Nos. 24-5993 & 24A498

# Supreme Court of the United States

CAREY DALE GRAYSON,
*Applicant*,
v.
JOHN HAMM,
Commissioner, Alabama Department of Corrections, et al.
*Respondents*.

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

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


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**EXECUTION SCHEDULED NOVEMBER 21, 2024**

**CAPITAL CASE**

## QUESTIONS PRESENTED

(Restated)

In *Baze v. Rees*, it was “uncontested” that “failing a proper dose of sodium thiopental that would render the prisoner unconscious,” Kentucky’s lethal-injection protocol would pose a “substantial, constitutionally unacceptable risk of suffocation from the administration of pancurionium bromide and pain from the injection of potassium chloride.” 553 U.S. 35, 53 (2008) (plurality op.). From that sentence, Petitioner infers that any “risk of suffocation” without a sedative *per se* violates the Eighth Amendment.

The district court found that a condemned inmate subject to Alabama’s nitrogen-hypoxia protocol will breathe nitrogen gas, rapidly become unconscious, and die without experiencing *any physical pain*. Petitioner alleges nonetheless that he will suffer emotional distress in anticipation of his death—“a type of pain that would exist regardless of the method.” DE95:46. The first question is:

1. Does a painless method of execution causing emotional distress no greater than that of any other method violate the Eighth Amendment because it deprives a conscious inmate of oxygen?

Petitioner proposed an alternative protocol involving intramuscular injections of midazolam and ketamine prior to the administration of nitrogen gas. But he “presented no evidence showing where exactly he sought to obtain his proposed sedatives on a regular basis and who exactly would administer them.” DE95:49. His proposed method is “neither tested nor used,” and he offered “no real analysis or consideration of the possible risks and side effects associated with using these sedatives in this manner.” *Id.* at 50. These drugs may exacerbate risks that “already exist according to Grayson,” such as “suppressed respiration, agitation, nausea, and combativeness.” *Id.* In light of these and other “real concerns,” the State had good reasons to refuse to adopt the alternative. *Id.* at 49, 51. The second question is:

2. Did the district court clearly err in finding that Petitioner failed to show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain that Alabama refused to adopt without a legitimate penological reason?

## TABLE OF CONTENTS

QUESTIONS PRESENTED .......... i

TABLE OF AUTHORITIES .......... iv

INTRODUCTION .......... 1

STATEMENT OF FACTS .......... 4

I. Grayson's Crime and Initial Post-Conviction Litigation. .......... 4

A. Grayson Murders, Molests, and Mutilates Vicki Deblieux, For Which He Receives a Unanimous Death Sentence. .......... 4

B. Grayson Challenges Lethal Injection and Pleads Nitrogen Hypoxia as an Alternative Method of Execution. .......... 5

II. The Executions of Kenneth Smith & Alan Miller By Nitrogen Hypoxia. .......... 6

III. Grayson Challenges Nitrogen Hypoxia, The Method He "Came Up With." .......... 10

STANDARD OF REVIEW .......... 16

REASONS TO DENY THE APPLICATION AND CERTIORARI .......... 17

I. Grayson Has No Chance Of Success On His Eighth Amendment Claim. .......... 17

A. Grayson's "Conscious Suffocation" Argument Is Wrong. .......... 18

B. Grayson Failed to Show a Substantial Risk of Severe Pain That A Feasible and Readily Available Alternative Would Significantly Reduce. .......... 22

C. Grayson Conceded That Nitrogen Hypoxia Is More Humane Than Lawful Alternatives and Not Deliberately Designed to Inflict Pain. .......... 31

II. The Equities Favor the State. .......... 32

A. Grayson's delay and manipulation are grounds to deny a stay. ........ 32

B. Grayson faces no irreparable harm because the method is painless. ........ 34

C. A stay would undermine the public interest in justice. ........ 34

III. Grayson violated Rule 23 by failing to request relief below. ........ 35

CONCLUSION ........ 38

## TABLE OF AUTHORITIES

**Cases**

*Angelone v. Bennett*,
519 U.S. 959 (1996) .......... 36

*Barefoot v. Estelle*,
463 U.S. 880 (1983) .......... 16

*Barr v. Lee*,
591 U.S. 979 (2020) .......... 17, 21

*Bateman v. Arizona*,
329 U.S. 1302 (1976) .......... 16

*Baze v. Rees*,
553 U.S. 35 (2008) .......... i, 3, 4, 9, 19, 20-24, 26, 27, 32

*Bucklew v. Precythe*,
587 U.S. 119 (2019) .......... 1, 2, 15, 17, 18, 21, 23, 24, 26, 27, 30, 32

*Calderon v. Thompson*,
523 U.S. 538 (1998) .......... 34

*City of Grants Pass v. Johnson*,
144 S. Ct. 2202 (2024) .......... 32

*Dolman v. United States*,
439 U.S. 1395 (1978) .......... 35

*Edwards v. Hope Medical Group for Women*,
512 U.S. 1301 (1994) .......... 16

*Francis v. Resweber*,
329 U.S. 459 (1947) .......... 23

*Glossip v. Gross*,
576 U.S. 863 (2015) .......... 2, 3, 17, 21, 24, 27, 32

*Grayson v. State*,
824 So. 2d 804 (Ala. Crim. App. 1999) .......... 4

*Hill v. McDonough*,
547 U.S. 573 (2006) .......... 17, 34

*Hollingsworth v. Perry*,
558 U.S. 183 (2010) .......... 16

*Ala. Lethal Injection Protocol Litig.*,
No. 2:12-cv-316-WKW-CSC (M.D. Ala. filed Nov. 29, 2017) .......... 5, 31

*Jordan v. Comm'r, Miss. Dep't of Corr.*,
947 F.3d 1322 (11th Cir. 2020) .......... 27

*Kemmler*,
136 U.S. 436 (1890) .......... 21

*Little v. Reclaim Idaho*,
140 S. Ct. 2616 (2020) .......... 36

*Middlebrooks v. Parker*,
22 F.4th 621 (6th Cir. 2022) .......... 22, 31

*Miller v. Marshall*,
2024 WL 2946093 (M.D. Ala. June 11, 2024) .......... 10

*Miller v. Marshall*,
No. 2:24-cv-197-RAH (M.D. Ala. filed Mar. 9, 2024) .......... 9

*Nance v. Ward*,
597 U.S. 159 (2022) .......... 17, 18, 24, 31

*Nelson v. Campbell*,
541 U.S. 637 (2004) .......... 17, 32

*New Hampshire v. Maine*,
532 U.S. 742 (2001) .......... 22

*Ramirez v. Collier*,
595 U.S. 411 (2022) .......... 33, 34

*Respect Maine PAC v. McKee*,
562 U.S. 996 (2010) .......... 16

*Siegel v. LePore*,
234 F.3d 1163 (11th Cir. 2000) ........ 34

*Smith v. Hamm*,
144 S. Ct. 414 (2024) ........ 7, 17, 20

*Smith v. Hamm*,
No. 2:23-CV-656-RAH, 2024 WL 262867 (M.D. Ala. Jan. 24, 2024) ........ 6, 7

*Smith v. Hamm*,
No. 24-10095 (11th Cir. filed Jan. 17, 2024) ........ 6

*Wilkerson v. Utah*,
99 U.S. 130 (1879) ........ 21

**Other Authorities**

*A Select Few Witnessed Alabama's Nitrogen Execution. This Is What They Saw*, N.Y. Times (Feb. 1, 2024), www.nytimes.com/2024/02/01/us/alabama-nitrogen-execution-kenneth-smith-witnesses.html ........ 8

Philip J. Nitschke, *The Facts about Nitrogen Hypoxia 101*, The Peaceful Pill Handbook (Jan. 27, 2024) ........ 8

**Rules**

SUP. CT. R. 14.1(a) ........ 36
SUP. CT. R. 15.1 ........ 36
SUP. CT. R. 20.4(b) ........ 36
SUP. CT. R. 23.3 ........ 35-37

## INTRODUCTION

Carey Grayson will be executed **tomorrow, November 21, 2024**, for the cruel and sadistic murder of Vicki Deblieux on February 21, 1994.

Grayson was scheduled to be executed in 2012, but he obtained a stay to challenge Alabama's lethal-injection protocol. Back then, Grayson told the courts that nitrogen hypoxia "was a more humane and constitutional method of execution." DE95:3. Now, he confesses that his pleading was just "a stalling tactic" and argues that nitrogen hypoxia is unlawful unless the inmate is first rendered unconscious using one of the same drugs (midazolam) that Grayson challenged years ago. The assumption that a prisoner is "more interested in avoiding unnecessary pain than in delaying his execution" does not hold for Carey Grayson. *Bucklew v. Precythe*, 587 U.S. 119, 140 (2019). His entire lawsuit should be barred by judicial estoppel, not entertained by the Supreme Court of the United States.

Grayson lost handily in district court after his own expert testified that Alabama's nitrogen-hypoxia method would be completely painless. Grayson then pivoted to a theory of "anxiety and stress," *e.g.*, DE92:7, but the district court rightly found no superadded risk: An inmate's emotional distress upon facing execution is unsurprising, perhaps inescapable, and not unconstitutional. DE95:45. In any event, breathing inert gas through a respirator causes rapid unconsciousness—as quickly as 12 seconds, according to OSHA (DE58-1) and almost certainly by the 2-minute mark in the recent execution of Alan Miller (DE95:47). Adding powerful

drugs to the protocol would not eliminate the inmate's fear of death, but it could prolong the execution and introduce new risks, such as serious side effects. DE95:50.

Grayson failed to satisfy the standard that "no doubt … governs 'all Eighth Amendment method-of-execution claims.'" *Bucklew*, 587 U.S. at 134 (quoting *Glossip v. Gross*, 576 U.S. 863, 867 (2015)). He did not show "a substantial risk of severe pain" that "a feasible and readily implemented alternative method of execution … would significantly reduce" and "that the State has refused to adopt without a legitimate penological reason." *Id.* The district court held as much after a two-day evidentiary hearing with live fact and expert witnesses, and not one of its copious factual findings was clearly erroneous, according to a unanimous panel of the Eleventh Circuit. The State had won a "classic battle of the experts" based on Dr. Antognini's "credible and persuasive" testimony as well as "numerous third-party articles and case studies." DE95:45, 51. In contrast, Grayson's "allegations amount[ed] to speculation, a speculative parade of highly unlikely events," which do not show "an unacceptable risk of pain, let alone superadded pain." DE95:44. And beyond a few areas of dispute, "what is generally uncontested from the evidence is that the ADOC's nitrogen hypoxia protocol has been successfully used twice, and both times it resulted in a death within a matter of minutes." DE95:51.[1]

[1] Grayson complains that nitrogen hypoxia "has never been assessed following a trial on the merits," Stay.App.4 n.7, but he pleaded and elected nitrogen hypoxia. He has been subject to the method since 2018. He delayed in bringing suit and in filing his motion for emergency relief. Then once he received discovery, Grayson engaged in a "consistent pattern of unnecessary delay" (DE68:6), declined to depose *any* witness, and instead spent his time filing frivolous motions like a 20-page demand to disqualify the Attorney General's Office from representing State Defendants (DE38).

Coming up "well short" of his burden, DE95:44, Grayson attempts to change it. He argues that this Court already outlawed Alabama's nitrogen-hypoxia protocol in *Baze v. Rees*, 553 U.S. 35 (2008). Or at least that "conscious suffocation satisfies [the] first prong" of the *Glossip* test. Pet.6-7. The petition's argument is a bit opaque, but what Grayson argued below was that "*Baze* establishes a per se prohibition on executions that cause conscious suffocation." CA11 Op. Br. 8 at 8. Of course, *Baze* held no such thing. But Grayson pointed to the following sentence:

> It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancurionium bromide and pain from the injection of potassium chloride.

*Id.* at 6 (quoting *Baze*, 553 U.S. at 44). In other words, Kentucky *agreed* that its sedative had to work. That tells us nothing about the kinds of pain that violate the Eighth Amendment. Putting aside that the entire argument relies on one sentence of *dicta*, its application here requires a sleight of hand. Yes, if "suffocation" just means the deprivation of oxygen, then the protocol causes suffocation. But, no, nitrogen hypoxia does not create "sensations of drowning and suffocation," and Grayson proved no such thing. Pet.7 (emphasis added). Inert gases in industrial settings cause accidental deaths precisely because there is *no* "sense of breathlessness"—indeed, no "indication that anything is amiss. Blackout occurs quickly, without warning." DE58-1. That fact distinguishes inert-gas asphyxiation from pancurionium bromide, which "inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration," *Baze*, 553 U.S. at 44. Consequently, the district court was right (at 36

n.17) to say that *Baze*'s *dicta* is inapplicable, and any "circuit split" over whether "excruciating suffering, including *sensations* of drowning" violates the Eighth Amendment is not at issue here. Pet.6-7 (emphasis added). Grayson did not prove nitrogen hypoxia feels like "drowning." He did not prove that it feels like anything. At most, Grayson showed a "psychological pain … that would exist regardless of the method of execution." CA11 Op. 12 n.3; *see also id.* at 8-10. On this record, Grayson's likelihood of success is zero, and the petition should be denied.

## STATEMENT OF FACTS

### I. Grayson's Crime and Initial Post-Conviction Litigation.

#### A. Grayson Murders, Molests, and Mutilates Vicki Deblieux, For Which He Receives a Unanimous Death Sentence.

On February 21, 1994, Carey Grayson and three friends picked up a hitchhiker, Vicki Deblieux, who was on her way to her mother's home. *Grayson v. State*, 824 So. 2d 804, 809 (Ala. Crim. App. 1999). They took her to a wooded area and began to drink, but Vicki knew something was wrong and tried to run. Grayson and his friends kicked and beat her nearly to death and stood on her throat until she gurgled blood. Her last gasping words were, "Okay, I'll party." *Id.* The killers removed her clothing, played with her body, and threw her off a cliff. Later, they returned to the scene "where they began to mutilate the body by stabbing and cutting her 180 times, removing part of a lung, and removing her fingers and thumbs." *Id.* Every bone in her face and almost every bone in her skull was fractured; the medical examiner determined that she was alive during much of the beating. *Id.* Grayson's precise

motive for such senseless violence remains a mystery, but law enforcement did find satanic drawings and writings among Grayson's possessions. *Id.* at 818-19.

Trial began in January 1996. Grayson was ultimately convicted of capital murder and sentenced to death by a vote of 12 to 0. *Id.* at 808. The trial court found two aggravating circumstances—one that the capital offense was committed while Grayson was engaged in kidnapping and two that the offense was especially heinous, atrocious, or cruel. *Id.* at 842. To the Alabama Court of Criminal Appeals, it was "abundantly clear that [the murder] was unnecessarily torturous, pitiless, conscienceless, extremely wicked, and shockingly evil." *Id.*

### B. Grayson Challenges Lethal Injection and Pleads Nitrogen Hypoxia as an Alternative Method of Execution.

Grayson exhausted appellate and collateral review in 2011, and the State moved for his execution by lethal injection. But the Alabama Supreme Court (ASC) ultimately stayed Grayson's execution pending resolution of a §1983 lawsuit filed in the U.S. District Court for the Middle District of Alabama. Grayson's federal challenge to lethal injection was consolidated with those of other inmates, and litigation continued for several years.

"In that litigation, Grayson claimed that nitrogen gas introduced through a mask (i.e., nitrogen hypoxia) was a more humane and constitutional method of execution than the ADOC's then-existing lethal injection protocol." DE95:3 (citing ECF No. 348 at 32-33, *In re Ala. Lethal Injection Protocol Litig.*, No. 2:12-cv-316-WKW-CSC (M.D. Ala. filed Nov. 29, 2017). Indeed, in Grayson's deposition in this case, he called himself "the poster child" for nitrogen gas because he "came up with

it." DE84-53:48. With respect to pleading nitrogen hypoxia as an alternative to lethal injection, Grayson admitted:

> We had a plan. Our plan was to cost [the State] as much money, make it … as expensive as it can be done, and as shockingly as it could be done. So I went looking for shocking. And I found nitrous gas. John [Palombi, his attorney,] went looking for something. And that's what we came up with. ***It was a stalling tactic.*** But if it didn't stall well enough I didn't suffer at the end. They got me.

*Id.* at 75-76 (emphasis added). While litigation was ongoing, the Alabama Legislature made nitrogen hypoxia one of the statutory methods of execution. Grayson elected nitrogen hypoxia and moved to dismiss his federal lawsuit as moot.

## II. The Executions of Kenneth Smith & Alan Miller By Nitrogen Hypoxia.

Kenneth Smith and Alan Miller also elected nitrogen hypoxia, and the State executed them using the method earlier this year.

**A. Kenneth Smith.** Smith challenged nitrogen hypoxia, the method he elected, on two primary grounds. *First*, Smith and multiple experts asserted that because of Smith's PTSD, he would vomit in the mask during the execution and then choke to death on his own vomit before dying of nitrogen hypoxia. *See, e.g.*, *Smith v. Hamm*, No. 2:23-CV-656-RAH, 2024 WL 262867, at *1 (M.D. Ala. Jan. 24, 2024). But Smith had no history of vomiting, State's Br. at 10-11, *Smith v. Hamm*, No. 24-10095 (11th Cir. filed Jan. 17, 2024),[2] and the district court rejected Smith's "theoretical"

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[2] An hour into oral argument before the Eleventh Circuit, Smith's attorney disclosed in rebuttal that Smith had been vomiting for quite some time. Smith, of course, was not permitted to supplement the record with evidence on appeal, nor could he supplement the record in the district court while his appeal was pending. But the

concern, which relied "upon the occurrence of a cascade of unlikely events." *Id.* at 2. The risk was "speculative" then, *id.*, and the alleged "certainty never happened," DE95:44 n.20.

*Second*, Smith and his expert Dr. Philip Nitschke asserted that ADOC's mask would not produce a tight seal. But the district court heard copious testimony on the mask and physically "examined [it] in detail," *Smith v. Hamm*, No. 2:23-CV-656-RAH, 2024 WL 116303, at *4 n.3 (M.D. Ala. Jan. 10, 2024). The court found Smith's fears to be "highly unlikely," *id.* at 20, and the Eleventh Circuit agreed, *Smith v. Comm'r*, No. 24-10095, 2024 WL 266027, at *8 (11th Cir. Jan. 24, 2024), *cert. denied*, 144 S. Ct. 414 (2024). Today, there is no evidence—despite Smith's movements on the gurney—that the mask became dislodged or that excess oxygen entrained into the mask.

Neither hypothetical pressed by Smith and his experts became reality. As Grayson admits, nitrogen hypoxia causes one to "lose consciousness within seconds, and experience no pain or discomfort while dying of asphyxiation within just a few minutes." DE1¶101.[3] And the evidence presented below showed that is exactly what happened to Kenneth Smith after he breathed in nitrogen gas.

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Eleventh Circuit remanded the case for the limited purpose of entertaining Smith's motion to supplement the record. The district court heard the new evidence and still denied preliminary injunctive relief. *Smith*, 2024 WL 262867 at *2.

[3] Grayson later amended his complaint to remove Paragraph 101 but argued that it still reflected his position on what should happen "assuming proper administration" of a nitrogen hypoxia method of execution. DE39:5.

What the journalists who described Smith *writhing* did not know was that when Smith was first moving on the gurney, he had not breathed in any nitrogen gas. That suggests his movements were voluntary or associated with holding his breath. We know that Smith did hold his breath because his blood-oxygen levels remained constant and high (98-99%) for some time, and then after he exhaled and ceased fighting, they suddenly plummeted. DE95:9 (describing testimony). Grayson has never been able to explain this evidence. In contrast, the State's view was corroborated by testimony from (1) the ADOC Commissioner, (2) the Warden of Holman Correctional Facility, (3) the ADOC Regional Director, and (4) the execution team captain, all of whom personally observed Smith holding his breath and fighting against the restraints voluntarily or had strong reason to believe that he did. Another eyewitness thought that Smith had "tried to hold his breath," according to the New York Times.[4] Days later, Smith's own expert Dr. Phillip Nitschke concurred with the State's assessment.[5] No plausible alternative explanation for Smith's movements has been offered here or in Miller's case. And it is difficult to see how nitrogen hypoxia could cause severe pain, given the evidence that inert-gas asphyxiation can kill

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[4] Nicholas Bogel-Burroughs, *A Select Few Witnessed Alabama's Nitrogen Execution. This Is What They Saw*, N.Y. Times (Feb. 1, 2024), www.nytimes.com/2024/02/01/us/alabama-nitrogen-execution-kenneth-smith-witnesses.html.

[5] Within days of the execution, Dr. Nitschke explained that some media reports were "outright wrong." *The Facts about Nitrogen Hypoxia 101*, The Peaceful Pill Handbook (Jan. 27, 2024), www.peacefulpillhandbook.com/the-facts-about-nitrogen-hypoxia-101/. Nitrogen hypoxia can be "peaceful and reliable," but Smith was "fighting against his execution in every way possible." *Id.* Because he was "holding his breath," the dying process was "slower." Had Smith "taken deep breaths … he would, almost certainly, have lost consciousness and died much sooner." *Id.*

without warning and its use and favor by right-to-die activists as a peaceful means of suicide. *See, e.g.*, DE58-1-4; DE84-42 & 43.

In addition to unrebutted evidence that Smith moved voluntarily before breathing nitrogen, the State showed that death by hypoxia can involve purposeless movements, convulsions, and agonal breathing after unconsciousness. *See, e.g.*, 2 Tr. 53, 74 (Dr. Antognini); 1 Tr. 227-28; DE84-33, 34, 37, 42 (exhibits citing convulsions or other involuntary movements after unconsciousness due to gas exposure). As this Court has recognized, an inmate's "convulsions or seizures could be misperceived as signs of consciousness or distress." *Baze*, 553 U.S. at 57; *accord* Grayson CA11 Op. Br. 10-11 (agreeing that "a lay person without medical training" may well confuse "agonal breathing [for] consciously gasping for air"). That's just what happened in the reports relied upon by Grayson.[6]

**B. Alan Miller.** The State sought Miller's execution warrant on February 21, 2024. He too challenged the method despite having elected it. Among other things, Miller argued that "a trained medical professional" should place and hold the mask, supervise the nitrogen flow rate, and respond if anything "goes awry." ECF No. 1 ¶193, *Miller v. Marshall*, No. 2:24-cv-197-RAH (M.D. Ala. filed Mar. 9, 2024). Miller alleged that the mask would not fit his large face, that ADOC should use "medical grade nitrogen," and that a "tranquilizing medication in pill form" would "reduce

[6] Another reason to view the media reports with caution is that witnesses had no way to know when the nitrogen gas began to flow, when nitrogen filled the lines and the mask, or when Smith began to breathe it. They had no idea if Smith began moving on the gurney prior to the nitrogen gas flowing, prior to breathing nitrogen gas, after breathing nitrogen gas, or after he became unconscious.

thrashing." *Id.* In an order dismissing two of the counts, the district court found Miller's Eighth Amendment allegations to be "noticeably lean on factual detail" and "barely … plausible," but permitted the suit to proceed. *Miller v. Marshall*, 2024 WL 2946093, at *7 (M.D. Ala. June 11, 2024).

Miller sought preliminary injunctive relief and received discovery. He had a team from two major law firms and an expert who ran the Hypoxia Research Laboratory at U.C. San Francisco. Miller received access to ADOC personnel and documents and deposed nearly ten witnesses. After all that, he settled with the State and dismissed his lawsuit. His fears never came to pass. Though his expert claimed that Smith's execution would be the best predictor, "for as much as Smith's execution was painted in the violent manner that it was, Miller's execution was not." DE95:47. Here, the "evidence established that [Miller's] execution was quick, unconsciousness reached in less than 2 minutes, was void of struggles against the restraints, and with minimal body movement" compared to Smith. *Id.* Miller "appeared deceased" after just six minutes. 1 Tr. 150-51; *accord* 2 Tr. 146. The State was not "proven wrong" about the efficacy of nitrogen hypoxia. Grayson CA11 Op. Br. 9.

## III. Grayson Challenges Nitrogen Hypoxia, The Method He "Came Up With."

On June 10, 2024, the State filed a motion in the Alabama Supreme Court for an order authorizing the execution of Carey Grayson. In response, Grayson argued that the Court should not authorize his execution because the State's method would cause "conscious suffocation." He explained that the ASC bore "primary responsibility" for protecting his constitutional rights. In reply, the State argued that

Grayson's concerns were unfounded in light of the testimony of witnesses to Smith's execution, Smith's pulse oximetry, and other evidence regarding inert-gas deaths.

The ASC ultimately authorized Grayson's execution by nitrogen hypoxia. Because Grayson's constitutional challenge had already been raised and litigated before the ASC, the State argued that Grayson should be precluded from raising the same claim in federal court under the *Rooker-Feldman* doctrine, claim preclusion, and/or issue preclusion. The district court disagreed. DE95:20-22.

**A.** Grayson filed his original § 1983 complaint challenging ADOC's nitrogen hypoxia protocol in late June. *See* DE1. In that complaint, he alleged that with "proper administration," nitrogen hypoxia would cause him to "lose consciousness within seconds" and die within "minutes" without any "pain or discomfort." *Id.* ¶101. But ADOC's protocol would result in "unconstitutional pain," he claimed, because (1) the inmate would not be rendered unconscious prior to the administration of nitrogen gas, allegedly causing "mental and physical anguish," *id.* ¶¶105, 111; (2) excess oxygen might enter the mask and prolong the execution, *id.* ¶119; (3) ADOC does not examine the inmates for medical issues like sleep apnea which could prolong the execution, *id.* ¶125; and (4) the execution team is unqualified to monitor the pulse oximeters and EKGs used during the execution, *id.* ¶¶128, 129.

For his alternatives, Grayson first pleaded a nitrogen-hypoxia method that involved injecting the inmate with 10 mg of ketamine, placing him on a table, and "wheel[ing]" him into a hyperbaric chamber filled with 90% nitrogen gas. *See id.*

¶¶78-88. His second alternative was an intramuscular injection of ketamine followed by an intramuscular injection of a lethal dose of fentanyl. *See id.* ¶¶89-96.

Two months after filing his complaint (and after the State's motion to dismiss was fully briefed), Grayson amended his complaint. *See* DE42. He pleaded the same four risks from his original complaint: conscious suffocation; excess oxygen; no pre-execution medical examination; and unqualified personnel monitoring equipment. *See, e.g., id.* ¶¶106, 120, 126, 130. But he also alleged that Kenneth Smith suffered from negative pressure pulmonary edema (NPPE), *id.* ¶43, and that administering nitrogen hypoxia to a conscious inmate "results in NPPE," *id.* ¶109. And Grayson completely changed his first alternative, removing the hyperbaric chamber. Instead, he offered a nitrogen hypoxia alternative that would supply nitrogen gas at 5 liters per minute. *Id.* ¶89. Before administering nitrogen, ADOC would sedate the inmate using a 10mg/kg oral dose of midazolam (or via intramuscular injection for a noncompliant inmate) and a 4mg/kg intramuscular injection of ketamine. *Id.* ¶¶84, 86 & n.19. If the inmate remains conscious ten minutes later, a second 4mg/kg ketamine injection would be provided. *Id.* ¶¶ 87-88. If he remains conscious after ten more minutes, the execution would be called off. *Id.* ¶ 88.

Grayson moved for a preliminary injunction and received some expedited discovery. DE30. Grayson did not depose any witness. He moved to disqualify the Attorney General's Office from representing defendants. DE38. He moved to videotape Alan Miller's execution. DE50. He moved to amend his complaint again, altering the dosage of midazolam from 10mg/kg to 0.2mg/kg. DE76.

The district court held a comprehensive, two-day hearing on Smith's motion for a preliminary injunction. The court received over 50 exhibits, including numerous case reports and articles on inert gas asphyxiation and media reports describing the Smith and Miller executions. DE95:6-7. The court heard live testimony from ten witnesses, including each side's expert, the medical examiner who conducted Smith's autopsy, and multiple State employees who witnessed the Smith and/or Miller executions. *Id.* at 7-9.

**B**. On November 6, the district court ruled on the State's motion to dismiss and Grayson's motion for a preliminary injunction. *See* DE69.

As to the State's motion, the court granted it in part and denied it in part. The court granted the motion to dismiss Governor Kay Ivey and Attorney General Steve Marshall as defendants for lack of standing. *Id.* at 19-20. For the remaining defendants (who did not contest standing), the court denied the motion to dismiss.

Turning to Grayson's motion, the court concluded that Grayson failed to establish a substantial likelihood of success on his Eighth Amendment claim. *Id.* at 52. In reaching that conclusion, the district court applied this Court's well-established method-of-execution framework. *See id.* at 18-20, 35.

First, Grayson failed to show "a risk that is sure or very likely to cause serious illness and needless suffering." *Id.* at 52. For the psychological risk, Grayson relied on Dr. McAlary. *See, e.g.*, *id.* at 45-46. But Dr. McAlary's opinion about that risk was unsupported by any studies or literature. *Id.* at 46. Indeed, Dr. McAlary's "evidence" of psychological harm associated with the protocol was his finding that Kenneth

Smith suffered from NPPE. *Id.* at 45. But that finding was "extrapolate[d]" from the autopsy report, *id.* at 45-46, which did not "support" his NPPE theory, *id.* at 51, and was driven by "highly questionable" "hearsay eyewitnesses accounts," *id.* at 45-46. The eyewitness accounts were "conflicting and inconsistent … and in some respects wrong." *Id.* at 47. Dr. Antognini, on the other hand, strongly disagreed with the finding of NPPE—the basis of Dr. McAlary's opinion that Smith suffered psychological harm—and the State offered "numerous third-party articles and cases studies" that "support[ed]" his opinion. *Id.* at 45-46. Thus, the district court found that Dr. Antognini was "more credible and persuasive" than Dr. McAlary. *Id.* at 51.

For Grayson's risks associated with excess oxygen, a pre-execution medical examination, and the execution team's qualifications to monitor equipment, the court found these concerns unsupported by the record and speculative. *See id.* at 47-49.

With "the credibility and weight" of the evidence in view, Grayson was "well short of showing … an unacceptable risk of pain, let alone superadded pain." *Id.* at 44. He instead offered "a speculative parade of highly unlikely events." *Id.*

Second, Grayson had not established "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the Defendants have refused to adopt without a legitimate penological reason." *Id.* at 52. On the alternatives, Grayson "focus[ed]" on his nitrogen hypoxia alternative and provided "very little evidence" about his ketamine-fentanyl alternative. *Id.* at 50 n.27. For both alternatives, the court had "real concerns" about whether those methods were "feasible and readily implement[able]." *Id.* at 49.

Grayson lacked evidence to show where ADOC would obtain the drugs and who would administer the drugs. *Id.* It would be difficult to force an inmate to "orally ingest anything, let alone a sedative" as part of the execution. *Id.* And his alternatives were "neither tested nor used." *Id.* at 50.

The district court also found that Grayson's alternatives create "their own issues." *Id.* at 50. Midazolam's side effects include "respiratory depression, agitation, hyperactivity, and combativeness." *Id.* Ketamine can cause "respiratory depression, nausea, vomiting, and anaphylaxis." *Id.* Fentanyl may result in "respiratory depression, muscle rigidity, nausea, vomiting, laryngospasm, and anaphylaxis." *Id.* The district court was troubled by those side effects, especially for "midazolam and ketamine in the context of a nitrogen hypoxia execution," yet Grayson provided "no real analysis or consideration" of any of the risks. *Id.*

Citing *Bucklew*'s holding that States have a legitimate penological reason not to adopt methods that have "never been used to carry out an execution and had no track record of successful use," the court also found that Grayson failed to show the State lacked a legitimate reason to reject his alternatives. *Id.* at 51. Grayson made no effort to demonstrate that his alternatives have a successful "track record," or have even "been used," or "adopted" by another State. *Id.*

Because the district court found no likelihood of success, it denied Grayson's motion without considering the remaining preliminary injunction factors. *Id.* at 52.

The Eleventh Circuit ordered expedited briefing on the merits of the appeal and heard oral argument. The Court affirmed in a unanimous decision that

thoroughly recited the district court's factual findings and identified no clear errors among them. *See* CA11 Op. 7-12 (listing 20 findings of fact). Based on those findings, the district court did not abuse its discretion in concluding that Grayson "failed to show a substantial likelihood of success on his claim." *Id.* at 12.

## STANDARD OF REVIEW

For Grayson "[t]o obtain a stay pending the filing and disposition of a petition for a writ of certiorari," he must show at least "(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).

On this posture, the Court gives "considerable weight" to the decisions below. *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983); *see also Respect Maine PAC v. McKee*, 562 U.S. 996 (2010) (Kennedy, J., in chambers) (requiring significant justification for "judicial intervention that has been withheld by lower courts" (quoting *Ohio Citizens for Responsible Energy v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)); *cf. Bateman v. Arizona*, 329 U.S. 1302, 1304 (1976) ("[T]he fact weighs heavily 'that the lower court refused to stay its order pending appeal.'") (quoting *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers)). Because no lower court granted injunctive relief, Grayson has "an especially heavy burden." *Edwards v. Hope Medical Group for Women*, 512 U.S. 1301 (1994) (Scalia, J., in chambers).

"A court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (quoting *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004)); *see also Bucklew*, 587 U.S. at 150 ("Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay. Last-minute stays should be the extreme exception, not the norm….").

## REASONS TO DENY THE APPLICATION AND CERTIORARI

### I. Grayson Has No Chance Of Success On His Eighth Amendment Claim.

To prove that nitrogen hypoxia is an unconstitutionally cruel method of execution, Grayson must meet an "extremely demanding standard." *Smith v. Hamm*, 144 S. Ct. 414, 416 (2024) (Kagan, J., dissenting). It is such an "exceedingly high bar" that no method-of-execution claim has ever surpassed it. *Barr v. Lee*, 591 U.S. 979, 980 (2020) "For good reason—'[f]ar from seeking to superadd terror, pain, or disgrace to their executions, the States have often sought more nearly the opposite,' developing new methods, such as lethal injection, thought to be less painful and more humane than traditional methods, like hanging, that have been uniformly regarded as constitutional for centuries." *Id.* (citation omitted).

First, Grayson must show that nitrogen hypoxia poses a "substantial risk" of "severe pain over and above death itself." *Nance v. Ward*, 597 U.S. 159, 164 (2022). That severe pain must be "sure or very likely" to occur. *Glossip v. Gross*, 576 U.S. 836, 877 (2015). Second, Grayson must prove "an alternative that is 'feasible, readily

implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* at 877. The alternative must provide "the State a pathway forward," such as "a veritable blueprint for carrying the death sentence out." *Nance*, 597 U.S. at 169. Grayson must show "that the State has refused to adopt [an alternative] without a legitimate penological reason"—*i.e.*, the State has cruelly "chosen" to "superadd[] pain to the death sentence." *Bucklew*, 587 U.S. at 134.

**A. Grayson's "Conscious Suffocation" Argument Is Wrong.**

Grayson's petition for a writ of certiorari does not attempt to show how he will satisfy the "standard [that] governs 'all Eighth Amendment method-of-execution claims.'" *Bucklew*, 587 U.S. at 134. Instead, he poses the question whether the Eighth Amendment bars *any* method that involves "conscious suffocation"—a term he never defines—regardless of the chance or severity of pain. Pet.i. The petition is unlikely to be granted for the following reasons.

***First***, the petition whistles past the graveyard of Grayson's utterly debunked factual allegations. The Court should not grant certiorari to resolve an alleged circuit split over the "sensations of drowning and suffocation" (Pet.7) because Grayson will not experience any such sensations. Grayson did not prove that nitrogen hypoxia involves "conscious suffocation" in the sense that an inmate will experience feelings of "drowning" or anything similar. In response to Grayson's false statement that he will feel like being sealed in a "dry-cleaning bag" or "submerge[ed] … in a tub of water until he drowns," Grayson CA11 Op. Br. at 7-8, the Eleventh Circuit panel unanimously held:

> Although we concur with Mr. Grayson that a substantial risk of conscious suffocation *can* create an Eighth Amendment problem …, the evidence presented at the evidentiary hearing—discussed below—did not show that nitrogen hypoxia creates a substantial risk of conscious suffocation.

CA11 Op. 6-7 (emphasis added). That holding was well supported by the evidence in the record, including the testimony of both experts and the medical literature. Grayson does not pinpoint any error, let alone clear error sufficient to reverse.

Indeed, the reason inert-gas asphyxiation is a danger in workplaces that use such gases is the same reason that the method is advocated as a means of peaceful suicide: The person breathing inert gas experiences no breathlessness, suffocation, or discomfort of any kind. When someone endures a *painful* suffocation (drowning, strangulation, smothering, and the like), there is a mechanical obstruction preventing inhalation of air and exhalation of carbon dioxide. That results in hypercapnia, which is uncomfortable and potentially painful. Because the nitrogen hypoxia method permits a free exchange of gases in and out of the lungs, there is no such pain. Grayson's petition proceeds on the basis of factual allegations that he has not proven and will not prove.

***Second***, Grayson misreads *Baze v. Rees*. In that case, the parties agreed that if the sedative were not properly administered, the inmate undergoing lethal injection would experience "severe pain" due to *both* the paralytic drug and the potassium chloride. 553 U.S. at 49. The only question was the likelihood that the sedative would not work as intended. The plurality found no real risk, so there was no occasion to decide whether some un-sedated pain would be constitutional. In other words, the

key passage on which Grayson relies was *obiter dictum*; it had no bearing on the outcome. The assumption that administering pancurionium bromide *and* potassium chloride without a sedative would be unconstitutional did not create a binding *per se* rule against any and all methods involving "conscious suffocation."

Even if *Baze* created a rule about "conscious suffocation," it must be understood in context. An inmate who received the second round of Kentucky's three-drug cocktail without a sedative would be sensate while his diaphragm and lungs become paralyzed and his inability to expel carbon dioxide causes painful hypercapnia. And an inmate who received potassium chloride without a sedative would feel "burning and intense pain." 553 U.S. at 114 (Ginsburg, J., dissenting); *accord* Tr. of Oral Arg. 3 ("excruciating burning pain as it courses through the veins"); *id.* at 27. That's what this Court opined might be unconstitutional without a sedative; it's a far cry from the rapid and painless unconsciousness induced through Alabama's nitrogen-hypoxia protocol. Additionally, to read an absolute *per se* rule about suffocation into *Baze* would call into doubt the constitutionality of hanging and lethal gas, both of which could cause "suffocation" in the technical sense but were long considered lawful. *Baze* announced no such rule.

Events since *Baze* make it even less plausible that Grayson's reading is correct. Grayson supposes that the Court decided the constitutionality of nitrogen hypoxia sixteen years ago, yet until now *no one* realized it—not Kenneth Smith, Alan Miller, the district court here, multiple panels of the Eleventh Circuit, or any Justice. *See Smith*, 144 S. Ct. at 414 (Sotomayor, J., dissenting); *id.* at 416 (Kagan, J., dissenting);

*Bucklew*, 587 U.S. at 164-95 (Breyer, J., dissenting) ("[T]he majority does not dispute the evidence suggesting that nitrogen hypoxia would be 'quick and painless' and would take effect in 20 to 30 seconds.").

***Third***, Grayson's reading of *Baze* cannot be squared with *Bucklew* and *Glossip*, which make clear that a prisoner must show a high likelihood of severe pain. Grayson's *per se* rule would relieve him of that burden, and he does not ask the Court to overrule any of its prior precedents. In *Bucklew*, the Court specifically rejected the idea of a "list" of methods "categorically off-limits." *Bucklew*, 587 U.S. at 136; *id.* at 137 ("The dissent insists that some forms of execution are just categorically cruel."). It would be surprising if *Baze* stood for a *per se* rule and even more so after *Bucklew*. Grayson has no legal support—not a single decision deeming a method to be unconstitutional based on a *per se* rule without any showing of pain.

***Fourth***, the rest of this Court's method-of-execution caselaw confirms that pains much greater than Grayson's alleged psychological stress still do not render a method unconstitutional. *Cf. Bucklew*, 587 U.S. at 132-33 (discussing Stuart Banner, The Death Penalty: An American History 170 (2002)); *Bucklew*, 587 U.S. at 154, 157-58 (Breyer, J., dissenting); *In re Kemmler*, 136 U.S. 436, 446 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 134-36 (1879). Grayson has not explained what makes the emotional distress attendant Alabama's method of execution so unique that there should be a *per se* rule against it. The Eighth Amendment was designed to prohibit "inhuman," "barbarous," and "horrid modes of torture." *Bucklew*, 587 U.S. at 130-31; *Lee*, 591 U.S. at 980. Nitrogen hypoxia does not belong in the category.

***Fifth***, Grayson should be estopped from advancing this argument because he admitted in this very case that a method involving conscious suffocation can be constitutional. *See, e.g.*, DE1¶101; *accord* DE39:5. He initially advocated a "hyperbaric chamber" method of nitrogen hypoxia that did not ensure unconsciousness. *See* DE1 ¶¶78-88. After the State's motion to dismiss (DE19:25-27), Grayson abandoned that alternative because it "appeared to be nonfeasible," not because he discovered it was *per se* unconstitutional. 1 Tr. 15. Grayson should be held to his initial litigation position in this case. Not only does his *Baze* argument contradict his position in *this* case; Grayson also represented in prior litigation that nitrogen hypoxia was constitutional even if the inmate were conscious. *See* DE95:3.

Grayson has not identified any facts that would make his about-face reasonable. Applying estoppel would "protect the integrity of the judicial process" by preventing Grayson from "deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). Estoppel may be a "useful tool for identifying inmates who are more interested in delaying their executions than in avoiding unnecessary pain." *Middlebrooks v. Parker*, 22 F.4th 621, 628 (6th Cir. 2022) (Thapar, J., statement).

### B. Grayson Failed to Show a Substantial Risk of Severe Pain That A Feasible and Readily Available Alternative Would Significantly Reduce.

**1. No Substantial Risk of Severe Pain.** Before pivoting to his theory that "conscious suffocation" *per se* violates the Eighth Amendment, Grayson had alleged certain pains that turned out to be wholly speculative. In the main, he claimed that

either "anxiety" or "the high flow rate" of gas would cause a laryngospasm—a contraction of the vocal cords—which in turn would cause additional panic and pulmonary edema, a swelling of the lungs. Grayson CA11 Op. Br. at 9, 13. The main problem with Grayson's theory was that a throat spasm is not painful, as his own expert testified. Another problem was that it had nothing to do with nitrogen hypoxia and everything to do with an inmate's anxiety upon facing execution. DE95:46. Grayson has not alleged, let alone proven, that the protocol is uniquely distressing among methods of execution. And it is difficult to see why nitrogen would create greater anxiety than other methods, which may pose at least the possibility of some physical pain. *See, e.g.*, *Baze*, 553 U.S. at 53; *Bucklew*, 587 U.S. at 132; *see also Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947).

Grayson's petition falsely suggests that nitrogen hypoxia produces a sensation of "drowning" that his expert never identified. At most, his expert opined that in the seconds (or minutes at most) before unconsciousness, a prisoner's lungs would begin to swell *if* he suffered a very strong throat spasm. And if this happened, it would be painless, not "excruciating suffering [like the] sensations of drowning." *Contra* Pet.7. But even that would be taking Dr. McAlary's testimony at face value, which the district court did not do. It found that Dr. McAlary offered no "real foundational support" and "no case studies or articles" to corroborate his "unsupported opinion." DE95:37. In his practice, Dr. McAlary had seen laryngospasms when a *foreign object* like a breathing tube was used. 1 Tr. 188; 2 Tr. 22-23. His theoretical application of that phenomenon to the Kenneth Smith execution relied not on settled science but

"highly questionable hearsay witness accounts." *See* DE95:51. Ultimately, Dr. McAlary's testimony was far less "credible and persuasive" than that of the State's expert, Dr. Antognini, DE95:51. Dr. Antognini explained that panic and anxiety often cause *hyperventilation*, which makes breathing easier, and that any pulmonary edema would develop postmortem or at least after unconsciousness, 2 Tr. 62, 126-27.

Because Grayson's claim rested on a "speculative parade of highly unlikely events," he did not show that the nitrogen-hypoxia protocol is "sure or very likely to cause serious illness and needless suffering." DR95:44, 52.

**2. No Feasible and Readily Available Alternative.** Grayson's claim requires proof of another "feasible and readily available method … that would have significantly reduced a substantial risk of pain." *Bucklew*, 587 U.S. at 138. The alternative also must be a "known" method, *Glossip*, 576 U.S. at 878, "sufficiently detailed," *Nance*, 597 U.S. at 169, with "documented advantages," *Baze*, 553 U.S. at 52. Its "comparative efficacy" must be "so well established" that refusal to adopt it implies cruelty. *Id.* at 57. Even if Grayson had offered a qualifying alternative, the State may still have a "legitimate penological justification" to reject it. *Id.* at 52.

Although the Eighth Amendment requires a "comparative exercise," *Nance*, 597 U.S. at 164, Grayson asks this Court to review the constitutionality of Alabama's method in a vacuum. His questions presented ask whether the method is unconstitutional on the ground that it "includes conscious suffocation" and "involves superadded terror" without reference to any alternative. Pet.i. That is not how Eighth Amendment analysis is done under *Bucklew*, *Glossip*, and *Baze*. Even if Grayson's

petition were construed as dealing with the first prong only, the Court's resolution of those questions would be advisory because Grayson does not seriously challenge the rejection of his alternatives.

Grayson's amended complaint advances two novel and experimental alternatives. The first modifies ADOC's protocol by dramatically reducing the flow of gas (to 5 liters per minute) and requiring two different sedatives: midazolam and ketamine. DE42¶¶84-86, 89. On this proposal, the inmate would either drink a large dose of midazolam,[7] or refuse, in which case ADOC would administer midazolam via intramuscular (not intravenous) injection. *Id.* ¶84 & n.19. ADOC would then administer an intramuscular injection of ketamine, wait until the inmate appears to be unconscious, and then commence nitrogen gas. *Id.* ¶¶86-89. Then, if an inmate remains conscious thirty minutes after taking midazolam and after two ketamine injections, the execution is called off. *Id.* ¶¶87-89. Grayson's second alternative—hardly mentioned and arguably waived below—is a new lethal-injection protocol, proposing intramuscular injections of both ketamine and fentanyl. *Id.* ¶91.

Neither alternative proposal came with much evidence, and the district court correctly rejected them as "untested" methods with "their own set of risks and complications." DE95:51. For Grayson, it would be "hard to show" that Alabama lacks "a legitimate penological reason" to reject his alternatives when he offered them "only a few weeks ago." DE95:49 n.25. His alternatives have been a "moving target," *id.* at

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[7] According to Grayson's first amended complaint, the dosage of midazolam should be 10 mg/kg. According to his second amendment, which the district court granted at the evidentiary hearing, the dosage should be 0.2 mg/kg.

5 n.2, and Grayson offered no "track record" of their successful use, *id.* at 51. Indeed, Grayson has not shown that either method has been tried or studied as a means of causing death, nor is the State aware of any studies on the efficacy of these drugs in combination, in these dosages, and administered within the proposed timeframes. The range of possible complications is also a total mystery. *See* DE95:50 ("Grayson also provides no real analysis or consideration of the possible risks and side effects associated with using these sedatives in this matter."); *see also id.* at 51.

As a matter of law, States are not constitutionally required to "experiment" with methods of execution. *Bucklew*, 587 U.S. at 142; *accord Baze*, 553 U.S. at 52. Rather than methods with a "comparative efficacy … so well established" that refusal suggests cruelty, *Baze*, 553 U.S. at 57, Grayson pleaded "untested" methods supported by the testimony of a single expert, DE95:51; *cf. Baze*, 553 U.S. at 67 (Alito, J., concurring). And that expert admits that he did basically *no research*, DE84-54:17-18, yet proposes a novel protocol for every single inmate who has elected nitrogen hypoxia, compared to ADOC's protocol which "has been successfully used twice, and both times it resulted in a death within a matter of minutes," DE95:52

The State has valid reason to ask for more than the hasty back-of-the-envelope sketch of one doctor with no experience in this setting. The Court should require more too, for Grayson's claim—if successful—is a recipe for interminable method-of-execution litigation. If all it takes to stay an execution is a never-before-seen alternative supported by one expert's *ipse dixit*, federal courts will hear §1983 method

suits for every execution and every method. That undermines federalism and the public's moral judgment. It is no "pathway forward." *Nance*, 597 U.S. at 169.

**a. Grayson's Nitrogen Hypoxia Alternative.** Grayson's nitrogen hypoxia alternative, proposing midazolam and ketamine as sedatives, is not feasible and readily available. States also have valid penological reasons to reject methods that use controlled substances. "[T]he question of capital punishment belongs to the people and their representatives," *Bucklew*, 587 U.S. at 150, and the People are entitled to protect that power from forces beyond their control, such as drug manufacturers refusing to provide their products, *see, e.g., Glossip*, 576 U.S. at 869-71, pharmacies facing "threats, harassment, and boycotts," *Jordan v. Comm'r, Miss. Dep't of Corr.*, 947 F.3d 1322, 1332-33 (11th Cir. 2020), and "ethics rules or traditions" may "impede" the participation of medical professionals, *Baze*, 553 U.S. at 66 (Alito, J., concurring); *see also Bucklew*, 587 U.S. at 134-35. By adopting a method that does not depend so heavily on external variables, Alabama has sought to ensure that questions over the propriety of capital punishment remain entrusted to the People.

Grayson has no evidence of a viable way for the State to obtain the drugs for his alternatives. *See* DE95:49. The State has reason to doubt the cooperation of doctors and pharmacies with executions. Grayson has argued that the prison system's healthcare provider could prescribe sedatives, but if they are not medically necessary, that assumption is speculative; if they are medically necessary, then Grayson might obtain a prescription on his own, making the alternative unnecessary to reduce risk.

Grayson proposes new methods of administering these drugs, methods which are not familiar to ADOC and pose their own challenges. He proposes a method in which an inmate would swallow a cup of midazolam syrup, although he stated in his deposition that he does not want to take it. Grayson does not explain how the State could force him to ingest it, and his expert testified that even children can successfully resist the oral administration of drugs. DE84-54:59; *see* DE95:49. Oral administration of midazolam also increases the time of sedation, 2 Tr. 27, which makes it a poor fit for Grayson's protocol with strict time limits to obtain unconsciousness before *calling off* an execution (despite administering a potentially lethal dose of midazolam). 2 Tr. at 27; DE42¶¶84-89. While the State has experience with intravenous midazolam, the FDA-approved insert notes that the "safety and efficacy of midazolam following *non-intravenous and nonintramuscular* routes of administration have not been established." DE84-27:17 (emphasis added); *see id.* at 33 ("Midazolam injection should only be administered IM or IV").

If the prisoner refuses oral midazolam, Grayson's alternative to his alternative is an intramuscular injection. DE42:12 n.19. But intramuscular injection is "not the best route." 1 Tr. 192. It is important for absorption that the injection hit muscle, not fat, 2 Tr. 13, and someone "well trained" may still "have problems getting into the muscle," *id.* at 71. The State cannot rely upon "well trained" doctors to participate, so there is a valid penological reason to avoid a method prone to this kind of error, especially in conjunction with the proposed time limits.

Grayson also failed to show that his nitrogen-hypoxia alternative would significantly reduce pain. The State cannot eliminate the prospect of emotional distress with any alternative. Even if the State sedated an inmate immediately prior to the nitrogen gas flowing, a prisoner may well suffer anxiety at any other time, such as before taking the drugs or before they take effect.

Further, ketamine and midazolam have their own side effects, some of which pose the very risks Grayson seeks to minimize. The FDA label for KETALAR (a brand name for an injected ketamine anesthetic) cites among the known adverse reactions "[l]aryngospasms and other forms of airway obstruction," DE84-26:7. Ketamine can cause respiratory depression and should be "used under the direction of physicians experienced in administering general anesthetics and in maintenance of an airway and in the control of respiration." *Id.* at 3, 4. When combined with other anesthetic agents, "adequate respiratory exchange [must be] maintained." *Id.* at 6. Not only might ketamine exacerbate a risk of airway constriction; "anxiety" and "psychotic episodes" are among the reported symptoms. *Id.* at 7. These risks and side effects are very similar to those that Grayson alleges will occur during nitrogen hypoxia.

Likewise, intravenous midazolam "has been associated with respiratory depression and respiratory arrest, especially when used for sedation in noncritical care settings." DE84-27:1. Midazolam requires individualized dosing "when used with other medications capable of producing central nervous system depression." *Id.* at 14-15. "Serious cardiorespiratory adverse events have occurred .... includ[ing] respiratory depression, airway obstruction, oxygen desaturation, apnea, respiratory

arrest and/or cardiac arrest, sometimes resulting in death or permanent neurologic injury." *Id*. at 15. In bolded capital letters, the FDA-approved label warns that "serious and life threatening cardiorespiratory adverse events have been reported." *Id*. at 32. While Grayson has argued that the State has experience with midazolam, he must show how the alternative will reduce the same risks he has pleaded, such as distressing throat spasms. It is far from clear that midazolam, posing its own respiratory risks, would reduce that risk overall. And the State certainly does not have experience combining midazolam, ketamine, and nitrogen gas.

Apart from the drugs, Grayson's nitrogen alternative increases the risks by calling for nitrogen gas to flow at 5 liters per minute, which is very low. A State employee wore the mask at that flow rate and testified that "you might as well not have the air turned on." 1 Tr. 166-67. According to Dr. Antognini, such low rates would "increase the [alleged] risk of negative-pressure pulmonary edema, … prolong the nitrogen buildup, and … cause a suffocation feeling," which is entirely absent from the protocol as written. 2 Tr. 70.

**b. Grayson's Fentanyl Alternative.** Grayson offered "very little evidence" about ketamine and fentanyl as a method of execution. DE95:50 n.27. As a result, he has not shown this alternative to be less painful, more "humane," or even as "effective" when compared to ADOC's protocol. *Bucklew*, 587 U.S. at 142. He makes no claims about fentanyl's efficacy and fails to grapple with the side effects of this method's drugs, *see, e.g.*, *supra* 43-44 (ketamine); DE95:50 (fentanyl), which include, for example, respiratory depression, vomiting, anaphylaxis, and laryngospasm.

DE95:50. Nor he has demonstrated the feasibility of this method because he offers no real answer for how the State should go about obtaining these drugs. *See supra* §I.C.1.a. And even if Grayson's sparse evidence could clear those hurdles, judicial estoppel bars Grayson's new lethal-injection alternative because he demanded relief *from lethal injection* on the promise that he preferred nitrogen hypoxia and that it was constitutional, feasible, and readily available. Doc. 348 at ¶163, *In re: Ala. Lethal Injection Protocol*, No. 2:12-cv-00316 (M.D. Ala. Nov. 29, 2017). If Grayson had genuine concerns before, he should have pleaded them in his prior §1983 case to give the State a "pathway forward." *Nance*, 597 U.S. at 169. Here is an inmate admittedly "more interested in delaying [his] execution[] than in avoiding unnecessary pain." *Middlebrooks*, 22 F.4th at 628.

### C. Grayson Conceded That Nitrogen Hypoxia Is More Humane Than Lawful Alternatives and Not Deliberately Designed to Inflict Pain.

Grayson made two dispositive concessions at the evidentiary hearing on his motion. ***First***, Grayson definitively stated that nitrogen hypoxia was more humane than electrocution, 2 Tr. 175, and seemed to affirm that it was more humane than lethal injection as well, 2 Tr. 174. *See* DE95:44 n.19. Because both of those methods are constitutional and Grayson waived any argument that nitrogen hypoxia is less humane, he cannot show unconstitutional cruelty as a matter of law. Cruelty means superadded pain, and the State does not superadd pain where its method is *admittedly less painful than the constitutionally permitted level of pain*.

***Second***, Grayson repeatedly answered "No" when asked whether he had any allegation or evidence that the nitrogen-hypoxia protocol was "deliberately designed

to inflict pain." 2 Tr. 173; *see also* DE95:27 n.11. That's also dispositive because the ultimate Eighth Amendment question—even if Grayson can satisfy *Glossip*—is whether the State's method was "*designed* to superadd terror, pain, or disgrace." *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2216 (2024) (emphasis added) (internal quotation marks omitted). Grayson must prove a risk that would "prevent[] prison officials from pleading that they were 'subjectively blameless[.]'" *Glossip*, 576 U.S. at 877 (quoting *Baze*, 553 U.S. at 50). But Grayson gave up the conclusion he was supposed to prove when he admitted that the protocol was not "written or adopted with the express point of causing pain," 2 Tr. 173. That's another way of saying the State *is* blameless and its method is not cruel, for it did not add pain "without … reason," *Bucklew*, 587 U.S. at 134.[8]

## II. The Equities Favor the State.

### A. Grayson's delay and manipulation are grounds to deny a stay.

The Court should reject Grayson's "last-minute attempt[] to manipulate the judicial process." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). Grayson has been subject to nitrogen hypoxia since he dropped his challenge to lethal injection in 2018. He has known that there would be no sedative to render the inmate insensate since the protocol was announced in August 2023. Even after the State moved for his execution, he waited over two months to file a motion for preliminary injunctive relief.

[8] Grayson later tried to amend his concession—arguing "now that we've seen it in practice, we know … it does super add pain." 2 Tr. 203. That's still not enough: Grayson must show that *State officials* both know the risks he alleges and deliberately chose to inflict them for no reason.

Once Grayson had a motion on file, he still did not exhibit great alacrity, and several of his litigation tactics suggested gamesmanship. At one point, even the district court acknowledged a "consistent pattern of unnecessary delay." DE68:6. Rather than taking depositions or otherwise trying to build his case, Grayson spent time drafting unauthorized briefs (DE25-1), filing frivolous motions to disqualify the entire Attorney General's office as counsel (DE38) and to videotape the execution of Alan Miller (DE50), and repeatedly amending his complaint out of time based on errors that could have been easily avoided.

Then there was Carey Grayson's deposition. He described how he came to plead nitrogen hypoxia in prior litigation. It was "a stalling tactic," he confessed. DE84-53:76. With one of his attorneys, he sought a method that would "cost as much money" and be as "shocking" as possible, and they "came up with" nitrogen gas. *Id.* at 75. (In this case, Grayson has proposed alternatives such as a hyperbaric gas chamber and a lethal dose of fentanyl. Are these serious attempts to avoid pain or more stalling tactics?) The deposition also revealed that Grayson does not advocate his alternative nitrogen protocol—the only alternative for which he developed any evidence at the hearing (CA11 Op. 11). Grayson does "not want midazolam," DE84-53:44. "This does not sound like my case," he said. *Id.* Grayson later argued that he was high on illegal drugs during his deposition.

Defendants respectfully ask the Court to consider the foregoing in balancing the equities. Both delay and "attempt[s] at manipulation" "provide a sound basis for denying equitable relief." *Ramirez v. Collier*, 595 U.S. 411, 434 (2022).

### B. Grayson faces no irreparable harm because the method is painless.

Neither court below reached the irreparable-harm factor. If this Court does, then it should decide that Grayson has not made the required showing because he does not contest the finding that nitrogen hypoxia is painless. True, he alleges a constitutional violation, but that's not "synonymous with the irreparable harm necessary for issuance of a preliminary injunction." *Siegel v. LePore*, 234 F.3d 1163, 1178 (11th Cir. 2000). In *Ramirez v. Collier*, for example, this Court emphasized that the inmate faced a "spiritual" harm, not a "pecuniary" one, so the threatened violation of the inmate's religious rights was irreparable. 595 U.S. at 433. There is no comparable allegation here. Grayson does not even attempt to argue that the alleged emotional distress he will face—that which any inmate might face—is akin to a restriction on prayer in one's final moments of life on Earth.

### C. A stay would undermine the public interest in justice.

Grayson is admittedly guilty of an abominable crime. A stay or any other injunctive relief that might delay his execution would undermine the powerful interest—shared by the State, the public, and the victims—in the timely enforcement of his sentence. *Hill,* 547 U.S. at 584. Any unpunished murder is an intrinsic and ongoing harm to those interests and to the rule of law. Thirty years is thirty years too long. "Only with real finality" can we "move forward knowing the moral judgment will be carried out." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). "To unsettle these expectations," especially at the eleventh hour, "is to inflict a profound injury to…the State and the victims of crime alike." *Id.*

## III. Grayson violated Rule 23 by failing to request relief below.

Grayson moved the district court for injunctive relief, and he appealed the district court's order to the Eleventh Circuit. But he never asked the Eleventh Circuit for a stay; in fact, he specifically disavowed seeking such relief. *See* CA11 DE3:1 n.1 ("Mr. Grayson is not filing a motion for stay or preliminary injunction on appeal…"); CA11 DE15:1 n.5 ("[Defendants] … argue against relief they acknowledge the District Court did not rule on and Mr. Grayson hasn't sought."); *cf.* 11TH CIR. R. 27-1(b)(2).

By asking this Court for a stay, Grayson flagrantly flouts Rule 23, which provides that that "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." SUP. CT. R. 23.3; *Dolman v. United States*, 439 U.S. 1395, 1397–98 (1978) (Rehnquist, J., as Circuit Justice) ("[A]pplications for a stay here will not normally be entertained unless application for a stay has first been made to a judge of the court rendering the decision sought to be reviewed.").

Grayson does not acknowledge Rule 23's requirement to seek relief in the court below, much less explain why his last-minute filing presents "most extraordinary circumstances." SUP. CT. R. 23.3. While Grayson is facing execution—an extraordinary punishment for an extraordinary crime—that fact alone does not excuse him from compliance with Rule 23.3. There is nothing to distinguish Grayson's case from any other capital case. And while this Court has several special rules

governing capital cases, *see, e.g.*, SUP. CT. R. 14.1(a), 15.1, 20.4(b), it does not provide an exception to Rule 23.3 for stay applicants facing capital punishment.

The high stakes in a capital case present all the more reason to apply the Court's ordinary procedural rules to deny the application. Condemned prisoners facing death and States seeking justice need to know the ground rules, especially in fast-paced eleventh-hour litigation. If the Court were to apply in this case an unannounced and unwritten policy excusing compliance with Rule 23, a future litigant may expect the same treatment and suffer for it.

Because not even the district court ruled on the equities here, Grayson asks this Court to act as a court of first view on a highly compressed timeline—exactly what the rules should prevent. Rule 23 ensures "the benefit of the appellate court's full consideration" and, to the extent possible in emergency litigation, helps fulfill "the public's expectation that its highest court will act only after considered deliberation." *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2619 (2020) (Sotomayor, J., dissenting); *see also Angelone v. Bennett*, 519 U.S. 959 (1996) (Stevens, J., dissenting) ("I believe we should steadfastly resist the temptation to endorse procedural shortcuts that can only increase the risk of error.").

It would not be unfair to Grayson to deny his application for failure to seek the same relief in the court below. Grayson is represented by competent counsel who regularly handle capital cases. He and his counsel know how to seek a stay yet intentionally chose not to do so. One is left to speculate why. He asked the Eleventh Circuit to reverse the likelihood-of-success ruling and to remand for further

proceedings. But here, he argues the Court can enter a stay without further findings; if that's true, then the Eleventh Circuit too could have entered a stay, and remanding would have just added delay. Enforcing Rule 23 can avoid the possibility that litigants intentionally choose appellate strategies to inject undue delay.[9]

Whatever the reason for Grayson's failure, it prejudiced the State. Our adversarial system relies on the principle of party presentation—not only so that courts know what claims and issues to address, but also so that parties know how to respond to protect their rights and interests. Because Grayson never moved in the Eleventh Circuit, he never disclosed the complete grounds on which he would seek emergency relief. In particular, he failed to address the prospect of irreparable injury, which is critical in this case involving a painless method of execution. As a result, the State was forced to dedicate pages of its responsive brief to rebutting an imaginary motion. State CA11 Br. at 50-52. Grayson evaded scrutiny by saving arguments for this Court to review in the first instance. This tactic is one of many that tax the courts and governments in capital litigation, and it should not be lightly excused.

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[9] Further, Grayson had notice of the State's position that seeking emergency relief is necessary to receive it. In its response brief below, the State suggested that Grayson had already "waived a request for equitable relief" and even if he had not, "the district court never considered the remaining equitable factors, so there is no basis on which the Court can find them satisfied." CA11 Resp. Br. 51. The same goes here. Grayson asks this Court to adopt his view about the equities, including "the relative harm to the State" (Stay.App.3), without giving the lower courts a chance to make any findings of fact or conclusions of law based on the proceedings below.

## CONCLUSION

Because Grayson has zero likelihood of success and engaged in purposeful manipulation and delay, the Court should deny his cert petition and stay application.

Respectfully submitted,


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