivation, and the government's interest. *Mathews v. Eldridge*, 424 U.S.

319, 335 (1976). Owens has not carried his burden to show that he is likely to satisfy any part of this test.

A. Owens overreads his statutory opportunity to elect a method of execution.

South Carolina law gives a condemned inmate the opportunity to elect the firing squad or lethal injection, instead of electrocution, if those methods are available. *See* S.C. Code Ann. § 24-3-530(A). The S.C. Supreme Court called this "choice" an "innovation" because "a condemned inmate in South Carolina will never be subjected to execution by a method he contends is more inhumane than another method that is available." *Owens*, 904 S.E.2d at 608.

Owens asks this Court to stretch that statutory choice beyond what the S.C. General Assembly intended it to mean. *Cf. Hodges v. Rainey*, 533 S.E.2d 578, 581 (S.C. 2000) (South Carolina's "cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature"). He cherry-picks quotes from the S.C. Supreme Court's recent methods-of-execution case about the Director having to explain the basis for his determination that lethal injection is available, *see* Stay Mot. 7, but he ignores other parts of the state court's discussion. Most notably, the S.C. Supreme Court explained that, whatever he includes in his certification, the Director still "must comply with the confidentiality requirements of the shield statute." *Owens*, 904 S.E.2d at 604. In other words, the right to elect—and any accompanying entitlement to information—must be read in conjunction with the Shield Statute.

That's unsurprising. In South Carolina (as in most jurisdictions), "[s]tatutes dealing with the same subject matter must be reconciled, if possible, so as to render

both operative." *Hodges*, 533 S.E.2d at 583. This conclusion is buttressed by the fact that the S.C. General Assembly enacted the Shield Statute *after* amending the methods-of-execution statute that allows Owens to elect a method, and "[t]he more recent and specific legislation controls if there is a conflict between two statutes." *Id.* at 583 n.3; *compare* 2023 S.C. Acts No. 16, *with* 2021 S.C. Acts No. 43.

Thus, as a matter of state law, Owens has received sufficient information to make his election. *See* Resp.Appendix18–19. As the S.C. Supreme Court acknowledged, that court "doubt[ed] there could be any legitimate legal basis on which to mount a challenge" if the Director's certification was based on testing by the S.C. Law Enforcement Division. *Owens*, 904 S.E.2d at 605.

Still, if Owens were correct that federal law required that he receive more information than the Shield Statute permits, he would actually lose the right to elect. In amending the methods-of-execution statute, the General Assembly included a robust severability clause. *See* 2021 S.C. Acts No. 43, § 2. The later-enacted Shield Statute came only after the S.C. Supreme Court had remanded Owens's state court litigation earlier in 2023 for more discovery on why the Department of Corrections had been unable to obtain lethal injection drugs. *See Owens v. Stirling*, 882 S.E.2d 858, 862–63 (S.C. 2023). The Shield Statute seeks to protect the State from the "well-known phenomenon in which drug suppliers, once exposed to pressure from activists opposed to the death penalty, refuse to supply drugs to state corrections departments." *Va. Dep't of Corr. v. Jordan*, 921 F.3d 180, 184 (4th Cir. 2019). Based on the legislature's aim to make—and keep—lethal injection available, severing the

right to elect is the only recourse. It's not a consent protective order or limited disclosure. *See* Owens's CA4 Reply, at 2 (Dkt. 22). The General Assembly made clear its "intent to ensure the *absolute* confidentiality of the identifying information of any person or entity directly or indirectly involved in the planning or execution of a death sentence." S.C. Code Ann. § 24-3-580(I) (emphasis added); *id.* § 24-3-580(C) (disclosing protected information is punishable by up to three years in prison).

B. Owens offers only speculation about the pentobarbital.

Owens hypothesizes about what could be true "if" certain conditions were met or what "may" happen if other things were true. Almgren Aff. ¶¶ 7, 8, Dist. Ct. ECF No. 1-6. "[S]peculation" about a drug "cannot substitute for evidence" about it. *Brewer v. Landrigan*, 562 U.S. 996, 996 (2010). Courts have been consistent on this front. The Fifth Circuit, for example, once vacated a stay of an execution when an inmate had not received all the information he wanted about the drugs, explaining that "the case might be different" only if a drug was "never before used or unheard of" and the "efficacy or science was completely unknown." *Sells v. Livingston*, 561 F. App'x 342, 344 (5th Cir. 2014), *stay of execution denied by* 572 U.S. 1044 (2014). The Ninth Circuit recently refused to stay an execution based on "arguments about the provenance, quality, and reliability of the drug" that were "purely speculative." *Creech v. Tewalt*, 94 F.4th 859, 862–63 (9th Cir. 2024). And the list goes on. *See, e.g.*, *Zink v. Lombardi*, 783 F.3d 1089, 1103 (8th Cir. 2015); *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1265–66 (11th Cir. 2014); *cf. Bucklew* 587 U.S. at 144 (explaining why arguments based on "speculation" about lethal injection fail).

Owens seeks to avoid these cases by looking to the supposed difference between his claim and the claims in those cases. But Owens has pleaded in his procedural due process claim that he "must be provided" with the information he seeks "to know whether Defendants' lethal injection procedures meet Eighth Amendment standards." Compl. ¶ 37, Dist. Ct. ECF No. 1; Owens's CA4 Reply, at 2. These cases are therefore more on-point here than Owens wants to admit. And in any event, the type of the claim aside, speculation isn't sufficient. "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). That bar gets higher—"a strong showing that he is likely to succeed on the merits"—for a stay. *Nken*, 556 U.S. at 434.

Although Owens says he needs more information, he only speculates that this information could change the election he has already made. *See* Stay Mot. 22–23. The Director has certified that the S.C. Law Enforcement Division's "internationally accredited" lab "used widely accepted testing protocols and methodologies" and "experienced, qualified, and duly authorized personnel" to test the pentobarbital for its "purity and stability." Resp.Appendix4–5. Owens may identify six categories of information, *see* Stay Mot. 11, but nothing in the complaint, preliminary injunction motion, or Almgren's affidavit casts credible doubt on the S.C. Law Enforcement Division's testing or suggests that his execution might be botched. *See Bucklew* 587 U.S. at 144 (speculation isn't enough). So, for instance, Owens hasn't alleged that the transportation or storage of the drugs would likely change the results of the testing or his election. As just one more example, Owens's demand for the expiration

date implies that the Director would have certified that lethal injection were available even if the pentobarbital had expired before today. Wanting more information does not relieve Owens from the burden of alleging sufficient facts that more information was necessary to make the election the General Assembly, through the exercise of legislative grace, afforded him.

In the same way, Owens only speculates about the need for details about the qualifications of the execution team members who will insert the IV. That other States may have experienced difficulties in specific cases (often involving inmates with complicating medical conditions, such as an Alabama inmate with cancer in 2018 or an Arizona inmate with a degenerative spinal condition in 2022) does not mean that South Carolina will.

C. South Carolina has a strong interest in protecting information about lethal injection drugs and execution-team members.

South Carolina has a "significant interest in enforcing its criminal judgments," *Nelson*, 541 U.S. at 650, and its law generally, *cf. Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (State suffers "irreparable injury" "[a]ny time" its law is enjoined). To protect those interests, courts should not be "transformed . . . into boards of inquiry charged with determining 'best practices' for executions." *Baze v. Rees*, 553 U.S. 35, 51 (2008) (plurality). Sanctioning that shift would result in endless new "round[s] of litigation," "embroil the courts in ongoing scientific controversies beyond their expertise," and "substantially intrude on the role of state legislatures in implementing their execution procedures." *Id.* Yet that is what Owens implicitly asks this Court to do. Rather than treat procedural due process as

a floor to ensure basic protections (which Owens received from Director Stirling's certification), Owens demands at least six additional categories of information. The Court should decline Owens's invitation to nudge open the door that this Court closed in *Baze*.

The State also has a strong interest in continuing to obtain lethal injection drugs for future executions (including Owens's co-plaintiffs here). Protecting the sources of these drugs is vital. "[D]isclosure of the supplier for a particular drug used by a state in executions will have predictable consequences: anti-death penalty advocates will hound the supplier of that drug until the supplier capitulates and ceases supplying the drug." *Jordan v. Comm'r, Miss. Dep't of Corr.*, 947 F.3d 1322, 1341 (11th Cir. 2020). Just as the Shield Statute was an important tool for making lethal injection available for Owens, it plays an equally critical role in maintaining Owens's preferred method as an option in the future.

The risk of disclosure isn't hypothetical. Attempts to learn more about these drugs predictably come from death row inmates in South Carolina. But they also come from other sources. For instance, a death row inmate in Idaho, represented by a federal public defender, recently sent a subpoena to the S.C. Department of Corrections for information about its drugs and sources. *See generally Pizzuto v. Tewalt*, No. 1:21-cv-359 (D. Idaho). Examples abound in other States. *See, e.g.*, *Va. Dep't of Corr.*, 921 F.3d at 194 (attempt by Mississippi inmates to obtain Virginia information). No matter what steps are taken to protect information in discovery, there remains "the inherent danger and hardship that would follow even an

inadvertent disclosure." *Jordan v. Hall*, No. 3:15-CV-295, 2018 WL 1546632, at *11 (S.D. Miss. Mar. 29, 2018) (emphasis added).

Owens tries to cast his demands as falling outside the scope of the Shield Statute, but that effort fails. *See* Stay Mot. 25. For instance, an expiration or "Beyond Use Date" would likely reveal whether the pentobarbital is manufactured or compounded. Yet there are only a few manufacturers, so if the Department of Corrections did obtain manufactured pentobarbital and say as much, that would leave Owens and anti-death penalty advocates with a limited universe to determine the Department's source. It is hardly a stretch to think that, if the Department did have manufactured pentobarbital and said as much, anti-death penalty advocates would rush to all pentobarbital manufacturers to have them threaten to stop selling all drugs (including those for regular medical use) to the Department unless the pentobarbital was returned. Even if the exact manufacturer were not identified, this entire scenario would make it harder for the Department to carry out its daily operations and a duly imposed death sentence. *Cf.* John H. Blume & Brendan Van Winkle, *Death Penalty: Determine if Capital Punishment Has Outlived its Use* 3, American Constitution Society (2020), https://tinyurl.com/ym2vcbdr (calling on the incoming Biden Administration to "heavily regulate lethal injection drugs and seek to prevent their importation and travel through interstate commerce"). The same concerns would arise if the Department were to reveal that it had compounded pentobarbital, as anti-death penalty advocates could start contacting the compounding pharmacies capable of providing that drug or the producers of the bulk

components. *See* Chiara Eisner, *Unmarked Cars and Secret Orders: How a Pharmacy Prepared Drugs for Texas' Executions*, NPR (July 10, 2024), https://tinyurl.com/3ypzp2ek.

Owens expresses dismay that South Carolina would take such a strong stance on protecting information about its lethal injection drugs. He says other States (such as Texas, Utah, and Florida) have disclosed more information but have still been able to carry out executions and that some courts have required disclosure. *See* Stay Mot. 25–29.

As for the cases, neither helps him. The plaintiff in *Martin v. Ward* based his requests for more information on an alleged "documented pattern of maladministration that has led to a surprisingly wide range of times to effectuate death that are inconsistent with the application of a uniform protocol," with either a drug that wasn't sufficiently potent or that was improperly administered. No. 1:18-CV-4617-MLB, 2021 WL 1186749, at *1 (N.D. Ga. Mar. 30, 2021). Owens has not (and cannot) allege such a pattern here. And *Moeller v. Weber* involved information unsealed, subject to South Dakota's shield law, after an execution. No. CIV 04-4200, 2013 WL 5442392 (D.S.D. Sept. 30, 2013).

Three responses dispose of the balance of Owens's argument. *First*, and as Owens acknowledges, those other States have had different experiences with lethal injection drugs than South Carolina has. The struggle that South Carolina has had compared to other States in obtaining drugs for lethal injection makes South Carolina understandably more intent on protecting its ability to secure those drugs moving

forward.

Second, other States' approaches may not work. About two months ago, NPR publicly identified Texas's drug supplier. *See* Eisner, *supra* (revealing Texas's supplier). Utah just adopted a more robust shield law. *See* Utah Code Ann. § 64-13-27(3)–(4) (enacted in 2024). And Florida is now using a three-drug protocol with etomidate, despite having used pentobarbital in the past. *See* Romy Ellenbogen, *Florida's First State Execution in Three Years Renews Lethal Injection Debate*, Miami Herald (Feb. 23, 2023), https://tinyurl.com/5dvrbr4c. What's more, these States' willingness to disclose more information does not shield them from the inevitable lawsuits that death row inmates bring as their execution dates approach.

And *third*, all States do not need the same approach. The Supreme Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009) (citing *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Just because some States disclose different or additional information does not mean South Carolina must too. The Constitution does not require South Carolina to count other States, much less copy them. Ultimately, Owens may disagree with South Carolina's Shield Statute, but South Carolina is where Owens chose to commit his crime.

III. The remaining factors do not support a stay.

As for irreparable harm, Owens treats this factor as a foregone conclusion in his favor. *See* Stay Mot. 30. But as one district court reasoned, "[i]rreparable harm, in the context of the death penalty, cannot mean the fact of death" because that

"would make analysis of this factor meaningless." *Jackson v. Danberg*, No. CIV. 06-300-SLR, 2011 WL 3205453, at *3 (D. Del. July 27, 2011), *aff'd,* 656 F.3d 157 (3d Cir. 2011); *see also, e.g.*, *Powell v. Thomas*, 784 F. Supp. 2d 1270, 1283 (M.D. Ala. 2011); *Reid v. Johnson*, 333 F. Supp. 2d 543, 550 (E.D. Va. 2004). Instead, a court must consider whether the inmate would suffer some constitutional wrong when his death sentence was carried out. *Jackson*, 2011 WL 3205453, at *3. That logic makes sense, but the Court need not stake out a position on this question because Owens cannot meet the other factors.

Taking the harm to the State and the public interest together, *see Nken*, 556 U.S. at 435,"[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence," *Bucklew*, 587 U.S. at 149; *see also* S.C. Const. art. I, § 24 (victim's bill of rights). Too often, those interests are "frustrated" by "delay through lawsuit after lawsuit." *Bucklew*, 587 U.S. at 149. Owens is no exception: Since 2021, he's filed multiple cases in state and federal court raising various challenges to his execution. Presumably, he'll always have one more challenge, if the courts continue to grant him stays. "The people of [South Carolina], the surviving victims of Mr. [Owens]'s crimes, and others like them deserve better." *Id.* Indeed, there is even a "moral dimension" to the State's interest in the finality that comes with carrying out Owens's sentence. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

Owens also ignores the State's separate interest in keeping federal courts from interfering with its criminal judgments. To be sure, federal courts "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But in doing so, they

"must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584. "The proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously. Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay." *Bucklew*, 587 U.S. at 150. From this role flows the common-sense conclusion that "[l]ast-minute stays should be the extreme exception, not the norm." *Id.* In other words, courts must guard against the "Groundhog Day" that is capital litigation, *Glossip v. Gross*, 576 U.S. 863, 893 (2015) (Scalia, J., concurring), so that duly imposed, fully appealed judgments can be carried out and the "seemingly endless proceedings" can end, *Baze*, 553 U.S. at 69 (Alito, J., concurring).

CONCLUSION

For all these reasons, the Court should deny the Emergency Motion for Stay of Execution and Petition for a Writ of Certiorari.

Respectfully Submitted,

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