No. 21-6055 & 21A99

In the Supreme Court of the United States

WILLIE B. SMITH III,
PETITIONER-APPLICANT,

v.

JEFFERSON DUNN,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
RESPONDENTS.

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

To the Honorable Clarence Thomas,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Eleventh Circuit

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October 21, 2021

EXECUTION SCHEDULED THURSDAY, OCTOBER 21, 7:00 P.M. EDT

PARTIES TO THE PROCEEDING

The parties to the proceedings below are as follows:

Applicant Willie B. Smith III was the plaintiff in the district court and the appellant in the court of appeals.

Respondent Jefferson S. Dunn, in his official capacity as Commissioner of the Alabama Department of Corrections, and Terry Raybon, in his official capacity as Warden of Holman Correctional Facility, were defendants in the district court and appellees in the court of appeals.

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

Willie Smith is scheduled to be executed at 7:00 p.m. EDT today[1] for kidnapping and murdering Sharma Ruth Johnson thirty years ago this month. For the second time this year and the second time in this case, the district court rejected Smith's request for a last-minute stay of his execution both because he could not show he was likely to prevail on the merits and due to his dilatory litigation strategy. This Court vacated the Eleventh Circuit's last-minute stay in February. *See Dunn v. Smith*, 141 S. Ct. 1290 (2021) (mem.). But this time, the court of appeals got it right and denied Smith's appeal and stay motion earlier this morning. *Smith v. Comm'r, Ala. Dep't of Corrs.*, 21-13581 (11th Cir. Oct. 21, 2021). This Court should do likewise.

And it should do so swiftly so the execution may take place. Though the Eleventh Circuit issued its opinion today at **11:25 a.m. EDT**, Smith has waited until after **4:00 p.m**. to seek a stay of his **7:00 p.m.** execution. Perhaps it is because he knows that the warrant expires at midnight CDT, meaning that if the Court waits too long to deny his application, he will have obtained an unwarranted reprieve of his sentence through pure gamesmanship. *Cf. Price v. Dunn*, 139 S. Ct. 1312 (2019) (lifting stay after warrant had expired). This Court should not let that happen.

The simplest ground for swiftly denying relief is delay. Today, he has delayed filing his stay application. Over the last two years, he has delayed prosecuting his claim. The district court that has presided over Smith's case since 2019 chronicled

1. Order, *Ex parte Smith*, No. 1011228 (Ala. Sept. 1, 2021).

Smith's leisurely approach to litigation and found that "Smith could have acted to expedite and complete this litigation before his execution, but he did not." Doc. 170 at 35–36. Smith never challenged this finding before the Eleventh Circuit. Thus, the emergency Smith created is reason enough to swiftly deny his emergency application.

Denial is also warranted because Smith has not shown that this Court is likely to grant certiorari on this interlocutory appeal of his heavily fact-bound claim, much less that he is likely to prevail on that claim. He pleaded a creative, if amorphous, Americans with Disabilities Act claim, but never backed it up with sufficient evidence. After the district court presided over the case for nearly two years, reviewed thousands of pages of evidence, and conducted multiple evidentiary hearings, the court made numerous factual findings in denying Smith's motion for preliminary injunction. The district court "applied the correct legal standard," and "Smith has not shown that any of these factual findings rise to the level of being clearly erroneous." CA11 Op. 9. Smith's stay request should be denied at once.

* * *

Smith's first execution setting was scheduled for February 11, 2021, but the Eleventh Circuit granted Smith's last-minute stay applications in both his RLUIPA case and his ADA case. *See Smith v. Comm'r, Ala. Dep't of Corrs.*, 844 F. App'x 286 (11th Cir. 2021) (RLUIPA); Order, *Smith v. Comm'r, Ala. Dep't of Corrs.*, 21-10413 (11th Cir. Feb. 10, 2021) (ADA). This Court promptly vacated the stay in the ADA case without noted dissent, *Dunn v. Smith*, 141 S. Ct. 1290, but allowed Smith's RLUIPA claim to go forward, *Dunn v. Smith*, 141 S. Ct. 725 (2021) (mem.).

The RLUIPA claim settled in June. *See* Order, *Smith v. Dunn*, 2:20-cv-01026 (M.D. Ala. June 17, 2021), ECF No. 58. As for his ADA claim, Smith alleged that the Alabama Department of Corrections (ADOC) failed to provide him a reasonable accommodation under the ADA for his cognitive disability in June 2018, when death-row inmates had a thirty-day statutory period to elect nitrogen hypoxia as their method of execution. Though Smith was provided an election form and ready access to counsel, he did not elect. And over the course of nearly two years of litigation, he never alleged or produced evidence before the district court that he *would have* elected during the statutory timeframe if he had been given a reasonable accommodation (which he never asked for). The district court asked Smith's counsel about this deficiency at a hearing in February, and counsel agreed there was no evidence or allegation that Smith "wanted to opt-in to nitrogen hypoxia in 2018." Doc. 57 at 22. In August, the court even ordered supplemental briefing and evidentiary submissions on whether Smith had established standing. Doc. 112 at 2. After the responses were in, and after noting that the discovery record "totaled more than 14,000 pages of documents," the court found that "none of the evidence submitted to [the] court indicate[d] that Smith wanted to opt into nitrogen hypoxia in June 2018." Doc. 148 at 15. So the court dismissed Smith's claim for lack of standing. *Id.* at 41; *see Carney v. Adams*, 141 S. Ct. 493, 499–500 (2020) (holding that plaintiff lacked standing to challenge state's judicial appointments provision because he did not establish that he was "likely to become a judge" if his suit was successful).

That was September 24. Smith filed his notice of appeal the same day, but waited twelve days to file his opening brief at the Eleventh Circuit. When he did, he addressed only standing arguments, so when the court of appeals ruled on October 15 that Smith had alleged "sufficient factual allegations in [his] pleadings" to prevent dismissal at the pleading stage, *Smith v. Comm'r, Ala. Dep't of Corrs.*, 21-13298, 2021 WL 4817748, at *4 (11th Cir. Oct. 15, 2021), time was tight at the district court to consider Smith's preliminary injunction motion.

The district court acted with alacrity. On Sunday, October 17, it issued a thirty-six-page, fact-intensive opinion denying Smith's motion to preliminarily enjoin Respondents—Jefferson Dunn, the ADOC Commissioner, and Terry Raybon, the Warden of Holman Correctional Facility—from executing Smith by any method other than nitrogen hypoxia. Doc. 170. The court concluded that Smith was unlikely to prevail on the merits and that the equities weighed against granting a stay. The court also found that Smith "could have acted to expedite and complete this litigation before his execution, but he did not." *Id.* at 35–36.

As the Eleventh Circuit pointed out, by the time the district court issued its ruling, it had "review[ed] over 14,000 pages of documentary evidence, review[ed] the parties' briefs, and presid[ed] over a seven-hour evidentiary hearing in which Mr. Smith called eight witnesses to testify, including both Defendants." CA11 Op. 9. The court had also been promised by Smith that it would have "all the evidence" it needed to rule on his preliminary injunction motion. Doc. 170 at 25. And while Smith had yet to be deposed when the district court ruled, that was Smith's fault: his deposition had

been scheduled for September 2, but the parties jointly asked the court to reschedule it, and Smith's counsel assured the court that his testimony would not be necessary for the resolution of his preliminary injunction motion. Doc. 170 at 25.

Smith appealed Sunday night. The next morning, before Smith had filed anything else, the Eleventh Circuit set a briefing schedule that would not conclude until Wednesday, October 20, at 6 p.m. EDT—twenty-five hours before Smith's scheduled execution. Respondents moved to expedite the schedule to allow the court of appeals and this Court more time, but Smith opposed the motion, and the court of appeals denied it. So Smith filed his opening brief and motion for stay Tuesday morning. In a remarkable act of sandbagging, after not producing evidence for nearly two years in the district court that Smith had not understood the hypoxia election form or that he would have elected hypoxia if he had been given a reasonable accommodation, Smith offered *for the first time in his stay motion before the circuit court* a subjunctive declaration stating that, had he testified in a deposition, he "would have said" that he "would have signed" the election form if he had understood it, which he "would have said" that he did not. Smith's CA11 Stay Mot. 9.

The Eleventh Circuit properly rejected this cynical ploy. So should this Court. Smith has not shown that he is likely to prevail on the merits. And his dilatory litigation strategy weighs heavily against his request: as the district court found, "Smith could have acted to expedite and complete this litigation before his execution, but he did not." Doc. 170 at 35–36. Nor has Smith shown that the State, the public, or his victim's family would be unharmed by a stay. Smith executed Sharma Ruth Johnson

thirty years ago next week. He has been on death row longer than Ms. Johnson was alive. And he has waited until less than **3 hours** before his execution to ask this Court for relief. It would be unjust to further delay the execution of Smith's lawful sentence.

STATEMENT

A. Smith's Crime, Trial, and Appeals

Smith is scheduled to be executed this evening for robbing, kidnapping, and executing twenty-two-year-old Sharma Ruth Johnson in October 1991. Johnson made the fatal error of stopping at an ATM late one evening. Smith spotted her, and with the aid of a female accomplice, Smith kidnapped Johnson, coerced her into giving him the PIN for her debit card, and shot her in the head in the trunk of her own car as she swore not to tell anyone about his crimes. *Smith v. State*, 838 So. 2d 413 (Ala. Crim. App. 2002). Smith's conventional appeals concluded on July 2, 2020, when this Court denied certiorari. *Smith v. Dunn*, 141 S. Ct. 188 (2020) (mem.).

B. Alabama Introduces Nitrogen Hypoxia as a Method of Execution

On March 22, 2018, Governor Kay Ivey signed Alabama Laws Act 2018-353, which made nitrogen hypoxia a statutorily approved method of execution in Alabama. Pursuant to Alabama Code § 15-18-82.1(b)(2), as modified by the act, an inmate whose conviction was final prior to June 1, 2018, had thirty days from that date to inform the warden of the correctional facility in which he was housed that he was electing to be executed by nitrogen hypoxia.

The law did not include any provision requiring that any individual be given special notice of its enactment, nor did it specify how an inmate should make an election, other than to require the election to be made "personally," "in writing," and

"delivered to the warden of the correctional facility" within thirty days of the triggering date. ALA. CODE § 15-18-82.1(b)(2). ADOC had no statutory duty to create an election program, and it had no authority to change the terms of the statute. *See* Doc. 46 at 12 ("At oral argument, counsel for Smith clarified that the service at issue relates to the Election Form, not the statutory election process."); Doc. 57 at 17 (Smith's counsel stating that "the State was under no obligation to notify folks at Holman" about the change in law). Rather, ADOC's only duty was to receive timely notices of election from inmates who wished to elect hypoxia.

On June 22, 2018, an attorney with the Federal Defenders for the Middle District of Alabama drafted an election form, which was given to death-row inmates represented by that organization on June 26. Affidavit of John A. Palombi at 2, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Mar. 29, 2019), ECF No. 29-3. Cynthia Stewart, then the Warden of Holman Correctional Facility, where Smith was an inmate, directed Captain Jeff Emberton to give every death-row inmate a copy of the form and an envelope in which he could return it to the warden, should he decide to elect. Doc. 44-6. Emberton did so, Doc. 118-28 at 83–87, explaining to each inmate (in the district court's summation) "that the law had changed and that if they wanted to elect a nitrogen hypoxia execution, they needed to fill out the form and seal it in the envelope provided," Doc. 170 at 8 (citations omitted). The form was distributed to every death-row inmate at Holman by June 27.[2] It stated:

2. Election forms were received from inmates not represented by the Federal Defenders as early as June 26. Doc. 118-20 at 5–9.

ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA

> Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection.
>
> This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia.

The form also included a line for the date of signing that read: "Done this ___ day of June, 2018." Doc. 44-9. "Almost fifty inmates, many not represented by the Federal Defenders, opted into nitrogen hypoxia during this period." Doc. 170 at 8. "Not every inmate who did so utilized the form provided." *Id.*

While Smith called one of his attorneys several times during June 2018—including on June 28, after the forms were distributed, Doc. 118-18 at 4—he did not elect. Nor did he request an ADA accommodation during (or any time before) the election period. In fact, the ADA coordinator for Holman reported that there was not a single request for accommodation from Smith in the facility's files. Doc. 47-38; Doc. 139 at 79; *see* Doc. 118-30 at 37–42.

C. Smith Brings This ADA Claim

Smith initiated the present action on November 25, 2019. Doc. 1. He alleged that he was a qualified individual with an intellectual disability under the ADA and that he was unable to make a timely election of nitrogen hypoxia during the June 2018 election period without a reasonable accommodation. *Id.* ¶¶ 53–55. Over the next two years, Smith would show little interest in moving this case to final judgment.

1. On January 31, 2020, Defendants moved to dismiss Smith's complaint. *See* Doc. 10. Briefing on that motion concluded on March 6, 2020. *See* Doc. 15. Smith never

requested an expedited ruling on this motion or for discovery to open—even after this Court denied Smith's petition for a writ of certiorari in his federal habeas case on July 2, *see Smith v. Dunn*, 141 S. Ct. 188 (2020) (mem.), and even after Defendants informed the Court on December 1, 2020, that Smith's execution date had been set. Doc. 17. Indeed, Smith's next filing did not come until December 10—and then only because the district court ordered supplemental briefing. *See* Docs. 18, 20. After a hearing, Doc. 24, the district court granted Respondents' motion to dismiss on December 14, 2020, Doc. 25.

Although Smith had known since December 1, 2020, that his execution was scheduled, he waited *sixty-five days* to ask the district court for a stay—finally moving for one on February 4, 2021, one week before his execution. Doc. 42. The district court denied the motion on February 9. Doc. 49 at 17–25. In addition to finding that Smith was unlikely to prevail on the merits, the court noted Smith's "unexplained delay in seeking a stay of execution" as "weigh[ing] against equitable relief." *Id.* at 25. Smith sought a stay from the Eleventh Circuit, which granted it on the evening of February 10 "to allow the court time to review the merits of the claim." Order, *Smith*, No. 21-10413. This Court vacated the stay in a one-sentence order without noted dissent, *Dunn*, 141 S. Ct. 1290, but declined to vacate another stay the court of appeals had entered in Smith's contemporaneous RLUIPA case.

2. Back in the district court, discovery commenced in March 2021, with a trial scheduled for June 2022. Doc. 62. On July 6, having settled Smith's religious liberty claim, the State moved for his execution to be reset. *See* State of Alabama's Renewed

Motion to Set an Execution Date, *Ex parte Smith*, No. 1011228 (Ala. July 6, 2021). Eight days later, Smith moved for a preliminary injunction to prevent his execution "by any means other than nitrogen hypoxia" until the conclusion of his § 1983 ADA litigation, Doc. 74 at 31, but he took no other action. As the district court later noted, Smith did not, for example, ask the court to "modify the scheduling order, expedite discovery, [or] set an earlier trial date, pursuant to the [Uniform Scheduling Order] and Rule 16(b)." Doc. 170 at 35.

On August 13, the district court ordered the parties to file supplemental briefs—"with documentary evidence in support of or in opposition to the motion for preliminary injunction"—and specifically directed the parties to address "whether the Plaintiff has standing." Doc. 112 at 2. In response, Smith's treatment of injury-in-fact and causation was limited to one paragraph, in which he argued only that he "sufficiently pleaded" those standing prongs. Doc. 118 at 4.

On August 23, four days before the evidentiary hearing on Smith's preliminary injunction motion, the parties jointly moved to modify the order setting Smith's deposition date from September 2 to October 11. Doc. 121. The district court held a telephonic conference the next day; Smith assured the court that there was no reason to delay the evidentiary hearing, "that Smith's testimony was not necessary [for resolution of the preliminary injunction motion], and that the Court had all the evidence before it needed to rule on the motion for preliminary injunction." Doc. 170 at 25 (citing Doc. 127). The court then held a seven-hour evidentiary hearing on August 27. Smith called eight witnesses, including Respondents. Doc. 139. By September 1, when

the Alabama Supreme Court reset Smith's execution for October 21, Order, *Ex parte Smith*, Smith's motion had been fully briefed and argued.

On September 9, nearly two weeks after the evidentiary hearing, Smith moved for partial summary judgment, contending that Defendants "admitted facts" in their answer to his amended complaint agreeing that Smith's need for an ADA accommodation was "obvious." Doc. 140 at 2. Defendants responded the next day, pointing out that their answer "used phrases like 'Admitted to the extent' and "Admitted only to the extent"' to admit just a portion of an allegation, and that they included a general denial to make clear that they denied all others. Doc. 142 at 2.

On September 24, the district court dismissed Smith's lawsuit on jurisdictional grounds, finding that Smith had not pleaded an injury in fact that was traceable to Respondents and redressable by the court. Doc. 148. Accordingly, the court did not rule on the merits of the pending preliminary injunction motion. Smith appealed and requested a briefing schedule that would conclude October 12—eighteen days after the district court's order and just nine days before his scheduled execution. The court of appeals granted his schedule, held oral argument on October 13, and vacated and remanded the matter to the district court on October 15, finding that Smith "sufficiently alleged standing in his complaint." *Smith*, 2021 WL 4817748, at *1. The Court expedited the mandate and issued it the same day. Doc. 168.

The district court wasted no time, issuing two opinions on the evening of Sunday, October 17. First, it denied Smith's motion for partial summary judgment, concluding that "Defendants did not admit the at-issue allegations in [Smith's] amended

complaint," and that Smith failed to meet his burden under Rule 56(c) to show that there were no genuine disputes of material fact regarding the final prong of his ADA claim. Doc. 169 at 9.

Second, the court denied Smith's preliminary injunction motion. Doc. 170. In a thirty-six-page order, the court made numerous factual findings and held that while Smith was likely to show that he was a qualified individual with a disability under the ADA, *id.* at 18, he likely could not prove that he lacked meaningful access to a benefit offered by ADOC due to a disability, *id.* at 18–25, or that he was denied a reasonable accommodation, *id.* at 25–32. The district court also found that "the equities favor the Defendants." *Id.* at 35. The court noted that "after the State moved to set his execution, Smith could have moved th[e] [c]ourt to modify the scheduling order, expedite discovery, and set an earlier trial date," but Smith "did not" do that. *Id.* "Instead … Smith requested, jointly with the Defendants, that the [c]ourt delay his deposition from September 2, 2021, to October 11, 2021." *Id.* The court continued: "Smith could have acted to expedite and complete this litigation before his execution, but he did not. His inaction with respect to the litigation timeline further undermines his entitlement to the extraordinary remedy of a preliminary injunction in order to fully litigate his case." *Id.* at 35–36 (citations and quotation marks omitted).

3. Smith filed a notice of appeal as to both opinions the same evening they issued. Doc. 171. The next day, before Smith filed anything else with the court of appeals, the Eleventh Circuit issued a schedule that would have briefing run until twenty-five hours before Smith's scheduled execution. Respondents asked the court

to expedite the briefing so this Court would have more time to consider any resulting applications, but Smith opposed the motion, and the court of appeals denied it. Smith thus filed his opening brief and a motion to stay in the court of appeals on Tuesday morning. Smith attached to his stay motion a declaration stating for the first time on appeal that, had he testified in a deposition, he "would have said" that he "would have signed" the election form if he had understood it, which he "would have said" that he did not. Smith's CA11 Stay Mot. 9.

The Eleventh Circuit affirmed the district court earlier today and denied Smith's stay request. After rejecting Smith's argument regarding his partial motion for summary judgment ("the strict reading of Rule 8 that Mr. Smith proposes would impermissibly prioritize the form of the pleadings over their substance," CA11 Op. 6), the court concluded that "Smith has not shown that any of [the district court's] factual findings rise to the level of being clearly erroneous[,] [n]or does the record indicate that the district court followed improper procedures or applied the incorrect legal standards to its factual findings," *id.* at 9. With less than **three hours** remaining before his scheduled execution, Smith filed his stay application with this Court.

REASONS FOR DENYING THE APPLICATION

I. Smith Is Not Entitled To Equitable Relief Because He Pursued His Claim In A Dilatory Fashion.

This Court has made clear time and again that "federal courts 'can and should' protect settled state judgments from 'undue interference' by invoking their 'equitable powers' to dismiss or curtail suits that are pursued in a 'dilatory' fashion." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (quoting *Hill v. McDonough*, 547 U.S. 573,

584–85 (2006)). The district court below received the message. In February, when it denied Smith's motion to stay his first execution setting, the court noted that "Smith could have filed his motion to stay as early as December 1, 2020," but instead waited "until February 4, 2021, one week before his scheduled execution." Doc. 49 at 25. Smith had "no reasonable explanation" for this delay and, under questioning from the court, had to admit "that the motion was one of last resort." *Id.* at 25–26. The district court saw through Smith's gambit and properly denied his motion (both on the merits and due to Smith's unexplained delay), but the Eleventh Circuit rewarded the ploy and stayed the proceedings. Order, *Smith*, 21-10413. This Court vacated the stay the next day. 141 S. Ct. 1290 (mem.).

Now history repeats itself. The district court has once again determined that Smith has pursued his claim "in a 'dilatory' fashion," *Bucklew*, 139 S. Ct. at 1134, and is thus not entitled to emergency equitable relief—either on the merits or otherwise. To be sure, Smith did not run the exact same play he tried in February; he filed his preliminary injunction motion on July 14. But his move this time was more subtle. After the district court received extensive briefing and evidence on Smith's request for a preliminary injunction, the court dismissed Smith's case for lack of standing on September 24. Smith appealed the ruling the same day, but waited *twelve days* to file his opening brief. And when he filed, he addressed only standing arguments in his brief, which meant that the most relief he could get from the court of appeals would be a remand to the district court for another fire drill—which is precisely what he got. Of course, the Eleventh Circuit would have been under no obligation to consider the

merits of Smith's preliminary injunction arguments had he raised them in his previous appeal. But "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). And Smith did not even try. At a minimum, he could have sought to avoid the situation we are now in either by raising his merits issues before the court of appeals three weeks ago or, at the very least, requesting a more expedited briefing schedule. Instead, his litigation strategy has guaranteed a repeat of last February.

And to fully appreciate Smith's strategy of interminable litigation—punctuated by emergency proceedings—the Court must zoom out. As the district court aptly noted, Smith has shown little interest over the last two years in resolving his claim. Smith tried to blame his latest emergency on the district court, arguing to the court of appeals that "[t]he largest block of delay in this case was the district court taking a year to decide the motion to dismiss." Smith's CA11 Br. 40. But Smith never once "request[ed] that the district court expedite [consideration of that motion] in any way." *Williams v. Allen*, 496 F.3d 1210, 1214 n.1 (11th Cir. 2007). Even after Respondents notified the district court on September 17, 2020, that this Court had denied Smith's petition for a writ of certiorari, Doc. 16, and even after they informed the court on December 1, 2020, that Smith's execution date had been set, Doc. 17, Smith failed to stir. Instead, it was the *district court* that acted by ordering a hearing. Doc. 18. Where Smith "did not request an accelerated briefing schedule or expedited consideration of [Respondents'] motion," he "cannot now blame *the court* for not

acting quickly enough." *Kay v. United of Omaha Life Ins. Co.*, 709 F. App'x 320, 326–27 (6th Cir. 2017); *cf. Irish v. SEC*, 367 F.2d 637, 639 (9th Cir. 1966) ("He could have earlier petitioned a court to compel the Commission to expedite its proceedings. But he might have been expediting the demise of his business. Perhaps that is why" he did not ask for "a speedy decision on the merits." (citations omitted)).

And "[a]fter the State moved to set his execution" a second time, as the district court explained, "Smith could have moved [the district court] to modify the scheduling order, expedite discovery, and set an earlier trial date, pursuant to the USO and Rule 16(b). He did not. Instead, Smith requested, jointly with the Defendants, that the Court delay his deposition from September 2, 2021, to October 11, 2021." Doc. 170 at 35. So while "Smith could have acted to expedite and complete this litigation before his execution," he simply chose not to. *Id.* at 35–36. "His inaction with respect to the litigation timeline" thus "undermines his entitlement to the 'extraordinary remedy' of a preliminary injunction," *id.* at 36 (quoting *Winter v. Nat'l Res. Def. Council, Inc.* 555 U.S. 7, 24 (2008)).

Not only that, but these earlier actions have set up Smith's latest "last-minute attempt[] to manipulate the judicial process." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). The background is this. In February, the district court asked Smith's counsel whether they "have any evidence Mr. Smith wanted to opt-in to nitrogen hypoxia in 2018." Doc. 57 at 22. The reply? "I don't, Your Honor." *Id.* Six months later, the court ordered the parties to brief and produce evidence of Smith's standing. Doc. 112. A few weeks after that, the court asked at the preliminary injunction hearing whether the

case should be dismissed if Smith did not "intend[] in 2018 to opt in to nitrogen hypoxia." Doc. 139 at 235. The court then dismissed Smith's claim for lack of standing because—among other reasons—he had not alleged or proved that he would have elected nitrogen hypoxia during the statutory window if he had been given an ADA accommodation. Doc. 148. And then the parties briefed and orally argued the issue at the Eleventh Circuit on Smith's direct appeal.

Suffice it to say, Smith has been on notice for quite a while that whether he intended to elect hypoxia in June 2018 was an important issue for the district court. Yet he waited until *two days ago*, when this case was before the court of appeals, to produce *for the first time* a declaration stating that he "would have said" in a deposition (that his counsel asked the court to postpone) that he "would have signed" the election form if he had understood it, which he "would have said" that he did not. Smith's CA11 Stay Mot. 9. Of course, this evidence comes too late to be considered and, as explained below, changes nothing even if it is. But it exemplifies Smith's litigation strategy: gum things up, present moving targets of his claims, don't expedite discovery or briefing, and seek a stay based on the delay and confusion this causes.

Smith responds (at 12 in his CA11 reply) that this is analysis is wrong because he is actually "in nearly the same situation" as Patrick Murphy, a Texas death-row inmate who obtained a stay from the district court that the Fifth Circuit refused to vacate because Texas had sought an execution date that occurred "before the district court had adequate time to resolve" Murphy's RLUIPA claim. *Murphy v. Collier*, 942 F.3d 704, 709 (5th Cir. 2019). But unlike in Murphy's case, it is uncontested that

Smith *did* have adequate time. While Smith assails numerous findings from the district court as clearly erroneous, he never challenges this one: "Smith could have acted to expedite and complete this litigation before his execution, but he did not." Doc. 170 at 35–36. Smith was content to keep this "long-pending litigation" pending indefinitely. Smith's CA11 Reply Br. 11. The State and his victim's family were not required to oblige. This Court should not grant Smith a reprieve of his lawful sentence, for Smith has not sought a "fair[] and expeditious[]" resolution of his claim. *Bucklew*, 139 S. Ct. at 1134.

II. Smith Cannot Show A Substantial Likelihood Of Success.

Preliminary injunctive relief—whether a stay or a preliminary injunction—should ordinarily not be granted unless the movant "has made a strong showing that he is likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009). "It is not enough that the chance of success on the merits be better than negligible." *Id.* (quotation marks and citation omitted). Smith has not shown that he is likely to succeed on the merits of his ADA claim or that he is likely to have standing.

A. Smith is Not Entitled to Partial Summary Judgment.

The Eleventh Circuit court correctly rejected Smith's appeal of the district court's denial of his motion for partial summary judgment. CA11 Op. 4–6. Although it should have dismissed the appeal for lack of jurisdiction under 28 U.S.C. § 1292(b) since the district court never certified the interlocutory appeal and Smith waived any argument concerning pendent appellate jurisdiction, *see* Respondents' CA11 Br. xi–xvi, the court properly noted that "the strict reading of Rule 8 that Mr. Smith proposes

would impermissibly prioritize the form of the pleadings over their substance," CA11 Op. 6 (citing FED. R. CIV. P. 8(d), (e)).

In sum, Smith takes issue with Respondents' answer to his amended complaint. *See* Doc. 58. Respondents made partial and total admissions and denials throughout the answer as appropriate, *e.g.*, *id.* ¶ 2 ("Admitted to the extent that 42 U.S.C. § 1983 is a proper vehicle for alleging deprivations of Constitutional rights."), and concluded the answer with, "Defendants deny any claim or allegation of Smith's amended complaint that is not expressly admitted above," *id.* at 9. Smith contends that Respondents' failure to make specific denials meant that they admitted the allegations. In particular, Smith claims that Respondents "admitted" that his need for ADA accommodation was obvious, that ADOC knew of this need, that he would not have understood the election form without assistance, and that reasonable accommodations included simple language, a comprehension check, assistive technology, or additional time for Smith to consider the election. *See* Doc. 169 at 5.

This is wrong for multiple reasons. For one, Smith's argument "ignores the language of Rule 8(b)(3)." CA11 Op. 5. "Rule 8(b)(4) requires that the party 'admit the part that is true and deny the rest' when denying only part of an allegation," and Rules 8(b)(6) states that if an allegation is not denied, the allegation is deemed admitted. *Id.* at 6. Thus, while Respondents "did not specifically deny the allegations when answers Paragraphs 33–36, Rule 8(b)(3) allows a party to specifically admit allegations and then generally deny the rest"—which is "exactly" what Respondents

did "by generally denying any allegation in Mr. Smith's complaint that was not expressly admitted." *Id.*

For another, Smith's implausible reading does not construe the pleadings "so as to do justice," as Rule 8(e) requires. *See also* 5 FED. PRAC. & PROC. § 1269 ("[A]s long as the pleading clearly indicates the allegations in the complaint that are intended to be placed in issue, [any] improper designation should not operate to prejudice the pleader"; *id.* § 1266 ("[A]s has been pointed out numerous times in this discussion of pleading under the federal rules, nomenclature and formal matters should not be determinative and the intention of the pleader should be given effect so that a resolution of the merits can be achieved.").

Here, no reasonable reader could interpret Respondents' Answer as Smith does because the "intention of the pleader" was so obvious and put Smith on notice of the facts admitted. Respondents plainly stated in their Answer:

> Defendants maintain that Smith is not a qualified individual with a disability for ADA purposes, that he was not excluded from or denied the benefits of a service, program, or activity due to a qualified disability, that he failed to request an accommodation, and that any disability Smith may have was not sufficiently known to Defendants so that the need for an accommodation was obvious.

Doc. 58 at 9. The court of appeals was right to reject Smith's challenge.

B. Smith is Unlikely to Prove the Merits.

"Title II of the Americans with Disabilities Act of 1990, 104 Stat. 337, 42 U.S.C. §§ 12131–12165, provides that 'no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination

by any such entity.'" *Tennessee v. Lane*, 541 U.S. 509, 513 (2004) (parenthetical omitted). Thus, to show a substantial likelihood of success on the merits of his ADA claim, Smith had to show "(1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of [his] disability." *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1083 (11th Cir. 2007). And "Title II does not require States to employ any and all means to make … services accessible to persons with disabilities." *Lane*, 541 U.S. at 531–32. Smith failed to meet his burden, and the district court did not err by denying Smith's partial motion for summary judgment or his motion for preliminary injunction.

At the outset, the district court was in an even better position to make its finding this time around than it was when it denied Smith a stay in February. Since then, Smith has received discovery from Respondents in the form of five requests for production. *See* Doc. 148 at 15 (referencing 14,000 pages of discovery). Smith's counsel visited Holman Correctional Facility to inspect the death-row law library computer. And they deposed seven current and former ADOC employees—one on two occasions—and put eight witnesses on the stand during a seven-hour preliminary injunction hearing in August. *See* Doc. 139.

Key facts from February have since been elaborated upon and *weaken* Smith's case. For instance:

- **Captain Emberton has maintained since January 2019 that he distributed the Federal Defenders' election form to Holman's death-row**

inmates. Not only that, but he also offered inmates a simple verbal explanation about the form. Doc. 118-28 at 83–91; Doc. 170 at 17. Emberton gave this explanation to three or four cells of inmates at a time, noting that "[i]t's very tight quarters" on the tiers. Doc. 139 at 67. He also testified that he woke sleeping inmates to give them the explanation. *Id.* According to Emberton's recollection, Smith was present at Holman that day. *Id.* at 68.

- **Smith can read.** As the district court found, the record "abounds with evidence that Smith spent his time reading, writing, or in the prison library."[3] Doc. 170 at 27. And as one of Smith's mental health reviewers put it, Smith "wants to talk about library books usually." Doc. 118-9 at 26. Emberton even remarked on the "[m]agazines, mail, [and] stuff like that" Smith kept in his cell. Doc. 139 at 57. Further, in 2008, clinical psychologist Dr. Glen King tested Smith's abilities with the WRAT-4 and determined that he reads at an 8.6-grade level and can spell at 11.5-grade level. Doc. 118-26 at 3.

- **Smith never requested an ADA accommodation.** The ADA coordinator for Holman confirmed that Smith's name was not on his list of inmates with ADA accommodations as of August 2021. Doc. 139 at 78–79. The only request for accommodation submitted on Smith's behalf came from the Federal Defenders in the form of an email to Respondents' counsel in December 2020—a year into Smith's litigation and almost eighteen months after the election period ended. Doc. 45-6. And since Smith worked as a tier runner—and did such a good job that his fellow inmates complained when he was rotated off—he knew where the ADA forms were kept had he wished to make a request. Doc. 118-28 at 120–21; Doc. 139 at 58.

- **Smith was represented by competent counsel in June 2018.** We now know that he called the direct line of one of his attorneys at Sidley Austin in Dallas six times in June 2018, including after the form was distributed. Doc. 118-18. If Smith had questions about the form he received or the election period more generally, he knew how to reach his attorney—and did so.

What is glaringly absent in the evidentiary record is evidence from Smith that supports his claim. As the district court wrote, "After two years of litigation, Smith still has not demonstrated to the [c]ourt what about the form he could not

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3. Smith deems the district court's analysis "stereotypical ablist" [sic] because the court noted his "excellent spelling and penmanship." Pet. 10 n.6. Smith can spell as well as a high school junior, *see* Doc. 118-26 at 3, which tends to undercut his claims of severe disability or failure to understand the form.

understand." Doc. 170 at 20–21. "Nothing in the record, contemporaneous or otherwise, speaks to how Smith understood the form, how he interacted with it, or what he gleaned from its text when it was distributed." *Id.* at 20. Smith also failed to produce evidence indicating that he *wanted* to elect hypoxia in June 2018. While he submitted a declaration prior to the August preliminary injunction hearing, it concerned only his failure to obtain a GED. Doc. 119-23. Curiously (or not), Smith remained silent, content to rely on his general allegations and to have the court "divine the record" based "on inference." Doc. 170 at 21. Of course, that was not enough to warrant a preliminary injunction.

So, when his silence failed him, Smith tossed his new October 18 declaration into his *Eleventh Circuit* pleadings about what he allegedly "would have said" in his deposition—which his counsel had assured the district court was unnecessary for deciding Smith's preliminary injunction motion. Smith's CA11 Stay Mot. 9; see Doc. 170 at 25. As explained above, this was wholly improper, and Smith had long been on notice that the district court thought this information was relevant to his suit; Smith's new "evidence"—which is now not subject to cross-examination or challenge—comes far too late and should not be considered. But it also ultimately does not matter. The declaration does not explain, for instance, why Smith failed to elect earlier in June 2018 or what he discussed with his lawyer during their conversations at the end of the month. Even with the declaration, Smith's evidence is insufficient to show that he will likely succeed on the merits of his ADA claim.

First, Smith never bore his "burden of identifying an accommodation, and of demonstrating that the accommodation [would have] allow[ed] him to" make a timely election in June 2018. *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255–56 (11th Cir. 2001); *see A.L. by and through D.L. v. Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1292 (11th Cir. 2018) ("The plaintiff bears the burden of proving not only that he is disabled but also that his requested modification is both 'reasonable' and 'necessary.'"). Smith's Amended Complaint was vague about what a reasonable accommodation for him might have been, suggesting "use of simple language, a comprehension check, additional time, or assistive technology." Doc. 36 ¶ 36. But evidence from the August 2021 preliminary injunction hearing and the district court's prior findings show that Smith had ready access to assistance relevant to electing hypoxia, with or without the form. Warden Raybon testified that death-row inmates share information and were talking about hypoxia before June 2018. Doc. 139 at 149, 152–53. Emberton testified that he gave all inmates a simple explanation of the form's purpose when he distributed it, Doc. 148 at 19 (citing Doc. 139 at 191–92), and the district court noted that "[t]here is no allegation or support for the contention that Smith could not understand Emberton's explanation," *id.*[4] Smith's phone records show that he was in contact with his counsel throughout June 2018, and in fact

4. After this finding came Smith's October 18 declaration, where he stated for the first time that Emberton never gave him the form or discussed the form or law with him. Smith's CA11 Stay Mot. 9. But the district court heard Emberton's testimony, and he reiterated what he stated in his deposition: Stewart told him to distribute the election forms to every inmate, and he did so, offering a brief explanation of the form as he distributed it. Doc. 139 at 46–49. Emberton has maintained since *January 2019* that he distributed the form to the inmates. Doc. 44-6.

communicated with one of his attorneys after the form was distributed. Doc. 170 at 23 n.13. Smith can read, and if he had questions about the form, he could have asked the person best situated to assist him with legal queries: his attorney. If these accommodations were insufficient to make Smith eligible for the receipt of the form's benefits, it is difficult to conceive what additional accommodation would have made a difference. There is no evidence that any of Smith's ideas for accommodation would have led to Smith making a timely election.

Second, Smith did not show that he was denied access to electing nitrogen hypoxia due to his alleged cognitive disability. While a disabled person "must be provided with meaningful access to the benefit that the grantee offers," *Alexander v. Choate*, 469 U.S. 287, 301 (1985), the ADA does not require "defining the benefit provided as meaningful access to" a plaintiff's benefit "of choice," *Jones v. City of Monroe*, 341 F.3d 474, 480 (6th Cir. 2003), *abrogated on other grounds by Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012) (en banc); *see Bircoll*, 480 F.3d at 1088 (affirming grant of summary judgement against a deaf plaintiff who brought a Title II ADA claim after being denied an interpreter during a traffic stop because, even though the plaintiff's understanding was imperfect, he admitted that he "usually understands fifty percent of what is said" and understood what the officer asked him to do).

While Smith argued to the court of appeals that the district court was "clearly erroneous" to find that Smith had "failed to 'concretely identify what the services benefit was,'" Smith's CA11 Br. at 19 (quoting Doc. 170 at 20), the district court was

rightly concerned with Smith's failure to link the distribution of the election form to his alleged inability to elect hypoxia. For instance, Smith claimed that he was denied meaningful access to the benefit of the election form because he did not understand it. Doc. 170 at 20. Yet as the district court found, "[n]othing in the record, contemporaneous or otherwise, speaks to how Smith understood the form, how he interacted with it, or what he gleaned from its text when it was distributed. … After over two years of litigation, Smith still has not demonstrated to the [c]ourt what about the form he could not understand." *Id.* at 20–21.

Left to "divine the record" on its own, the district court examined two ways in which the record could support Smith's general assertion that he did not understand the form—"both heavy on inference and light on evidence." *Id.* at 21. Option one was that the court could infer that because Smith did not use the election form, he necessarily must not have understood it. But as the court pointed out, Smith's failure to use the form would likewise support an inference that he did not *want* to elect hypoxia, so that was not a good option. *Id.* Option two was that Smith's reading abilities necessarily meant he could not understand the form, but even here, the evidence is scant (though that didn't stop Smith from touting it as "unrebutted evidence that he was incapable of understanding the Election Form," Smith's CA11 Br. 27). For this option, Smith had retained an expert, Kathleen Fahey, Ph.D., a speech-language pathologist. Dr. Fahey's report, submitted on September 20—weeks after the preliminary injunction hearing—was based on her analysis of prior experts' reports and four of Smith's writings from Holman. Doc. 145-1 at 2. But Dr. Fahey herself never

evaluated Smith, so her opinion that he reads at a second- to fourth-grade level is suspect. *Id.* at 5. On the other hand, Glen King, J.D., Ph.D., the State's clinical psychologist in state postconviction proceedings, administered the WRAT-4 to Smith in 2008 and determined that Smith could read at an 8.6-grade level. Doc. 118-26 at 3.

Regardless, even if Dr. Fahey is correct that the election form was written at an eleventh-grade level,[5] Doc. 145 at 5, and that Smith therefore could not fully understand it, the district court found that "the record also contains support for the proposition that Smith did receive information about the form sufficient to satisfy the ADOC's obligation to provide him meaningful access" because Emberton gave inmates a verbal explanation of the form, Doc. 170 at 22. To this, Smith did not "allege, or provide evidence to support, that he could not understand Emberton's explanation, or that he never heard it." *Id.*; *cf.* Smith's CA11 Stay Mot. 9. Instead, he simply protested that Emberton's explanation was insufficient. Doc. 74 at 15. But he did "not explain why or explain what Emberton should have informed inmates about their choice," or what about Emberton's explanation made it insufficient—or caused Smith to have a different understanding of the election process than other death-row inmates had. *Id.*

And ultimately, as the district court explained, "[i]t is immaterial whether Emberton's explanation was sufficient to endow inmates with an understanding of their

5. Smith previously claimed that the election form was written at a 15.6-grade level, or that it would practically take a bachelor's degree to comprehend it. This assertion appears to have come solely from Microsoft Word's spell check and readability statistics function. *See* Doc. 44-11.

form, their new choice, or the greater implications of execution by nitrogen hypoxia." *Id.* "What matters is how Smith's understanding and access to the program differ[ed] from those qualified inmates who lacked disabilities." Doc. 170 at 22–23. Yet "[w]ithout making clear what explanation he sought, Smith fail[ed] to identify anything in the record indicating that Emberton's explanation bestowed Smith's preferred level of understanding upon *any* inmate." *Id.* at 23.

In fact, it is likely that none of the inmates had the perfect information they wished they had—such as when Alabama would implement nitrogen hypoxia (still unknown) or what legal ramifications could attach from electing or not (something ADOC would not be able to tell *any* inmate). *Id.* at 23 nn.13 & 14. This matters because the ADA does not entitle Smith to preferential treatment by way of "a more comprehensive explanation than his fellow inmates received." *Id.* at 23. It entitles him only to "meaningful access"—same as the other inmates. At the very least, Smith has not shown that his cognitive deficiencies prevented him from understanding that he may wish to talk to his lawyers about whether to elect hypoxia—which he seems to have done, since he did talk to at least one of his lawyers during the election period. Smith thus failed to provide substantial evidence that he lacked access to elect hypoxia during the statutory window due to his disability.

Third, Smith failed to show that he was denied a reasonable accommodation because he concedes he never asked for one, and he never provided substantial evidence that his need for one was obvious. Because Title II regulations prohibit discrimination based on "the *known* disability of an individual," 28 C.F.R. § 35.130(g)

(emphasis added), ordinarily, "the duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made," *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 (11th Cir. 1999). But it is undisputed that Smith did not request an ADA accommodation before or during the election period, and his only "request for accommodation" came by email from his counsel in December 2020, long after the election period closed. *See* Doc. 170 at 26 & n.15; Doc. 45-6. So Smith has not met his burden by this route.

The other possible avenue is obviousness—an inmate may not need to make a demand if his need for a specific accommodation is obvious. *Arenas v. Ga. Dep't of Corrs.*, 4:16-cv-00320, 2020 WL 1849362, at *12 (S.D. Ga. Apr. 13, 2020); *cf. Waggel v. George Washington Univ.*, 957 F.3d 1364, 1372 (D.C. Cir. 2020) (recognizing that "there may well be cases where the plaintiff's need for an accommodation is so apparent that the defendant must offer one regardless of whether the plaintiff requested it" (citation omitted)). But as the Fifth Circuit has explained, for this path, an entity's "knowledge of a disability is different from knowledge of the resulting limitation. And it certainly is different from knowledge of the necessary accommodation. To prevail, [a plaintiff] must adduce evidence that all three were or should have been obvious." *Windham v. Harris County*, 875 F.3d 229, 238 (5th Cir. 2017) (citations omitted)).

The district court correctly found that Smith did not prevail by this avenue, either. Instead, in the district court's words, "the record abounds with evidence that Smith spent his time reading, writing, or in the prison library, and with examples of disclosures and forms Smith knowingly signed," Doc. 170 at 27, making it not obvious

at all that he needed an accommodation to understand the election form, much less what "necessary accommodation" it was "obvious" he needed.

Smith's arguments to the contrary are unavailing. For instance, he claimed below that ADOC should have been on notice of his borderline intelligence because of testing done during his state proceedings and that his need thus should have been obvious. But he points to no intelligence test results in his ADOC files (there are none), and it is undisputed that ADOC's legal division does not handle state postconviction or § 2254 petitions in capital cases like Smith's. They are handled by the Attorney General's Office. Doc. 139 at 103–04. And as the district court noted, Smith also "does not explain how an inability to read or understand this form necessarily follows from having an IQ in that range." Doc. 170 at 27. Smith *can* read, and Dr. King tested his reading at an 8.6-grade level and spelling at an 11.5-grade level. Doc. 118-26 at 3. As the district court found, "while Smith argues that the form required 'nearly a four year college degree to fully understand,' it does not appear *obvious* that he could not do so without evidence that the Defendants were aware of the form's difficulty." Doc. 170 at 27 (quoting Doc. 74 at 27 n.89).

Smith also claims that ADOC had been on notice of his intellectual disability since his 1992 intake evaluation, in which the evaluator commented, "Personally, I feel [Smith] didn't understand why the interview was being held. Although I did explain." Doc. 44-1. But as the district court remarked, "Smith fails to explain how this note on his twenty-nine year old intake form is sufficient to put the ADOC on notice that he required any accommodation for this Election Form." Doc. 170 at 27–28. In

fact, as the district court found, Smith's record gave ADOC no indication that he needed an accommodation:

> [F]or years, the ADOC evaluated Smith's mental functioning, memory, speech, and concentration as "normal," and his demeanor and behavior as "rational." (*See*, for example, Docs. 47-3 at 17–20; 471-2 at 22). On forms to identify special needs, the ADOC never marked Smith as "Developmentally Disabled" or as having "Special Mental Health Needs." (*See* Docs. 47-25 at 2–3, 7, 11, 14, 17; 47-30 at 18, 23). Spaces to indicate required special accommodations on multiple forms were repeatedly left blank. (*See* Doc. 47-30 at 18, 23). Smith himself appears to have answered in the negative when asked if he had "ever been told [he had] a mental disorder, learning disability, physical or a developmental disability." (Doc. 47-4 at 40).

Doc. 170 at 28. Witnesses who testified at the August preliminary injunction hearing likewise indicated that they had no knowledge of Smith struggling to read or requesting help in that area. Doc. 139 at 26–27 (Stewart), 56–57 (Emberton), 144–45, 147 (Raybon). Moreover, Smith's inmate and health files showed his "history of understanding and completing forms and other paperwork," Doc. 170 at 28, including "many containing legal jargon and complicated medical terminology," *id.* at 29 (footnotes omitted). On occasion, Smith wrote notes on these forms, and he also wrote at least three letters to the warden, "complete with excellent spelling and penmanship." *Id.*

Smith tried to shift the burden to ADOC, arguing that ADOC does not adequately accommodate mental disabilities and so would overlook "obvious" evidence of one. *Id.* at 30 (citing Doc. 74 at 24–26). But the district court correctly rejected this argument:

> Smith misconstrues what he needs to show. Regardless of whether the ADOC would, in fact, accommodate his disability does not mean Smith

> satisfies his burden of demonstrating that he obviously needed an accommodation for his disability. Put a different way, even if the ADOC had an extensive program of mental accommodations, this record does not make obvious that Smith needed an accommodation with respect to the Election Form.

Id. While Smith hinted at a futility argument as well, the court pointed out that he failed to cite any case in which a plaintiff satisfies his Title II burden on futility grounds; moreover, futility generally only applies when the public entity has indicated its refusal to comply with the ADA, which ADOC has not done. *Id.* at 31.

In sum, Smith—an inmate with a demonstrated ability to read, write, and follow instructions, and who knew how to call his attorney and frequently did so—was given an election form on June 26 or 27, near the end of the election period. While other inmates in the close-knit Holman death-row community were discussing hypoxia before June 2018, Doc. 139 at 152–53, there is no evidence in the record that Smith wanted to elect during that time. Nor is there evidence in the record clearly showing that he was unable to understand the form, either before or after Emberton explained what it concerned. And while Smith called his lawyer on June 26 and 28, he provided no information about what was discussed on those calls. Smith's alleged need for accommodation was certainly not obvious to the Defendants. The district court thus did not abuse its discretion in determining that Smith is unlikely to prevail on the merits of his ADA claim.

C. Smith is Unlikely to Establish Standing.

This Court should deny Smith's application for another reason: Smith is unlikely to establish standing. Although the Eleventh Circuit reversed the district court's dismissal of Smith's claim for lack of standing, it did so by focusing only on

whether "Smith sufficiently alleged standing in his complaint." *Smith*, 2021 WL 4817748, at *1. Because it found "sufficient factual allegations in Smith's pleadings to establish standing," *id.* at *4, the court determined that the district court erred by dismissing Smith's action.

A different standard now applies. No longer can Smith rest on satisfying the "mere pleading requirements" that allowed him to survive dismissal. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Rather, to obtain preliminary relief, he must produce evidence that he is "likely to succeed on the merits" of his claim. *Nken*, 556 U.S. at 434. That includes producing evidence demonstrating a likelihood of standing. *See, e.g.*, *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 59 (2d Cir. 2020) ("At the preliminary injunction stage, a plaintiff's burden to demonstrate standing will normally be no less than that required on a motion for summary judgment." (quotation omitted)); *Speech First, Inc. v. Killeen*, 968 F.3d 628, 638 (7th Cir. 2020) (plaintiff's "burden to demonstrate standing in the context of a preliminary injunction motion is at least as great as the burden of resisting a summary judgment motion" (quotation omitted)); *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) ("A party who fails to show a 'substantial likelihood' of standing is not entitled to a preliminary injunction."). Thus, while "an inability to establish a substantial likelihood of standing" at the preliminary injunction stage may preclude "dismissal of the case," it nonetheless "requires denial of the motion for preliminary injunction." *Vilsack*, 808 F.3d at 913.

To be sure, "in limited circumstances, the absence of notice of the need to prove standing may mandate … the application of a more lenient standard." *City of Miami Gardens v. Wells Fargo & Co.*, 931 F.3d 1274, 1285 (11th Cir. 2019) (citing *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994), and *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015)). In *Alabama Legislative Black Caucus*, for instance, the Court "concluded that, under the circumstances at issue, the evidence in the record was 'strong enough to lead the [plaintiff] reasonably to believe' that it satisfied a requirement of standing and the defendant failed to argue otherwise, so 'elementary principles of procedural fairness' required the district court to provide notice and an opportunity to respond before deciding *sua sponte* that the plaintiff had not satisfied that requirement." *Id.* (alterations in original) (quoting *Ala. Legis. Black Caucus*, 575 U.S. at 270–71).

Alabama Black Legislative Caucus thus "circumscribe[s] the power of a court to consider standing *sua sponte* without providing a plaintiff with notice and an opportunity to respond." *Id.* at 1286. But it does "not purport to speak to circumstances like those of this" case, *id.*, where the district court provided the parties notice of its jurisdictional doubts and ordered a response, *see* Doc. 112 at 2. Thus, while the district court might have been precluded from *dismissing* Smith's case at the pleading stage, *see Smith*, 2021 WL 4717748, at *4, "each element [of standing] must [now] be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation," *Lujan*, 504 U.S. at 561. And just as Smith's allegations are

not evidence that he is likely to prove his ADA claim, they are not evidence that he is likely to prove standing. Smith must "clearly show … that each element of standing is likely to obtain in the case at hand" for him to be entitled to preliminary relief. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020).

Smith failed to do that, and for the most part, he did not even try to meet his burden. After the district court ordered the parties to produce "supplemental briefs with documentary evidence" that "specifically address th[e] [c]ourt's jurisdiction," including whether Smith "has standing," Doc. 112 at 1–2, Smith's treatment of injury-in-fact and causation was limited to a short paragraph that argued only that he "sufficiently pleaded" those standing prongs, Doc. 118 at 4. That is insufficient.

Turning to injury-in-fact in particular, in reversing the district court's dismissal, the Eleventh Circuit held only that "[a]s provided in the *complaint*, Smith *alleges* that the denial of such reasonable accommodation violates the ADA. That violation, in turn, allegedly barred Smith from the benefit of electing a less painful method of execution: nitrogen hypoxia. Smith thus sufficiently *alleges* an injury in fact." *Smith*, 2021 WL 4817748, at *3 (emphasis added). Notably, the court defined Smith's injury not just as a bare statutory denial of a reasonable accommodation, but a denial that "in turn, allegedly barred Smith from the benefit of electing … nitrogen hypoxia." *Id.*

So even if Smith has adequately alleged that an ADA violation "resulted in the future harm of his scheduled execution by lethal injection," *id.* at *3, he has submitted no evidence to back up the notion that the ADA violation "resulted in" anything. Most fundamentally, that is because Smith never submitted evidence to the district court

that he would have elected nitrogen hypoxia in June 2018 had he received an ADA accommodation. He never submitted an affidavit from himself—or from his former counsel, or from anyone else—stating that he would have elected during the statutory window if only he had been given an accommodation under the ADA. In fact, as the district court found, despite a discovery record that "totaled more than 14,000 pages of documents, *none* of the evidence submitted to [the] court indicate[d] that Smith wanted to opt into nitrogen hypoxia in June 2018." Doc. 148 at 15 (emphasis added). Even if these findings might not have been adequate grounds to dismiss Smith's case at that juncture, they are certainly proper now that Smith is invoking the judicial power for injunctive relief.

Because there is no evidence in the record that Smith would have wished to elect hypoxia if he had been provided a reasonable accommodation, Smith cannot have been harmed by ADOC's alleged failure to accommodate his intellectual disability. The form offered a benefit of convenience only to those inmates who wanted to elect hypoxia; it was useless to inmates who did not want to elect. That standing defect holds true whether or not the Respondents violated Smith's rights under the ADA. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) ("For standing purposes … an important difference exists between (i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law."). Because Smith provided no evidence to the district court that he wanted to elect, he is like a person "driv[ing] home from work a quarter mile ahead of a reckless driver

who is dangerously swerving across lanes"—exposed, perhaps, to the "risk of future harm," but without an Article III injury because "the risk d[id] not materialize." *Id.* at 2211.

The Court recently applied this concept in *Carney v. Adams*, 141 S. Ct. 493 (2020), when it held that a plaintiff seeking to challenge Delaware's requirement that judicial appointments reflect a partisan balance lacked Article III standing to do so. The reason? The plaintiff did not establish, at the time he filed suit, "that Delaware's major party requirement in fact prevents him, a political independent, from having his judicial application considered" because he did not show "that he is likely to apply to become a judge … if Delaware did not bar him because of political affiliation." *Id.* at 499–500.

So too here. Despite having nearly two years to do so—and despite any relevant information being *in his or his attorneys' possession*—Smith has failed to produce evidence to the district court that he was "able and ready" to elect nitrogen hypoxia during the statutory opt-in period if only he had been offered a reasonable accommodation. Because Smith has only "set[] forth facts from which [the Court] could *imagine* an injury sufficient to satisfy Article III's standing requirements," *Aaron Private Clinic Management LLC v. Berry*, 912 F.3d 1330, 1336 (11th Cir. 2019), he has failed to carry his burden of showing a likelihood of standing at the preliminary injunction stage.

In his reply below, Smith challenges these arguments on several grounds. None of them are availing. First, he says he didn't know standing was at issue.

Smith's CA11 Reply Br. 7. But in *February*, the district court asked whether Smith's counsel had evidence that he wanted to elect nitrogen hypoxia in June 2018; they did not. Doc. 57 at 22. If that hint wasn't strong enough, in August, the district court ordered supplemental evidentiary submissions and briefing on whether Smith had standing to bring suit. Doc. 112 at 2. Smith cannot claim that he was not on notice that he needed to submit evidence that he was likely to have standing. The district court told him so.

Next, Smith claims that the district court "prohibited [him] from introducing" evidence of his standing because it limited his examination of Commissioner Dunn. Smith's CA11 Reply Br. 8. For one, the context of the exchange shows that the court simply would not let Smith's counsel question Dunn about the nuances of the hypoxia protocol, which is not at issue in this litigation. *See* Doc. 139 at 165–66. For another, Smith does not explain what information Dunn could possibly have about whether Smith would have elected hypoxia in June 2018 if he had been provided an ADA accommodation.

Smith's next retort is to claim that he established standing because "the harm—the violation of Mr. Smith's rights under the ADA—is neither speculative nor vague." Smith's CA11 Reply Br. 8–9. But if that's the test, all the plaintiffs in *TransUnion* would have had Article III standing, as the violation of their rights under the Fair Credit Reporting Act was equally "neither speculative nor vague." Nor can Smith establish standing by asking the Court to infer from the fact that he "initiated this case in November 2019" that he would have elected in June 2018. Smith's CA11

Reply Br. 9. Standing "cannot be 'inferred argumentatively from averments in the pleadings,' but rather 'must affirmatively appear in the record.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (citations omitted).

That leaves Smith to argue that his injury is "well-established" because he "has submitted an affidavit"—two days ago in the court of appeals—suggesting that he would have signed the election form if he had understood it. Smith's CA11 Reply Br. 9. Of course, by filing an inexplicably late declaration and now pointing to it as the sole piece of evidence for standing, Smith admits that there is no evidence in the record to establish his standing. If the Court considers this declaration, it should be ready to consider a lot more evidentiary sandbagging sprung on States at the last minute as a "tool[] to interpose unjustified delay." *Bucklew*, 139 S. Ct. at 1134.

III. The Remaining Equitable Factors Favor Denying A Stay.

Finally, the Court should deny Smith's application because a stay would harm Respondents and is adverse to the public interest. This Court has repeatedly held that "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. For this reason, "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.*

Smith murdered Sharma Ruth Johnson thirty years ago this month. He has exhausted his criminal appeals and postconviction proceedings. And his current ADA lawsuit has carried on for nearly two years and yielded three appeals to the Eleventh Circuit, one eleventh-hour stay of execution, and another last-minute request for one.

Despite all this, his suit in the end amounts to little more than regret that he did not opt for execution by nitrogen hypoxia, now that it's clear the State does not yet have a hypoxia execution protocol, and a thinly disguised attempt to delay his execution by any means necessary—including by filing new evidence at the last minute on appeal. *Cf. Bucklew*, 139 S. Ct. at 1133–34. Given Smith's dilatory approach to this litigation and his "weak position under the law, it is difficult to see his litigation strategy as anything other than an attempt to delay his execution." *Price v. Dunn*, 139 S. Ct. 1533, 1539 (2019) (Thomas, J., concurring in the denial of certiorari). The district court was right to find that the equities weighed against Smith both eight months ago and earlier this week. This Court should again reach that same conclusion.

CONCLUSION

The Court should swiftly deny Smith's stay application so his execution can take place today at 7:00 p.m. EDT.

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Respectfully submitted,

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