No. 21A___

# In The Supreme Court of the United States

WILLIE B. SMITH III,
*Petitioner,*
v.
JEFFERSON DUNN, COMMISSIONER,
TERRY RAYBON, WARDEN
*Respondents.*

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

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

**CAPITAL CASE – EXECUTION SCHEDULED FOR THURSDAY, OCTOBER 21, 2021, AT 6:00 P.M. CST**

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The State's Brief in Opposition fails to engage Mr. Smith's question presented in his petition for *certiorari*. As such, he will not address the bulk of the State's Brief in Opposition and Opposition to Motion for Stay. However, Mr. Smith will address one aspect of the State's filing: the accusations of delay and "gamesmanship" on Mr. Smith's behalf.

The State cites numerous alleged actions Mr. Smith could have taken to speed his case along since November 2019. However, they leave out one salient fact: they were the cause of Mr. Smith's need for a preliminary injunction. The State cannot simultaneously set the fire alarm testing schedule, then complain about the timing of a "fire drill." (BIO at 14).

Mr. Smith will not waste this Court's time reciting Respondents laundry list of alleged faults, save one: the previous briefing in Eleventh Circuit. Respondents blame Mr. Smith for the appeal leading to last week's decision reversing the District Court's dismissal on standing. Specifically, they claim Mr. Smith could have asked the Eleventh Circuit to rule on the merits of the preliminary injunction motion *without a ruling from the District Court.* (*Id.*) The case it cites, *Singleton v. Wulff,* 428 U.S. 106, 121 (1976), does not provide authority for when an appellate court may rule on a *judgment* that is not before it.[1] Second, Respondents take Mr. Smith to task for "waiting" 12 days to file his initial brief in that action. (BIO at 15) However, that briefing schedule was expedited on Mr. Smith's motion, to which Respondents

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[1] This argument is ironic because, in the very same brief, Defendants argued against the Eleventh Circuit exercising pendent appellate jurisdiction to resolve a claim decided below. (BIO at 18).

responded by seeking to lengthen the proposed briefing schedule. Moreover, the appeal was complicated by Respondents' decision to abandon their argument that Mr. Smith had standing, and—rather than confess error upon his filing a notice of appeal and seek a quick remand—pursue a defense of the order it argued against before the District Court.

The Alabama Rules of Appellate Procedure give the State the authority to ask the Alabama Supreme Court to set an execution date "at the appropriate time." Ala. R. App. P. 8(d)(1). Here, the State decided that the "appropriate time" to execute Mr. Smith by lethal injection would be while he was in the middle of long-pending litigation. The only detail they provided the Alabama Supreme Court about this case was to say "Smith's first § 1983 action is in discovery at this time. There is, however, no active stay of execution from any federal court." (Renewed Mot. to Set Execution Date (July 7, 2021)).

In *Murphy v. Collier*, 139 S. Ct. 1475 (2019), Supreme Court had enjoined Texas from executing Mr. Murphy without his spiritual advisor present. The litigation proceeded after that, and while summary judgment motions were pending, the state set an execution date for Mr. Murphy. *Murphy v. Collier*, 942 F.3d 704, 707 (5th Cir. 2019). After the district court granted Mr. Murphy's stay motion, Texas asked the Fifth Circuit to vacate it. In declining to do so, the Fifth Circuit held:

> Of course, "[a] court considering a stay must also apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Hill v. McDonough*, 547 U.S. 573, 584, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006). However, this is not a case where Murphy filed a last-minute claim with his execution date looming. Here,

> the State of Texas set a new execution date on August 12, 2019, four months after Murphy filed his complaint. Therefore, Murphy brought his claim "at such a time as to allow consideration of the merits without requiring entry of a stay." *Id. It is the State of Texas that required entry of a stay by seeking an execution date while the parties were in the midst of litigation in the district court and before the district court had adequate time to resolve the claim.*

*Murphy*, 942 F.3d at 709 (emphasis added).

Mr. Smith is in nearly the same situation as Mr. Murphy. He was proceeding with his litigation when the State chose to prevent a trial on the merits by setting an execution date. Moreover, there is a great possibility of harm to the public resulting from permitting the State to moot a meritorious lawsuit by executing the claimant. The appearance of fairness is essential to public confidence in the justice system. Public proceedings vindicate the concerns of likeminded victims and the community in knowing that violations of federal law are not ignored.

This concept regularly applies in cases where real property or money is at issue. Preservation of property rights is a common theme in Rule 65 cases. In *Transcontinental Gas Pipe Line Co., UC v. 6.04 Acres, More or Less,* 910 F.3d 1130 (11th Cir. 2018), the Eleventh Circuit allowed a preliminary injunction to issue to allow a natural gas company access to property to which it had a condemnation order. In *Sarasota Tennis Club Holdings LLC v. Mitchell,* 2018 WL 8584156, at *2 (M.D. Fla. Apr. 16, 2018), *order dissolved,* 2018 WL 2688788 (M.D. Fla. May 15, 2018)), a district court enjoined one of the defendants from giving funds it held in escrow to the other defendant until a dispute over a property purchase was resolved. *Id.* at *2 ("Defendant Exchange Resources, Inc. is immediately enjoined and restrained from

returning to Defendant Mitchell the amount of $2,092,495.85 that it holds in escrow for Mitchell; or providing those funds to any other party.").

In short, where a dispute involves funds held in escrow, a piece of property subject to a pending lawsuit or at risk of being destroyed, or a Rule 11 sanction, courts do not hesitate to find the equities in favor of the party who could be harmed, and to enter injunctive relief to preserve the status quo. There should be no hesitation to preserve the status quo here, where Mr. Smith's life is at stake. The equities are in favor of Mr. Smith, and the District Court's finding otherwise was clearly erroneous.

As Respondents acknowledge (BIO, p. 2) this is a case where the facts matter. This Court should not allow the district court to deny Mr. Smith's relief where the district court's factual findings were based on mere inferences rooted in stereotypes about how a person with disabilities should behave. The ADA is intended to protect individuals with disabilities that are both visible, such as the need for a wheelchair in order to walk, and invisible, like cognitive disabilities. Both can manifest in a way that is "obvious." However, the District Court set an impossible bar for what is "obvious" for invisible disabilities, including cognitive disabilities. Without intervention, the district court's opinion has is the functional equivalent of eviscerating the benefits the ADA was intended to provide for individuals with invisible disabilities.

Dated: October 21, 2021

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, John A. Palombi, a Member of the Bar of this Court, do hereby certify that on October 21, 2021, as required by Rule 29.4(a) of the Rules of the Supreme Court of the United States, I served the enclosed Reply to Brief in Opposition to Counsel for Respondents by sending them via e-mail to:

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Respectfully submitted,
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