No. 24-6709

IN THE
SUPREME COURT OF THE UNTED STATES

BRAD KEITH SIGMON,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

**** Execution Scheduled for March 7, 2025 @ 6:00 p.m. ****

ALAN WILSON
Attorney General of South Carolina

DONALD J. ZELENKA
Deputy Attorney General

*MELODY J. BROWN
Senior Assistant Deputy Attorney General
mbrown@scag.gov

RICHARD B. LARRABEE
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
STATE OF SOUTH CAROLINA

P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

**counsel of record* *Counsel for Respondents*

CAPITAL CASE
[EXECUTION SET FOR FRIDAY, MARCH 7, 2025, at 6:00 p.m.]

QUESTION PRESENTED

Does a timely election of one of three available methods of execution maintained by the South Carolina Department of Corrections waive arguments, and deprive a condemned inmate of standing, to seek additional details as to other available methods not selected?

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INTRODUCTION

Of this there is no question: Brad Keith Sigmon is guilty of the bludgeoning murders of his former girlfriend's parents, David and Gladys Larke. He has consistently admitted his guilt. Nothing in the petition undermines or challenges his guilt or his death sentences as returned by a jury in July 2002. His execution is to be carried out in the next few hours.

Sigmon now asks this Court to stay his execution so that he can litigate whether South Carolina has provided him enough information about its supply of lethal injection drugs. For three reasons, the Court should deny the petition and the application for a stay of execution.

First, Sigmon elected the firing squad on February 21, 2025. BIO App. a1. Sigmon should not be permitted to litigate questions about a method that he is not facing simply to delay his execution by another.

Second, Sigmon brings an eve-of-execution request weeks after he was aware that his request for additional information was denied on February 19, 2025. (Pet. App. 8a). Nothing prevented a request following that denial, yet he waited until less than 48 hours before his scheduled execution to seek this Court's intervention.

And *third*, he is wrong on the merits. The S.C. Supreme Court has made clear that the information that Director Stirling has disclosed regarding South Carolina's supply of its lethal injection drug (pentobarbital) satisfies what state law requires him to provide an inmate. The S.C. Supreme Court's decision on that question is the "final word" on the matter. *Musser v. Utah*, 333 U.S. 95, 98 (1948). Reading Sigmon's

argument for what it is—an attempt to "federalize" the information a State must provide if it gives an inmate a choice of methods of execution—does not help him. Federal law does not establish any due process right to this information because requiring the government to provide it is not "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Lastly, Sigmon gets no more traction from questioning the pentobarbital used in the State's three most recent executions. The opinion he relies upon offers only speculation about what could happen "if" the inmate was sensate. That speculation is facially insufficient to warrant a last-minute stay. In stark contrast, the State offered expert opinion, also by affidavit, that explained how a condemned inmate is quickly rendered insensate; why the timing of the State's previous executions was expected; and, how the witness statements from all three of South Carolina's most recent lethal injection executions confirm that the State's single-drug protocol was effective. (The State's expert is, no less, the same expert that the federal government used when this Court quickly vacated a stay of execution in *Barr v. Lee*, 591 U.S. 979, 981 (2020), and that Missouri used in *Bucklew v. Precythe*, 587 U.S. 119, 146–47 (2019).)

The State has a "significant interest in enforcing its criminal judgments," *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)—an interest that has a "moral dimension" to it, *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). Sigmon offers no compelling reason for a last-minute stay of his execution. His request for delay should be denied.

STATEMENT OF THE CASE

A. Sigmon is sentenced to death for gruesome murders.

The State will rely, for the most part, on the general summary included in the Fourth Circuit Court of Appeals' opinion in the appeal from the denial of federal habeas corpus relief:

> In 2001, Sigmon and Rebecca Barbare had been in a romantic relationship for approximately three years and lived together in a trailer near the trailer of Barbare's parents, David and Gladys Larke. *Sigmon v. State*, 403 S.C. 120, 742 S.E.2d 394, 396 (2013). But early in that year, after Barbare ended their relationship and moved in with her parents, Sigmon became increasingly obsessed with Barbare. *Id.*
>
> On April 26, 2001, Sigmon and an acquaintance, Eugene Strube, spent the evening drinking alcohol and smoking crack cocaine. *Id.* Early in the morning of April 27, Sigmon told Strube that when Barbare left to take her children to school the next morning, Sigmon would go to the Larkes' home, "tie her parents up," and "get ahold of" Barbare. J.A. 40–41.
>
> Later that morning, after Barbare left to take her children to school, Sigmon took a baseball bat from beneath his trailer and entered David and Gladys Larke's home. *Sigmon*, 742 S.E.2d at 396. When David Larke, upon seeing Sigmon, called to Gladys Larke to bring him his gun, Sigmon struck David Larke in the back of his head with the bat several times. *Id.* Thereafter, Sigmon chased Gladys Larke into the living room and struck her several times in the head. *Id.* at 397. Sigmon then went to the kitchen, saw David Larke was still moving, and struck him again. *Id.* And after seeing that Gladys Larke was also still moving, Sigmon struck her several more times. *Id.* David and Gladys Larke died within minutes.
>
> Sigmon retrieved David Larke's gun and waited for Barbare to return. *Id.* When she arrived, Sigmon forced her into her car and drove her away. *Id.* But during the ride,

> Barbare jumped from the car, causing Sigmon to pull over, chase after her, and shoot her. *Id.* Barbare survived the shooting. *Id.*
>
> Meanwhile, Sigmon fled but was captured in Tennessee ten days later after his mother helped authorities locate him. *Id.* Upon his capture, Sigmon confessed to the murders. *Id.*

Sigmon v. Stirling, 956 F.3d 183, 189 (4th Cir. 2020).

Helpful as it is, this summary does not adequately reflect the overwhelming evidence in aggravation and plain malice evident in the murders. For instance, Sigmon waited all night in the home next to the Larkes, and waited for "Becky" to leave to take her children to school, before entering the home. He surprised Mr. Larke in the kitchen area then struck him repeatedly with a baseball bat. When Ms. Larke entered the kitchen, Sigmon chased her back into her living room, where he repeatedly struck her with the same baseball bat. Sigmon then returned to the kitchen and continued beating Mr. Larke only to later go back to the living room and continue beating Mrs. Larke. *Sigmon,* 956 F.3d at 189. Mr. Larke sustained a total of nine crushing blows to the skull (some likely while his head was on the floor), bruising on his ears and left shoulder, and a defensive wound on the back of his right hand. His "skull was basically almost broken in two." The pathologist testified the injuries indicated that "these are not trivial swings with this bat. These are full force, great deal of energy transmitted, homerun type swings." Mrs. Larke similarly received nine injuries to her skull and had defensive wounds to her forearms, wrists, and elbows. Bruising indicated she attempted to put her arms up "across her head" in futile defense as the blows were inflicted. She had also inhaled blood into her lungs

"indicating that she was alive following the injuries that caused her basilar skull fractures, and was breathing through these fractured sinuses and inhaling that blood down into her lungs." The pathologist opined that both victims would have died in approximately three to five minutes from the severity of the beatings. *See* BIO App. a53, Tr. pp. 1710-1716 and 1728-1731.

Sigmon was convicted by a Greenville County, South Carolina jury in July 2002 and sentenced to death. His convictions and sentences were affirmed on direct appeal and throughout state and federal collateral challenges. *See State v. Sigmon*, 623 S.E.2d 648 (S.C. 2005); *Sigmon v. Stirling*, *supra.*

B. Sigmon and other death-sentenced inmates litigated the methods of execution in South Carolina years prior to his 2025 notice of execution.

1. After years of being unable to obtain lethal injection drugs, South Carolina amended its method-of-execution statute to make electrocution the default method while also giving a condemned inmate the option to elect lethal injection or the firing squad, if those methods are available. *See* S.C. Code Ann. § 24-3-530(A). The SCDC Director must certify for each execution which methods are available. *Id.* § 24-3-530(B).

Several condemned inmates, including Sigmon, immediately challenged that new law, but the S.C. Supreme Court upheld the constitutionality of these methods and the statute. *See Owens v. Stirling*, 904 S.E.2d 580 (S.C. 2024). In that litigation, the death row inmates insisted that section 24-3-530 entitled them to information about "the drugs' 'potency, purity, and stability.'" *Id.* at 604 (quoting death row

inmates' counsel). Addressing that concern, the S.C. Supreme Court required the Director to "explain in the affidavit the basis *for his determination*" about which methods are available for each execution. *Id* (*emphasis added*). However, rather than laying out a precise formula for how the Director must explain his determination, the court offered "two extreme examples," one at each end of the spectrum of sufficiency. *Id.* at 605. On the inadequate "extreme," the Director might only report he "accept[s] the word of an unnamed person with unknown qualifications." *Id.* On the upper "extreme," the Director might "certif[y] in the affidavit that scientists at the Forensic Services Lab of the South Carolina Law Enforcement Division (SLED), whose experience and qualifications were verified by the Director and the Chief of SLED, recently performed testing according to widely accepted testing protocols and found the drugs were not only stable, but of a clearly acceptable degree of purity." *Id.* But whatever his certification included, "the Director must comply with the shield statute." *Id.*; *see also* S.C. Code Ann. § 24-3-580(I) (providing for "the absolute confidentiality" of those involved in carrying out a death sentence).

The court even explained the schedule it would follow and that would allow opportunity to challenge the information. The court would allow the clerk to issue execution notices only on a Friday, thereby maximizing the days between the notice and an execution under section 17-25-370 (which establishes when a statutory schedule for when execution will take place after S.C. Supreme Court Clerk issues an execution notice). *Id.* at 604 n.23. The Director must then submit his certification by the next Wednesday, giving the condemned inmate until the following Friday to elect

a method 14 days before his execution. *Id.* "This procedure," the court explained, "gives the inmate at least eight days in which to evaluate the affidavit and file any motion [to challenge the certification]." *Id.* If an inmate chooses to file such a motion, he must do so "no later than fifteen days prior to the date of the scheduled execution" (that is, on the day before the statutory deadline for electing a method). *Id.* (cleaned up) (quoting *In re Stays of Execution in Cap. Cases*, 471 S.E.2d 140, 142 (S.C. 1996)). "If a challenge is made," the S.C. Supreme Court continued, that court "will promptly decide if the challenge warrants relief." *Id.* at 605.

2. While the state court litigation was on remand, the General Assembly passed the Shield Statute in 2023 to facilitate SCDC obtaining lethal injection drugs. That law protects any entity that "manufactures," "compounds," or "supplies" the "drugs . . . utilized in the execution of a death sentence" from having its identity disclosed, as well as protecting the identity of any person who "participates in the planning or administration of the execution of a death sentence." S.C. Code Ann. § 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).

3. Freddie Owens utilized the S.C. Supreme Court's noted process and timing for challenge and demanded the same information that Sigmon seeks here. *See* Objection, *State v. Owens*, No. 2024-001397 (S.C. Sept. 3, 2024). The S.C. Supreme Court rejected Owens's argument.[1] But the process was available, and the process worked.

4. Meanwhile, a group of condemned inmates—and Sigmon was also included in that group—brought a facial challenge to the Shield Statute. A district court rejected those claims. *See Bixby v. Stirling*, No. 3:24-cv-5072, 2024 WL 4627451, at *11 (D.S.C. Oct. 30, 2024). Further, the most recent inmate that South Carolina executed by lethal injection, Marion Bowman, brought a due process claim much like Sigmon's argument here, and both the district court and the Fourth Circuit rejected it (he did not seek this Court's review in that case). *See* Order, *Bowman v. Stirling*, No. 3:25-cv-199 (D.S.C. Jan. 28, 2025), ECF No. 21; Order, *Bowman v. Stirling*, No. 25-1 (4th Cir. Jan. 30, 2025), ECF No. 24. Relevant here, the district court explained:

> Initially, the Court notes that *Owens* could not have created a liberty interest that the Shield Statute infringes because *Owens* made clear that prisoners are not entitled to information that the Shield Statute protects. *See*, *e.g.*, *id.* at 605 ("We reiterate that the Director must comply with the [S]hield [S]tatute."). In any event, the arguments of the Remaining Plaintiffs notwithstanding, condemned prisoners remain allowed to choose the execution method they and their lawyers believe is best for them, using whatever criteria they prefer, based on all of the

[1] And this Court rejected Owens's emergency stay motion based on a similar procedural due process theory to the one Sigmon offers. *See* Order, No. 24-5603 (U.S. Sept. 20, 2024).

> information available to them. That is all that the right to elect their execution method provides.[16] *See Woods v. Dunn*, No. 2:20-cv-58-ECM, 2020 WL 1015763, at *12 (M.D. Ala. Mar. 2, 2020) (holding that Alabama's death penalty laws, which allow condemned prisoners to choose between death by lethal injection, electrocution, or nitrogen hypoxia, did not confer upon the prisoners the right to know, when making their election, that the Alabama Department of Corrections had not yet developed a protocol for performing nitrogen hypoxia executions; explaining that the only interest that Alabama's death penalty laws conferred was the opportunity to choose the execution method), *stay of execution denied*, 951 F.3d 1288 (11th Cir. 2020). Accordingly, the Court concludes that the Complaint fails to state a procedural due process claim based on a state-created liberty interest.

Bixby, 2024 WL 4627451, at *13.

C. Sigmon objects to the Director's certification and then moves to reconsider.

Even before the S.C. Supreme Court issued his execution notice, Sigmon asked that court to delay issuing a notice until Sigmon received Marion Bowman's autopsy report. The S.C. Supreme Court declined to do so, and on February 7, the court issued the execution notice.

On February 11, Director Stirling timely certified that all three of South Carolina's statutorily authorized methods were available for Sigmon's execution. As for lethal injection, Director Stirling explained that the drugs were tested by SLED's Forensic Services Lab ("an internationally accredited forensic laboratory . . . that . . . used widely accepted testing protocols and methodologies in this matter" with testing performed by "experienced, qualified, and duly authorized personnel"), which "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." This explanation tracked the S.C. Supreme Court's upper "extreme example[]," to which the court "doubt[ed] there could be any legitimate legal basis on which to mount a challenge" to the certification. *Owens*, 904 S.E.2d at 605.

Sigmon objected to the Director's certification on February 14, making similar arguments to Owens and Bowman before him and using the same affidavit to support asking for more information that Owens had used. *See* Pet.11. The S.C. Supreme Court rejected his arguments on February 19. Without seeking any review of that order from this Court, Sigmon elected the firing squad on February 21. (BIO App. a1-2).

After electing the firing squad, Sigmon asked the S.C. Supreme Court to reconsider its decision on his objection to the Director's certification, citing Marion Bowman's autopsy as the reason to do so. The S.C. Supreme Court again rejected his arguments, this time on March 3.

Sigmon, after he elected the firing squad, and after his repeat attempt to utilize the Bowman autopsy in argument for more information, seeks to have this Court stop his scheduled execution.

REASONS FOR DENYING THE PETITION AND THE APPLICATION FOR STAY OF EXECUTION

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). 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). Though it has become commonplace to file emergency petitions, a stay of an execution "should be the extreme exception, not the norm," *Lee*, 591 U.S. at 981 (vacating stay).

I. Sigmon has waived any objection to, and lacks standing to litigate, aspects of a method that will not be used to execute him.

Because Sigmon will not be executed by lethal injection, he lacks standing to litigate his claim here, which is rooted in a demand for more information about lethal injection drugs. "Article III requires a plaintiff to first answer a basic question: 'What's it to you?'" *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 379 (2024). Sigmon cannot show a stake in the litigation.

In a related context, this Court has held that "[b]y declaring his method of execution" and "picking [it] over the State's default form of execution," a condemned inmate "waive[s] any objection he might have" to the method he picked. *Stewart v.*

LaGrand, 526 U.S. 115, 119 (1999). If an inmate waives a challenge to a method that he elects, he should similarly waive a challenge to a method he doesn't pick (even if doctrines like standing did not preclude him from pursuing such claims).

Not enforcing these rules presents at least two problems. One, it would ignore Article III's "bedrock constitutional requirement" that all plaintiffs have standing. *All. for Hippocratic Med.*, 602 U.S. at 378. And two, it would exacerbate "[t]he seemingly endless proceedings that have characterized capital litigation" in recent decades. *Baze v. Rees*, 553 U.S. 35, 69 (2008) (Alito, J., concurring).

II. Sigmon raises his due process argument too late.

The crux of Sigmon's claim is that due process requires that he be given more information and more time. *See* Pet.9–10. Nothing about that argument turns on Bowman's autopsy, and the general gist of more information was the basis for Sigmon's February 14 objection to the Director's certification. That was 20 days ago. Sigmon could have brought his due process argument to this Court once the S.C. Supreme Court rejected his objection on February 19, almost two weeks ago.

But Sigmon didn't do that. Only now—on the eve of his execution—does Sigmon bring that argument to this Court. "The people of [South Carolina], the surviving victims of [Death Row Inmates'] crimes, and others like them deserve better" than additional delay. *Bucklew*, 587 U.S. at 149. Sigmon brutally murdered his ex-girlfriend's parents two decades ago, and he has litigated claims ever since, including how he might be executed for the past four years. If courts give him more delays, he will always have more claims. But at some point, the delays must end.

III. Sigmon is wrong on the merits.

A. South Carolina has not denied Sigmon any due process right.

Sigmon is not entitled to a stay of his execution or a writ of certiorari because he cannot show that the State has deprived him of any right. He asserts a procedural due process claim, insisting that the certification process is insufficient. Sigmon is incorrect.

1. A State may create an interest protected by due process. *E.g.*, *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011). Sigmon has a "right of election" when it comes to the method of his execution, S.C. Code Ann. § 24-3-530(A), but he has no such right to receive the information he seeks about lethal injection. What "basic facts," *Owens*, 904 S.E.2d at 604, are needed to satisfy section 24-3-530 is a question of state law. And the S.C. Supreme Court, of course, gets "the final word" on that. *Musser*, 333 U.S. at 98.

Sigmon claims a right to more facts about the drug that would be used for his execution beyond what the Director has provided. *See* Pet.11–12. All that the S.C. Supreme Court requires the Director to do is "explain . . . how he determined the drugs were of sufficient 'potency, purity, and stability' to carry out their intended purpose." *Owens*, 904 S.E.2d at 605. The Director need not disclose anything specific or everything about the drugs.

The S.C. Supreme Court's decision in Freddie Owens's case confirms that the Director's certification provides sufficient information under state law. There, the Director provided Owens essentially the identical explanation of how he determined

lethal injection was available, and the S.C. Supreme Court held that the explanation "provide[d] sufficient detail for [the inmate] to make an informed election." So not only does the Director enjoy latitude in deciding what information "satisf[ies] himself that the drugs are capable of carrying out the death sentence," *id.* at 605, but the S.C. Supreme Court has expressly blessed how the Director exercised his discretion here.

2. Perhaps even more troubling for Sigmon's procedural due process claim is that he does not make a procedural due process argument. S*ee* Pet.11–14. Rather, he makes a substantive due process one. Procedural due process is, of course, not about a "result," but about a process. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985). At its "core," "due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). When confronted with a procedural due process claim, federal courts are not charged with conducting "a meticulous examination of the minutiae of the state's procedural rubric," but "simply . . . guarantee[ing] that there is notice and an opportunity to be heard." *Snider Int'l Corp. v. Town of Forest Heights, Md.*, 739 F.3d 140, 149 (4th Cir. 2014) (cleaned up); *cf. Baze*, 553 U.S. at 51 (plurality op.) (courts are not "boards of inquiry charged with determining 'best practices' for executions").

In other words, with procedural due process, the question is whether the S.C. Supreme Court's process gives a condemned inmate like Sigmon notice and the opportunity to be heard. It does. Sigmon received notice (he was served with the Director's certification), and then Sigmon had the opportunity to be heard (in the S.C. Supreme Court on his objection). No doubt, Sigmon did not like the answer he

received from the S.C. Supreme Court, but not liking the answer does not mean that he did not receive sufficient process.

To be sure, Sigmon could not succeed if his argument were framed as a substantive due process one. Substantive due process protects only "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720–21 (cleaned up). There is nothing in America's history or tradition that requires giving condemned inmates the level of detail that Sigmon demands. *See generally* Stuart Banner, *The Death Penalty: An American History* (2003).

The argument gets no better when framed as a right to information. "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality op.). That's why courts have consistently rejected due process arguments for more information about execution details. As the Eleventh Circuit put it, due process does not encompass "the broad right to know where, how, and by whom the lethal injection drugs will be manufactured, as well as the qualifications of the person or persons who will manufacture the drugs." *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1267 (11th Cir. 2014) (denying stay of execution); *see also, e.g.*, *Phillips v. DeWine*, 841 F.3d 405, 420 (6th Cir. 2016); *Zink v. Lombardi*, 783 F.3d 1089, 1109 (8th Cir. 2015); *Trottie v. Livingston*, 766 F.3d 450, 452 (5th Cir. 2014).

3. Complaining about the supposed "timing problem" of having "only ten days to elect his method," Pet.14, gets Sigmon no traction for three reasons.

One, ten days is a significant amount of time to make that decision. Many people have to make important life decisions in less time and with less notice that the decision will have to be made. Moreover, his argument is internally inconsistent. He complains ten days is not enough time for him but then argues "a nearly three-week" time frame would be detrimental to assuring the drugs remain stable and effective. *See* Pet. 12. It appears he concedes a concise time frame is beneficial—it simply undercuts his argument here.

Two, it's not really "only" ten days. Sigmon has known since South Carolina amended its method-of-execution statute in 2021 that electrocution, lethal injection, and the firing squad were the three possible methods, and he's known that all three methods were available for each of the three inmates executed in the past seven months. Notably, he participated in litigation over several years that resulted in detailed understanding of how the electric chair and a firing squad produces death. *Owens, supra*. Surely, Sigmon understands the methods.

Three, if the timeframe were longer, some inmate would claim that the certification came too soon to trust that it was still reliable by the execution. Indeed, Sigmon makes that claim here. (Pet. 12). His fluid concept as to importance of timing undermines his position.

4. A final thought on Sigmon's merits argument: Like other condemned inmates, he has latched onto the S.C. Supreme Court's statement that he

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. That is not some guarantee of whatever information an inmate wants "to discover what is, objectively, the best choice" for a method of execution. *Bixby*, 2024 WL 4224081, at *7. Instead, it simply "gives him the right to choose his method of execution," *id.*, such that, when at least two methods of execution are available, the inmate knows that he will not have to face the method that "he contends is more inhumane," *Owens*, 904 S.E.2d at 608.

B. Sigmon's attacks on previous executions are baseless.

Undergirding Sigmon's argument, is the contention that recent South Carolina inmates suffered during executions by lethal injection. That suggestion has no merit.

1. Sigmon continues to assert that twice the dose was "required" in those executions. *Id.* That at best is misleading. Sigmon knows that South Carolina's protocol leaves no discretion in the timing of a second series. (If the protocol did provide for discretion, Sigmon would surely be complaining about that instead.)

We also know that lethal injection often requires more than ten minutes for an inmate to be declared dead. Electrical activity may be observed on a heart monitor for some time after breathing stops. *Cf. Owens*, 904 S.E.2d at 596 (discussing evidence of how the brain and heart don't necessarily cease functioning at the same time). In other words, a condemned inmate may (and typically does) stop breathing before all electrical activity from his heart ceases. As Dr. Antognini explains, a person's body must use up any stored oxygen after breathing stops, which results in "periodic

irregular beats" before "the heart stops all together." BIO App. a53. Antognini Decl. ¶ 7; *see also id.* ¶ 26. Both the circulatory and respiratory systems must completely stop before the inmate is declared dead. *See* S.C. Code Ann. § 44-43-460. And some lag time between when breathing stops and when death is pronounced is typical. Indeed, this lag is consistent with the fact that "it would not be unexpected that some heart electrical activity persists after 10 minutes," meaning that the second injection would happen under the protocol. Antognini Decl. ¶ 28. Under SCDC's protocol, then, the second round of pentobarbital does not indicate that there is any issue with the drug or its administration. Rather, it's simply the consequence of SCDC following its protocol[2] when all electrical activity has not ceased within ten minutes, something that Dr. Antognini explains is "not . . . unexpected." *Id.*

Given all this, all Sigmon has to offer is speculation that these executions were painful. But "speculation" about a drug "cannot substitute for evidence" about it. *Brewer v. Landrigan*, 562 U.S. 996, 996 (2010); *see also Creech v. Tewalt*, 94 F.4th 859, 862–63 (9th Cir. 2024) (refusing to stay an execution based on "arguments about the provenance, quality, and reliability of the drug" that were "purely speculative"). Sigmon's expert, Dr. David Waisel, opines about what would happen "if" an inmate was sensate. *See* Pet. App. 42a, ¶ 9. That's a big "if." It's also the same type of expert

[2] In claiming to have evidence that the previous execution went awry, Sigmon indicates that the State in its response to his motion for reconsideration of the objection to the certification "admitted" a redundancy dose was administered and "presume[es]" that was done in the last three lethal injection executions. Pet. 7-8. Sigmon has the protocol (as provided under a confidentiality order in separate litigation) and has not yet admitted his knowledge that there is no discretion in the administration of the second series of pentobarbital. There is *nothing* to support his inference that a second series was necessary to bring about death. What Sigmon has shown is a consistency in the inmates being quickly rendered insensate and being pronounced dead in the expected timeframe.

speculation that the state court rightly rejected about electrocution in *Owens*. *See* 904 S.E.2d at 595–96.

2. Witness statements from those earlier executions also belie any problems. According to the witnesses, Owens "appeared to lose consciousness after about a minute," after which "his eyes closed and he took several deep breaths." Jeffrey Collins, *South Carolina Inmate Dies by Lethal Injection in State's First Execution in 13 Years*, Associate Press (Sept. 20, 2024), https://tinyurl.com/3x7662j8. Then, "[h]is breathing got shallower and his face twitched for another four or five minutes before the movements stopped." *Id.* This is remarkably consistent with the witnesses' description of Richard Moore's execution, which began at 6:01 p.m.: "Moore took several deep breaths that sounded like snores over the next minute. Then he took some shallow breaths until about 6:04, when his breathing stopped. Moore showed no obvious signs of discomfort." Jeffrey Collins, *South Carolina Executes Richard Moore Despite Broadly Supported Plea to Cut Sentence to Life*, Associated Press (Nov. 1, 2024), https://tinyurl.com/2s4tc4vr. And Marion Bowman stopped breathing "in less than a minute," and there were no reports that he otherwise moved before being declared dead. Jeffrey Collins, *South Carolina Puts Inmate Marion Bowman Jr. to Death in State's Third Execution Since September*, Associated Press (Jan. 31, 2025), https://tinyurl.com/5a9bmbz4. These statements contradict Waisel's prediction of conscious pain, and they leave Waisel only speculating about what would happen "if" an inmate was "sensate." *See* Pet. App. 42a, ¶ 9. (Again, "if" . . .)

As it relates to witnesses, two other things are true of all three executions.

First, Owens, Moore, and Bowman had a lawyer sitting in the front row of the witness room. Second, no lawyer has claimed that any man showed any signs of pain during his execution.

These witness statements (or lack of statements, in the case of the lawyers) align with Dr. Antognini's declaration. He thoroughly explains how quickly pentobarbital renders a person insensate, at which point that person would not feel anything. *See* Antognini Decl. ¶¶ 8–13.

3. Finally, Waisel's pulmonary edema contention has multiple shortcomings. In the first place, claims of pulmonary edema are nothing new in lethal injection. This objection has been lodged against lethal injection generally in recent years, even before South Carolina resumed executions last year. *See, e.g.*, Noah Cadwell, et al., *Gasping for Air*, NPR (Sept. 21, 2020), https://tinyurl.com/4f8aj9ha. Arguments about the risk of pulmonary edema are thus a criticism of lethal injection generally, not of South Carolina specifically. Plus, it can be found in any death, based on post-mortem CT scans and other studies. *See* Antognini Decl. ¶¶ 16–23.

In the second, this Court has already rejected Waisel's pulmonary edema argument. A district court stayed federal executions because, according to those inmates' expert, they would "suffer[] flash pulmonary edema" during their executions. *Matter of Fed. Bureau of Prisons' Execution Protocol Cases*, 471 F. Supp. 3d 209, 218 (D.D.C. 2020). This Court lifted that stay, noting that the government had offered evidence to the contrary—from Dr. Antognini, in fact, *see id.* at 219—that "any pulmonary edema occurs only *after* the prisoner has died or been rendered fully

insensate." *Lee*, 591 U.S. at 981. The U.S. Supreme Court therefore has already determined that this argument is not "the extreme exception" to warrant a "[l]ast-minute stay[]." *Id.* Nothing Waisel offers proves that the edema occurs before the inmate is rendered insensate.

And in the third, Waisel doesn't suggest that the effects of any pulmonary edema—"if" sensate—would last more than a few moments. As Dr. Antognini observes, if Moore was feeling pain for 23 minutes before his death was pronounced, he would have displayed some signs of suffering. *See* Antognini Decl. ¶ 27. Or as the Eleventh Circuit pointed out in rejecting Waisel's objections to pentobarbital in another case, Waisel "admitted that any suffering was short lived as it clearly ended within a few minutes—three minutes at the most—after the pentobarbital was injected." *DeYoung v. Owens*, 646 F.3d 1319, 1326 (11th Cir. 2011); *see also* Antognini Decl. ¶ 16 (a person would be quickly rendered insensate and not feel anything after that moment). The Constitution, however, prohibits only "serious harm" and "substantial risk," *DeYoung*, 646 F.3d at 1327, because pain is "an inescapable consequence of death," *Baze*, 553 U.S. at 50. "Short lived" pain (particularly pain that is not "superadd[ed]" just for its own sake, *Bucklew*, 587 U.S. at 133) does not violate the Constitution.

IV. The remaining factors do not support a stay.

As for irreparable harm, death alone cannot be enough. *Cf.* Application 7. As one 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). 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. Sigmon cannot make that showing. *See supra* Part III.

Taking the last two factors together, *Nken*, 556 U.S. at 435, Sigmon tries to downplay the public interest, *see* Application 7–8. Any delay, he insists, will be "slight." *Id.* at 7. That contention rings hollow, even if Sigmon were a plausible spokesman for the public's interest. Sigmon committed murder in 2001, has been on death row for more than two decades, and was just granted a judicial reprieve by the S.C. Supreme Court, which stayed its own execution schedule over the holidays. *See* Order, *Sigmon v. State*, No. 2024-001373 (S.C. Nov. 14, 2024). There's already been more than significant delay.

But more to the point, Sigmon discounts the State's compelling interests here. "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew*, 587 U.S. at 149. Too often, those interests are "frustrated" by "delay through lawsuit after lawsuit." *Id.* Sigmon is no exception: In just the past few months, he's filed cases in state and federal court raising various challenges to his execution. *See Sigmon v. State*, No. 2025-000187 (S.C.); *Bixby v. Stirling*, *supra.* 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. [Bowman]'s crimes, and others like them deserve better." *Bucklew*, 587 U.S. at 149.

Sigmon also ignores the State's separate interest in ensuring that federal courts do not interfere 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.* That is why courts must guard against the "Groundhog Day" that is capital litigation so that duly imposed, fully appealed judgments can be carried out. *Glossip v. Gross*, 576 U.S. 863, 893 (2015) (Scalia, J., concurring).

CONCLUSION

The Court should deny the Petition and the Application.

Respectfully submitted,

ALAN WILSON
Attorney General of South Carolina

DONALD J. ZELENKA
Deputy Attorney General

*MELODY J. BROWN
Senior Assistant Deputy Attorney General
mbrown@scag.gov

RICHARD B. LARRABEE
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
STATE OF SOUTH CAROLINA

P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

**counsel of record* *Counsel for Respondents*