No. 21A____

In the Supreme Court of the United States

JOHN HAMM,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,
APPLICANTS,
v.
MATTHEW REEVES,
RESPONDENT.

EMERGENCY APPLICATION TO VACATE INJUNCTION OF EXECUTION

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

Steve Marshall
Attorney General

Edmund G. LaCour Jr.
Solicitor General

Beth Jackson Hughes
Counsel of Record
Richard D. Anderson
Assistant Attorneys General

State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130-0152
Tel: (334) 242-7300
Beth.Hughes@AlabamaAG.gov

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EXECUTION SCHEDULED THURSDAY, JANUARY 27, 2022 6:00 P.M. CDT

PARTIES TO THE PROCEEDING

The parties to the proceedings below are as follows:

Applicants John Hamm, in his official capacity as Commissioner of the Alabama Department of Corrections[1], and Terry Raybon, in his official capacity as warden of Holman Correctional Facility, were defendants in the district court and appellants in the court of appeals.

Respondent Matthew Reeves was the plaintiff in the district court and the appellee in the court of appeals.

[1] John Hamm replaced Jefferson Dunn as the ADOC Commissioner while this litigation was ongoing. Accordingly, Hamm is automatically substituted as a defendant per Federal Rule of Appellate Procedure 43(c)(2).

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

Matthew Reeves is scheduled to be executed by lethal injection on January 27, 2022, for the robbery and execution of Willie Johnson. Reeves was convicted of one count of capital murder—murder during a robbery—for Johnson's murder. Ala. Code § 13A-5-40(a)(2); *Reeves v. State*, 807 So. 2d 18 (Ala. Crim. App. 2000). On January 7, 2022, the district court enjoined Applicants from executing Reeves "by any method other than nitrogen hypoxia." Doc. 83 at 37. And on January 26, 2022, the Eleventh Circuit upheld the injunction. This Court should vacate it.

The district court granted the injunction based on its determination that Reeves was likely to succeed on the merits of his claim under the Americans with Disabilities Act. Reeves 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. Under the election statute, ADOC had no obligation to inform inmates of the election period or to facilitate their electing a method of execution. *See* Ala. Code § 15-18-82.1(b)(2). The district court even recognized this: "After Alabama law was amended to add nitrogen hypoxia as a method of execution, had the ADOC simply done nothing, it would have had no duty or obligation to inform inmates of the law or facilitate their ability to elect a new method of execution." Doc. 83 at 23.

On June 26, 2018, attorneys with the Federal Defenders office provided their clients on death row an election form. Soon after, the warden at the prison where

Reeves was housed ordered that a copy of the form be given to every death-row inmate. Reeves received the form, but did not elect—perhaps because he was in the middle of litigating an *Atkins* claim and actively challenging lethal injection in his ongoing habeas litigation, and his counsel filed a responsive brief addressing that claim *on the first day of the election period*. Reply Brief in Support of Amended Petition for Writ of Habeas Corpus at 30-31, *Reeves v. Dunn*, 1:17-cv-00061 (N.D. Ala. June 1, 2018), ECF No. 28. A year-and-a-half later, he brought this ADA suit and claimed that he did not understand the election form and that he would have elected had he received an accommodation.

It is on this claim that the district court granted relief. The problem is that the court—and Reeves—failed to frame the ADA "program" at issue in a way that corresponded with the relief the court ordered: in effect, reopening the statutory election process. While Reeves alleged in his complaint that he could not access the statutory election process, when it came time to substantiate his claims with evidence, he narrowed his focus to the election form only. Yet to the extent the "program" at issue is the distribution of the election form, the remedy must be tied to *that* service, not to the broader election process. And to the extent Reeves claims that the distribution of the election form was simply part of the statutory election process, he failed to show—indeed, did not even try to show—that *that* program was not accessible to him. Either way, the district court erred as a matter of law when it mischaracterized the ADA program at issue and found that Reeves was likely to succeed on the merits. That error also infected the court's standing analysis, for it should have held that Reeves's

alleged injuries were not redressable by the Defendants he chose to sue—the warden of his facility and the ADOC commissioner—because they have no authority to alter the statutory election process when Reeves either failed to challenge that process or never proved that the broader process caused his harm.

The district court also committed other egregious errors that warrant this Court's intervention. It focused, wrongly, on evidence concerning whether Reeves had shown that he could participate in the "program" of the distribution of the election form and ignored entirely the fact that Reeves submitted *no evidence* that he could not participate in the election process itself. It conflated the presence of a disability with the open and obvious need for a particular accommodation. It misconstrued the evidence regarding whether Reeves's need for an accommodation was open and obvious to ADOC officials. And it misweighed the equities, finding that Reeves established irreparable harm simply because he would be executed by one lawful method (lethal injection) rather than another (nitrogen hypoxia).

Reeves murdered Willie Johnson a little over twenty-five years ago. It would be unjust to further delay the execution of Reeves's lawful sentence. This Court should vacate the district court's injunction.

STATEMENT

A. Reeves's Crime, Trial, and Appeals

Reeves is scheduled to be executed this Thursday, January 27, for robbing and executing Willie Johnson, a good Samaritan, in November 1996. On that date, Reeves, his brother, Julius, Brenda Suttles, and Emanuel Suttles decided to commit a robbery. When their friend's vehicle broke down, Willie Johnson towed them to

Selma. Johnson made the fatal mistake of asking for $25 in return. Matthew killed him with a shotgun, and he, Julius, and Brenda stole $360 from his body. *Reeves*, 807 So. 2d at 24-26.

Reeves was tried for capital murder in Dallas County, and a jury found him guilty. Habeas Doc. 23-8, Tab #JR-19 at 1105.[2] Following the penalty-phase presentation of mitigation evidence, the jury recommended death 10-2; the trial court followed the jury's recommendation and imposed that sentence. Habeas Doc. 23-8, Tab #JR-29 at 1227; Tab #JR-31 at 1232.

On direct appeal, the Alabama Court of Criminal Appeals ("ACCA") affirmed Reeves's conviction and death sentence. *Reeves*, 807 So. 2d 18. The Alabama Supreme Court denied certiorari, as did this Court. *Id.*; *Reeves v. Alabama*, 534 U.S. 1026 (2002).

Reeves also challenged his conviction and death sentence in State post-conviction proceedings and in federal habeas proceedings to no avail. *Reeves v. State*, 226 So. 2d 711 (Ala. Crim. App. 2016); Order¸ *Reeves v. Dunn*, 1:17-cv-00061 (S.D. Ala. January 8, 2019), ECF No. 29. On appeal to the Eleventh Circuit, that court denied relief on Reeves's claim that he is intellectually disabled but granted relief on an ineffective assistance of counsel claim. *Reeves v. Comm'r, Ala. Dep't of Corrs.*, 836 F. App'x 733 (11th Cir. 2020). On July 2, 2021, this Court summarily reversed the Eleventh Circuit's decision. *Dunn v. Reeves*, 141 S. Ct. 2405 (2021). On August 9, 2021,

[2]. References to "Habeas Doc." are to the record filed in *Reeves v. Dunn*, 1:17-cv-00061 (S.D. Ala.).

the Eleventh Circuit affirmed the district court's denial of relief, *Reeves v. Comm'r, Ala. Dep't of Corrs,* 855 F. App'x 657 (11th Cir. 2021), thus concluding Reeve's conventional appeals.

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—like most laws—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. The only role the statute anticipated for any ADOC personnel was for the Warden to receive timely notices of election from inmates who wished to elect hypoxia.

Attorneys from the Federal Defenders for the Middle District of Alabama drafted an election form and gave it to their death-row clients at Holman Correctional Facility on June 26, 2018. Affidavit of John A. Palombi at 2, *Price v. Dunn*, 1:19-cv-00057 (S.D. Ala. Mar. 29, 2019), ECF No. 29-3. Cynthia Stewart, then Warden of

Holman Correctional Facility, directed Captain Jeff Emberton to give every death-row inmate at Holman a copy of the form and an envelope in which he could return it to the warden, should he decide to make the election. Doc. 42-8 at 2; Affidavit of Captain Jeff Emberton at 1, *Price v. Dunn*, ECF 91-1.[3] Emberton did as instructed before the end of June. The form stated:

> 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. 70-5. Approximately fifty inmates elected hypoxia, including inmates not represented by the Federal Defenders. Not every inmate who did so utilized the form provided.

Reeves, though represented by at least seven attorneys from two law firms during the election period, did not elect. He did, however, call his attorneys twice during the election period.[4] Doc. 42-8 at 118. Nor did Reeves request an ADA accommodation during (or prior to) the election period. Significantly, the ADA coordinator for Holman reported that there was not a single request for accommodation from Reeves in the facility files, much less any request for a reading accommodation. Doc.

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[3]. Ms. Stewart testified that she was instructed by someone at ADOC to pass out this form but cannot remember who gave her this instruction. No one in Ms. Stewart's chain of command remembers giving her this instruction.

[4]. *E.g.*, Civil Docket Sheet for 1:17-cv-00061 (S.D. Ala.) (listing counsel).

78 at 121:1-14.

C. Reeves Brings This ADA Claim

Reeves initiated the present action on January 10, 2020. Doc. 1. He raised an untimely Eighth Amendment challenge to the ADOC's lethal injection protocol and a claim alleging a violation of the Americans with Disabilities Act of 1990. *Id*. Defendants filed a motion to dismiss, doc. 11, and the district court granted the motion in part and denied it in part. Doc. 17. The district court found Reeves's Eighth Amendment claim time-barred, but denied the motion to dismiss his ADA claim because "the issue of Reeves' alleged intellectual disability has not been resolved." *Id*. at 13-14. Reeves never requested an expedited ruling on his complaint or for discovery to open.

Instead, Reeves's next filing was in response to the district court's August 2021, order permitting him to amend his complaint. Doc. 20. Reeves filed an amended complaint on August 26, doc. 21, and Defendants again moved to dismiss on September 9. Doc. 23. Defendants moved the Alabama Supreme Court to set Reeves's execution on September 17 after his conventional appeals concluded. Reeves responded to the Defendants' motion to dismiss on October 25, doc. 26, and Defendants filed their reply on November 9. Doc. 30.

Reeves filed a motion for preliminary injunction on November 4, 2021, forty-eight days after Defendants moved the Alabama Supreme Court to set his execution and almost two years after Reeves initiated his ADA litigation in the district court. Doc. 27. Defendants responded on November 24, doc. 32, and Reeves replied on December 1. Doc. 35. The district court set an evidentiary hearing for December 9, doc.

32, at which time the court heard over seven hours of testimony and oral argument. Doc. 83 at 2. The parties then filed supplemental briefs. Docs. 81, 82.

On January 7, 2022, the district court granted Reeves's motion for a preliminary injunction. Doc. 83 at 13. The court rejected Defendants' argument that Reeves lacked standing to bring his ADA lawsuit based on the Eleventh Circuit's unpublished opinion in *Smith v. Dunn*, No. 21-13298, 2021 WL 4817748 (11th Cir. Oct. 15, 2021). Doc. 83 at 10-12. The district court then found that there is a substantial likelihood that Reeves is a qualified individual with a disability under the ADA, *id.* at 14-21, lacked meaningful access to a benefit provided by the ADOC, *id.* at 22-26, and was denied a reasonable accommodation, *id.* at 26-33. The court also found that the equities favor Reeves. *Id.* at 37. The court enjoined Defendants "from executing Matthew Reeves by any method other than nitrogen hypoxia until further order from this Court." *Id.* at 37.

Defendants appealed and sought a stay from the district court, which that court denied. Docs. 84, 86, 94. The Eleventh Circuit expedited briefing and held oral argument on January 21, 2022. On January 26, the Eleventh Circuit affirmed the district court's grant of Reeves's preliminary injunction motion and denied Defendants' request for a stay. *Reeves v. Comm'r, Ala. Dep't* of *Corrs,* No. 22-10064, slip op. (11th Cir. Jan. 26, 2022).

REASONS FOR GRANTING THE APPLICATION

I. Reeves Failed To 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). The district court abused its discretion when it found that Reeves is likely to succeed on the merits of his ADA claim, that he is likely to have standing, or that the equities weigh in Reeves's favor.

A. Reeves is Unlikely to Prevail on His ADA Claim.

"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, Reeves 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). "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.

The district court abused its discretion when it granted Reeves relief on his ADA claim. First, the district court made a clear legal error when it mischaracterized the ADA "program" at issue and ordered relief related to a program that Reeves did not even try to show that he was denied access to. This definitional error also led the

court to err in its standing analysis, for Reeves has not shown that his alleged injuries are redressable by the defendants he sued. Second, Reeves did not demonstrate a likelihood that he was excluded from, or denied access to, a public benefit, and the district court abused its discretion when it held otherwise. Third, the district court wrongly conflated the presence of a disability with the open and obvious need for an accommodation. And fourth, Reeves did not show a likelihood that his need for an accommodation was open and obvious to the ADOC Defendants, and again the district court abused its discretion by granting relief on a contrary finding.

1. The District Court Mischaracterized the ADA Program at Issue.

Defining the "service[], program[], or activit[y]" at issue is integral to establishing each of the three elements of an ADA discrimination claim. 42 U.S.C. § 12132. At step 1, Reeves had to show that he was a "qualified individual," which included showing that he met "the essential eligibility requirements for the receipt of services or the participation in programs or activities" provided by ADOC. *Id.* § 12131(2). At step 2, he had the burden of demonstrating that he lacked "meaningful access to the benefit" of the program ADOC offered. *Alexander v. Choate*, 469 U.S. 287, 301 (1985). And at step 3, he had to show that he was denied "the benefits of the service[], program[], or activity" "by reason of" his disability. 42 U.S.C. § 12132. If a service, program, or activity is wrongly defined, the entire ADA analysis breaks down.

That is what happened here. In his Complaint, Reeves oscillated between (1) alleging that ADOC's distribution of the election form constituted the program at issue, and (2) alleging that the entire election process constituted the program at issue. *Compare, e.g.*, Doc. 21 at 4 ¶22 ("The ADOC implemented a policy, protocol, and

program whereby corrections staff were instructed to distribute the Election Forms along with an envelope to all death row prisoners"), *id.* at 7 ¶43 ("Due to his disability, the Election Form was not readily accessible and usable by Mr. Reeves."), *with, e.g.*, *id.* at 11 ¶70 ("Mr. Reeves' cognitive impairments render him unable to personally make the election in the manner specified in Senate Bill 272, including via the Election Form."), *id.* at 14 ¶1 (seeking relief "declaring Defendants in violation of the ADA for failing to develop and implement reasonable accommodations concerning the nitrogen hypoxia opt-in and Election Form, for disabled death-sentenced prisoners….").

When it came time to provide evidence to support his allegations, though, Reeves confined himself to demonstrating that he did not understand the election form—*not*, as he had alleged in his complaint, that he could not access the election program, "including via the Election Form." His declaration, for instance, consisted of the following eight sentences:

> Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:
>
> 1. I am a resident of Alabama and over the age of 19.
>
> 2. I did not understand the Election Form.
>
> 3. A hall runner gave me the Election Form in the last week of June 2018.
>
> 4. Captain Emberton did not give me the Election Form.
>
> 5. Captain Emberton did not talk to me about the Election Form or the new law.
>
> 6. If I had understood the Election Form, I would have signed it and turned it in in June 2018.
>
> 7. In August 2015, I asked for help understanding paperwork, but was not given any help.

I declare, under penalty of perjury, that the above is true and correct.

Doc. 27-14.

Thus, what Reeves did *not* say, but which would have been relevant if he were attacking the election program, was anything about whether he knew about the election period at the time, whether he had talked to his lawyers about electing, or whether the ADOC provided other ways that he could have elected. And there is evidence to suggest that death-row inmates *were* talking about the election period at the time, that Reeves *did* talk with his lawyers during the relevant timeframe (though it's unknown what they talked about), and that ADOC *did* provide other ways for inmates to elect, such as facilitating access to their attorneys, providing space for "Project Hope" meetings at which hypoxia and the election process were discussed, providing a process for making ADA requests for accommodation, and providing writing materials to inmates, including Inmate Request Slips on which any request can be made. Doc. 42-4 at 114, 147-48, 151, 159; Doc. 78 at 84, 113-14.

This distinction matters because Reeves was not harmed simply by his not being able to understand the election form. Rather, his claim is that he was harmed because he was unable to understand the election form, that therefore he did not fill out the form, and that therefore he did not take advantage of the 30-day election period. In other words, it was the election period that provided Reeves the benefit he says he wanted; the form was simply one way to access that benefit. The district court thus erred by defining the ADA program at issue as the election form itself and then crafting relief as if Reeves had proved that he could not access the election period at all. *See* Doc. 83 at 23-24.

The Court's decision in *Alexander v. Choate*, 469 U.S. 287 (1985), is instructive on this point. In that case, Medicaid recipients challenged Tennessee's decision to reduce the number of inpatient hospital days that Tennessee Medicaid would pay on behalf of a Medicaid recipient from 20 days to 14. *Id.* at 289-90. The plaintiffs alleged that Tennessee violated the Rehabilitation Act, which prohibited "any program or activity receiving Federal financial assistance" from denying any "qualified handicapped individual" from participating in, or benefitting from, the program. *Id.* at 290 (quoting 29 U.S.C. § 794). Their theory was that reducing the days of coverage would deny handicapped individuals meaningful access to the program because handicapped individuals were more likely than nonhandicapped individuals to require more than 14 days of hospital care. *See id.* at 290-91.

The Court rejected the challenge, holding that the plaintiffs had defined the "program" at issue too broadly. *See id.* at 302-03. The Court explained that the plaintiffs' theory that "meaningful access" to the Medicaid program must entail more than 14 days of coverage "rest[ed] on the notion that the benefit provided through state Medicaid programs is the amorphous objective of 'adequate health care.'" That wasn't so. *Id.* at 303. "Instead," the Court explained, "the benefit provided through Medicaid is a particular package of health care services, such as 14 days of inpatient coverage. That package of services has the general aim of assuring that individuals will receive necessary medical care, but the benefit provided remains the individual services offered—not 'adequate health care.'" *Id.* Thus, the Court concluded: "The State has made the same benefit—14 days of coverage—equally accessible to both handicapped

and nonhandicapped persons, and the State is not required to assure the handicapped 'adequate health care' by providing them with more coverage than the nonhandicapped." *Id.* at 309.

This same framing issue has also arisen in cases regarding handicap access to football games. In *Daubert v. Lindsay Unified School District*, for instance, the Ninth Circuit considered an ADA challenge brought by an individual who attended high school football games; because of his disability, he had to watch the games from locations near the field that offered him less camaraderie and worse views than if he had been able to watch from the bleachers with everyone else. *See* 760 F.3d 982, 983-84 (9th Cir. 2014). The bleachers were built before 1992 and thus were not required to be "accessible to and usable by individuals with disabilities" so long as the program, "when viewed in its entirety, [was] readily accessible to and usable by individuals with disabilities." *Id.* at 986 (quoting 28 C.F.R. § 35.150(a)). The plaintiff argued that "the 'social experience' of sitting in the bleachers with other Lindsay High School fans constitute[d] a distinct public program, to which he ha[d] a right of access." *Id.* at 987.

The Ninth Circuit rightly rejected this framing. The court of appeals explained that the football games were the "program" at issue, while the bleachers were but "one part of the facility in which that program takes place." *Id.* Thus, "[w]hile sitting in the southside bleachers may offer a particular social experience," the court said, "this experience is merely incidental to the program the government offers (i.e., football games)." *Id.*; *see also Greer v. Richardson Independent School Dist.*, 472 F. App'x 287, 291-93 (5th Cir. 2012) (holding that program access does not require "that a

disabled individual … be able to … experience [a high school football] game from the general admission public bleachers").

Similar reasoning governed the result in *Jones v. City of Monroe*, 341 F.3d 474 (6th Cir. 2003), *abrogated on other grounds by Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012) (en banc). The plaintiff in that case suffered from multiple sclerosis and alleged that the City of Monroe violated her rights under the ADA by ticketing her when she parked for the entire work day in designated one-hour parking spaces near her workplace in the business district. *Id.* at 475. The city also offered free all-day parking "a short distance away from the one-hour parking," but the plaintiff could not use those spaces "due to the distance of the parking spaces from her place of employment." *Id.* at 478 n.5. The Sixth Circuit rejected the plaintiff's challenge that she had been excluded from the benefit of free downtown parking because the plaintiff had mischaracterized the program at issue. "[T]he benefit is not appropriately defined as free downtown parking generally," the court held, "but rather as the provision of all-day and one-hour parking in specific locations." *Id.* at 477. Thus, even though the plaintiff did "not have free downtown parking accessible to any destination she selects or, unfortunately, her workplace," the city had not violated the ADA because she still had meaningful access to the benefit the city provided to everyone: "free downtown parking at specific locations." *Id.* at 479.

To be sure, none of these cases cover the exact factual scenario involved here. But they all point to the district court's failure to properly define the ADA program Reeves challenges and seeks access to in this case. So to the extent the program

Reeves challenges is the distribution of the election form, as the district court held it was, then it cannot be that the remedy for violating his right to access that program is to alter the separate (if related) program of the election process itself. Under that process, death-row inmates had from March 22 to June 1 to consider whether to elect nitrogen hypoxia as their method of execution, and then from June 1 to June 30 to make an election. The election form was distributed only in the last few days of that period. Thus, to the extent these are separately definable programs, like the two kinds of parking spots in *Jones*, a denial of access as to one program should not result in a remedy relating to the *other* program.

For instance, say that the Secretary of State rather than ADOC had decided to mail all death-row inmates an election form, identical to the one at issue here. Say that the Secretary did so on his own accord, knowing that the statute had no role for him to play. And say that Reeves receives it, cannot understand it, and does not elect. Assuming the Secretary has created a program under the ADA at all, what would be the scope of that program? Quite clearly it would not touch the statutory election program itself, which gave the Secretary no role in its implementation. And what would be the remedy if Reeves could show that the Secretary knew he could not understand the form he sent? Whatever it is—an injunction to accommodate Reeves the next time the Secretary sends him a form, a declaration that the Secretary violated the ADA, or something else—there is no reason to think the remedy would be to alter the statutory election program itself.

The same analysis holds here. The district court rightly recognized that the 2018 Act imposed on ADOC "no duty or obligation to inform inmates of the law or facilitate their ability to elect a new method of execution." Doc. 83 at 23. And it then held that "when the ADOC voluntarily made the decision to distribute a form … the ADOC provided a service subject to the requirements of the ADA and imposed upon itself a duty to ensure that all inmates were able to meaningfully access benefits tied to that service." *Id.* at 23-24. If this framing is right, then the "benefits tied to that service" must be tied to the distribution of the election form, not the entire election process—to a "particular package of health care services," not "adequate health care," to return to the Medicaid example, *Choate*, 469 U.S. at 303.

Perhaps this framing is too narrow. The election form was meant to facilitate access to the broader election process, after all. And this broader framing fits Reeves's complaint more snugly than the district court's hyperfocus on the election form itself did. But if that is the case, Reeves's failure is a failure of proof, not framing. That is, the election form is *Daubert*'s bleachers and the election process the football game—and Reeves has not attempted to show that he could not watch the football game from some other point than the bleachers. While Reeves alleged in his complaint that the entire program was deficient, he abandoned that claim when he needed to substantiate his allegations with proof to seek injunctive relief. Again, he presented *no* evidence to suggest that he did not know of the election process, that the general inmate request forms ADOC provided were insufficient for him to elect, or that he lacked meaningful access to his lawyers in June 2018 (when he was in the middle of

litigating his *Atkins* claim *and lethal injection* in his habeas petition). Reply Brief in Support of Amended Petition for Writ of Habeas Corpus at 8-16, 30-31, *Reeves*, 1:17-cv-00061 (N.D. Ala. June 1, 2018), ECF No. 28. It is as though Reeves alleged that he could not access the third floor because the elevator was down, yet failed to show that the wheelchair ramp also failed to provide him access.

For these same reasons, the district court's framing error led it to err in its standing analysis. At heart, Reeves is attacking a statute over which Defendants have no authority. And contrary to the Eleventh Circuit's finding, slip op. 15, Defendants did not admit that the Commissioner has the authority to alter the statutory opt-in process. Instead, Defendants acknowledged in their Answer that the Commissioner has the authority to alter, amend, or make exceptions to the "protocol and procedures" governing executions. *See id.* But Alabama's methods of execution (and provisions for allowing the condemned to elect a particular method) are not set by the Commissioner – they are set by the Legislature and the Governor. As such, they are not within the realm of "protocol and procedures" that are within the Commissioner's administrative authority. Indeed, Defendants cannot by any action or inaction give effect to an election made outside the statutory election period. *See* Ala. Code § 15-18-82.1(b). Prospective injunctive relief is unavailable because Defendants entirely lack the power to void the statute or to grant Reeves another bite at the election apple—if not in every case, at least in a case like this one where all proof is directed at the narrower distribution of the election form.

The election statute does not set out any role in the election process for the ADOC Commissioner. *Id.* As for the Warden, his role in the statutory election scheme was entirely passive. All that was required for an effective election was that it be "personally made by the person in writing and delivered to" the Warden. *Id.* § 15-18-82.1. The election statute neither requires the Warden to do anything nor empowers him to do anything. Like the Commissioner, he cannot waive the opt-in statutory deadline.

To be sure, the Eleventh Circuit held in an unpublished opinion that another inmate's ADA claims were redressable in a similar context. *See Smith v. Comm'r, Ala. Dep't of Corrs.*, 21-13298, 2021 WL 4817748, at *4 (11th Cir. Oct. 15, 2021). But that decision was wrong. The appellate panel engaged in minimal analysis of causation and traceability, no analysis of Defendants' ability to grant the relief sought, and relied on one case—*Florida Wildlife Federation, Inc. v. South Florida Water Management District*, 647 F.3d 1296, 1304 (11th Cir. 2011)—for the proposition that "all redressability requires" is that a favorable order would lead to a "significant increase in the likelihood that the plaintiff would obtain relief." *Id.* Yet *Florida Wildlife Federation* cuts strongly *against* the panel's reasoning in *Smith*—and the district court's conclusion here.

Reeves argued that his alleged injury is redressable because the district court had the power to "order[] the reopening" of the statutory election period, "prohibit[] the enforcement of the deadline," or to "order[] the acceptance of an out-of-time" election. Doc. 48 at 26. But redressability requires more than that a court have the naked

power to issue an order. As *Florida Wildlife Federation* indicates, it also requires that the order be legally justifiable. In *Florida Wildlife Federation*, the Eleventh Circuit addressed a challenge to a consent decree and a subsequent environmental administrative rule. The plaintiffs claimed that the consent decree "led to the promulgation of a substantially unfair rule." 647 F.3d at 1302. But the rule arose out of an independent statutory duty, not out of the consent decree. As a result, the court of appeals held that the plaintiffs' injuries were *not* redressable. It explained:

> The only way that this court could issue a decision that "directly redresses the injury suffered" from the December 2010 Rule is if we were able to strike down the rule itself. In other words, the rule would have to depend on the validity of the consent decree. Because this is not the case, the Appellants' alleged injuries stemming from the December 2010 Rule are not redressable and do not present a justiciable claim under the mootness doctrine.

Id. at 1304.

In other words, while a federal court could have ordered the EPA to ignore the rule or refuse to enforce it—such an order would have made it significantly more likely that the plaintiffs would get the relief they sought, after all—that order would have been illegitimate because the rule that the plaintiffs sought to strike down was independent of the consent decree that gave rise to their cause of action. Accordingly, the Eleventh Circuit properly rejected plaintiffs' claim that their grievance was redressable.

Likewise, in the present case, Reeves's cause of action arises out of the distribution of the Federal Defenders' election form at Holman. Doc. 36 at 4-5. Yet even assuming Defendants created a program by passing out the form, that "program" was independent of the statutory election process created by section 15-18-82.1.

Defendants might arguably have authority over the alleged "program" of passing out the election form and could be ordered to make changes to that program, but they manifestly do not have authority over the independent statutory election requirements. The statute imposes the duty to elect *on the inmate himself*, and neither requires nor empowers Defendants to do anything. *Id.* At most, Defendants briefly had the ability, but not the duty, to make election easier by distributing the election form. But the form could not alter the requirements of the statute: that the election be made in writing and within thirty days of the statute's effective date.

It is as if a public university offered students buses to polling places on the day of a municipal election, but the buses were not wheelchair accessible. If a wheelchair-bound student missed the election and sued, that program might indeed be found to violate Title II of the ADA, but even if the university were enjoined from future violations, it would not redress the student's failure to participate in the election. Defendants provided one of many ways that Reeves could have "gotten to" the election that mattered to him, but they did not prevent him from going. Nor were they responsible for holding the election, or have the power to hold another one.

Moreover, "[s]tanding's redressability requirement mandates that it be 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Support Working Animals, Inc. v. Gov. of Fla.*, 8 F.4th 1198, 1205 (11th Cir. 2021). Part of that determination of "likelihood" is considering whether the named defendants have the power to grant the relief sought. In *Support Working Animals*, the Eleventh Circuit considered whether the Florida Attorney General was

a proper defendant in "an amendment to the state constitution outlawing gambling on greyhound racing." *Id.* at 1200. The court found that the plaintiff's alleged injuries in connection with that amendment were not redressable because "[a] judgment against the Attorney General prohibiting her from enforcing § 32 wouldn't significantly increase the likelihood of redressing the plaintiffs' injuries because … the Attorney General has no enforcement authority." *Id.* The same is true here. Defendants have no more power to "unring the bell" than the Florida Attorney General did.[5]

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[5] Reeves's reliance on *Mary Jo C. v. New York State & Loc. Ret. Sys.,* 707 F.3d 144 (2d Cir. 2013), is misplaced. First, in *Mary Jo C.*, the defendant was not an individual sued in his official capacity, but rather a state entity, the New York State and Local Retirement System. This implicated sovereign immunity concerns, and as such, the Second Circuit remanded to allow the plaintiff to amend her complaint to sue a state official who had the power to grant the relief sought, the "State Comptroller." *Id.* at 166. Second, the Second Circuit's holding that "ADA's reasonable modification requirement contemplates modification to state laws … when necessary to effectuate Title II's reasonable modification provision" was made in the context of a suit against a governmental entity, not an individual defendant acting in his official capacity. *Id.* at 163. Because the governmental pension agency was the defendant, the limitations of an individual's official powers or responsibilities were not implicated or discussed. *Cf. Support Working Animals*, 8 F.4th 1198. Third, *Mary Jo C.* does not stand for the proposition that all state laws fall if they stand in the way of a disabled person's desired accommodation. Rather, the Second Circuit held that the ADA "requires preemption of inconsistent state law when necessary to effectuate a required 'reasonable modification.'" 707 F.3d at 163. But even if Defendants had the power to modify or ignore Alabama's statutory election provision, Reeves has not shown that a modification that would empower inmates to undo the statute's time limitations to remedy an alleged deficiency in an alleged program that was neither contemplated nor authorized by the statue would be a "reasonable modification."

Nor is *Quinones v. City of Evanston*, 58 F.3d 275 (7th Cir. 1995), applicable. There, the plaintiff was not challenging a program that existed independently of a statute. Rather, he was directly challenging the application of a statute that was objectively discriminatory against him *on its face*. Quinones, who was hired by the Evanston Fire Department at age thirty-nine, was denied a pension by an Illinois statute that forbids pension contributions for firefighters thirty-five or older when hired. *Id.* at 277. In the present case, it is not the statute that Reeves claims is

The district court thus erred as a matter of law by mischaracterizing the ADA program here at issue. That error infected both its analysis of Reeves's likelihood of success on the merits and its determination that Reeves's allegations were redressable. If the ADA "program" at issue is defined narrowly to be the distribution of the election form, then the remedy cannot be re-opening the election period because (among other reasons) the Defendants Reeves sued do not have that power and the broader remedy does not fit with the narrower challenge. And if the program is defined more broadly to encompass the election process, then Reeves has failed to carry his burden of proving with evidence that he is likely to succeed on that challenge. Either way, the district court abused its discretion by granting relief, and this Court should vacate the injunction the court erroneously entered.

2. Reeves Did Not Show a Likelihood That He Was Excluded From, or Denied Access to, a Public Benefit.

The district court also abused its discretion by granting Reeves relief even though he did not show a likelihood that he was excluded from, or denied access to, a public benefit. While a disabled person "must be provided with meaningful access to the benefit that the grantee offers," *Choate,* 469 U.S. at 301, mere difficulty in accessing a benefit is not a violation of the ADA, *see Bircoll*, 480 F.3d at 1088. In *Bircoll*, the Eleventh Circuit affirmed the grant of summary judgment against a profoundly deaf plaintiff who brought a Title II claim after being denied an interpreter during a traffic stop and field sobriety test. *Id.* at 1089. After emphasizing that "the inquiry is highly

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discriminatory, but rather Defendants' alleged program that facilitated compliance with the statute. Doc. 36 at 7-8.

fact-specific," the court explained that while the plaintiff's communication was imperfect, he admitted that he "usually understands fifty percent of what is said," and that he understood the purpose of what the officer asked him to do—even though the officers refused the plaintiff's request for an interpreter. *Id.* at 1087-88; *see also Ganstine v. Sec'y, Fla. Dep't of Corrs.,* 502 F. App'x 905, 910 (11th Cir. 2012) (inmate who required a wheelchair failed to establish a Title II claim because "inmate orderlies were available 'most of the time' to push his wheelchair wherever he needed to go"). On the other hand, when a person with a disability is *prevented* from accessing the benefit, Title II provides a remedy. *See, e.g.*, *Shortz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001) (granting Title II relief to plaintiffs who used wheelchairs at county courthouses and were "impeded" in their ability to attend trials because the wheelchair ramps were overly steep and the bathrooms were wheelchair inaccessible).

As explained above, the district court erroneously found that when ADOC voluntarily made the decision to distribute a form, it provided a service that was subject to the requirements of the ADA and imposed a duty to ensure that all inmates were able to meaningfully access benefits tied to that service. But even if the form's benefit *was* to provide inmates with a choice regarding their method of execution, Reeves produced no evidence that he lacked meaningful access to that benefit. While the form was not distributed until June 26 or 27 of 2018, Reeves had a thirty-day period running from June 1 in which to make an election. And before that, he had 71 days—since the Act was signed into law—to think about what election he would make. Yet Reeves did not show, and did not even try to show, that

he could not make an election aside from the election form distributed late in the cycle.

It is undisputed that Reeves did not have to use the election form to make an election. He could have used any piece of paper he wished, or he "could have simply flipped the form over and written 'I elect nitrogen hypoxia' across the back." As a different district court explained in denying a preliminary injunction in a very similar case just a few months ago:

> That this form was distributed during the final few days of [the election] period did not impede or supplant Smith's contemporaneous right to elect under the statute during the entire month of June. Nothing in the record indicates that Smith believed that this form was the only way to effectuate his opt-in, nor is there any evidence or allegation that the form served as a barrier to Smith's concomitant statutory right to opt into nitrogen hypoxia by any writing. He had, like every other inmate on death row, "any number of other ways to" elect nitrogen hypoxia and Smith has not shown that he "has meaningfully explored these options or that they [were] unavailable to [him]."

Smith v. Dunn, -- F. Supp. 3d --, 2021 WL 485123, at *11 (M.D. Ala. Oct. 17, 2021) (citations omitted); *see Smith v. Dunn*, 142 S. Ct. 12 (2021) (mem.) (denying stay).

Like Smith, Reeves had access to counsel, and in fact spoke to his attorneys twice during the election period—when he was also litigating his *Atkins* claim and actively challenging lethal injection in his ongoing habeas litigation, and his counsel filed a responsive brief addressing that claim *on the first day of the election period.* Reply Brief in Support of Amended Petition for Writ of Habeas Corpus at 30-31, *Reeves v. Dunn*, 1:17-cv-00061 (N.D. Ala. June 1, 2018), ECF No. 28. And Reeves did not even allege, much less show, that his cognitive deficiencies prevented him from

understanding that he should at least talk to his lawyers about whether to elect hypoxia.

3. The District Court Conflated the Presence of a Disability With the Open and Obvious Need For a Particular Accommodation.

The district court next erred when it conflated the presence of a disability with the open and obvious need for an accommodation. The court found that Reeves's need for an accommodation was "open and obvious" because ADOC records reflect repeated "concerns" in 1998, 1999, and 2003 about Reeves's "cognitive abilities and literacy"; that Reeves asked someone to read him some papers in 2015; and that Commissioner Dunn filed a brief in a case acknowledging Reeves's low IQ scores and functional illiteracy in 2018. While this evidence may be relevant to determine whether Reeves had a disability, it was not enough to put ADOC on notice that Reeves needed a specific accommodation for the 2018 election form. The district court abused its discretion by conflating those two inquiries.

These questions are critical and are not interchangeable. Some disabilities are open and obvious. For instance, a paraplegic would have obvious mobility issues in a tall building with no elevator. But the question quickly becomes more complex when the alleged disability is mental. The Fifth Circuit recognized this fact:

> Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee, or his health-care provider, to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.

Taylor v. Principal Fin. Grp., Inc., 93 F.3d 155, 165 (5th Cir. 1996). Accordingly in cases involving prisoners' alleged mental disabilities, ordinarily, "a disabled

[plaintiff] cannot remain silent and expect [the defendant] to bear the initial burden of identifying the need for, and suggesting, an appropriate accommodation." *Pena Arita v. Cty. of Starr, Texas*, No. 7:19-CV-00288, 2020 WL 5505929, at *7 (S.D. Tex. Sept. 11, 2020) (alterations in original) (quotation omitted); *see also Taylor v. Hartley*, 488 F. Supp. 3d 517, 545 (S. D. Tex. 2020) (noting that some physical disabilities are "apparent" but mental disabilities are often of a "hidden or obscured" nature).

Moreover, "[f]or purposes of proving ADA discrimination, it is important to distinguish between an employer's knowledge of an employee's disability versus an employer's knowledge of any limitations experienced by the employee as a result of that disability." *Howard v. Steris Corp.*, 886 F. Supp. 2d. 1279 (M. D. Ala. 2012) (quoting *Taylor*, 93 F.3d at 163); *see also Rogers v. CH2M Hill, Inc.*, 18 F. Supp. 2d 1328, 1337 (M.D. Ala. 1998) (noting that "mental disabilities" often are not "open and obvious"). This problem of identifying hidden mental or cognitive needs is clearly present in custodial settings. Indeed, neither the district court nor Reeves identified any case in which an inmate was found to have an "open and obvious" need for accommodation of the sort of "hidden or obscured" needs that Reeves allegedly had.

Consequently, the district court erred by failing to guard against the danger of conflating the presence of a disability with the open and obvious need for a particular accommodation. Instead of considering what evidence supported each of these separate inquiries, the district court consistently treated evidence regarding Reeves's IQ scores (his disability) as evidence demonstrating that "his need for an accommodation was open and obvious to the ADOC." Doc. 83 at 34. This conflation of the issues was

further complicated when, as discussed below, the district court made clearly erroneous factual findings relying on outdated and speculative evidence, and failed to cite any evidence that Reeves had demonstrated any reading limitations, much less limitations so profound that it would be "open and obvious" to ADOC that he required an accommodation in 2018 to read the election form. In fact, there is no evidence that ADOC had any level of knowledge that Reeves needed an accommodation to help him read the election form (or any other document). It is undisputed that Reeves never made any request for assistance in reading. And the ADA coordinator at Holman testified that Reeves had never made a request for any accommodation, including reading. Doc. 78 at 121.

In this way, the case is like *Windham v. Harris County*, 875 F.3d 229 (5th Cir. 2017), in which the Fifth Circuit held that it was *not* "open and obvious" to the officials in the Harris County Sheriff's Department that an inmate, Windham, required an accommodation for a neck disability. The court of appeals noted that "knowledge of a disability is different from knowledge of the resulting limitation. And it is certainly different from knowledge of the necessary accommodation." *Id*. at 238. Windham had relied on a doctor's note to argue that officers should have known of his limitation and need for accommodation, but the court of appeals found this insufficient: "The closest the note came [to indicating an issue] was its statement, buried in a dependent clause in the second paragraph, that Windham 'risk[ed] … neurologic injury from neck extension.'" *Id*. The Fifth Circuit held that this note "could not have rendered

Windham's limitation 'obvious'—and it certainly could not have made obvious the necessary accommodation." *Id.*

The district court should have, but did not, apply the same analysis to the facts here. Instead of focusing on a few notes from many years ago—notes whose evidentiary value was diminished by the passage of time—the court should have examined the entire record, including the more recent evidence set forth below. As discussed next, had it not overlooked the evidence that spoke most clearly to Reeves's condition *in 2018*, the court would have found that Reeves's need for an accommodation was not "open and obvious" to the ADOC. The district court thus erred when it conflated whether Reeves had a disability with whether it was open and obvious what accommodation Reeves needed for his disability. That legal error led it to abuse its discretion by granting Reeves an injunction.

4. Reeves Did Not Show a Likelihood That His Need for an Accommodation Was "Open and Obvious."

Finally, the district court abused its discretion by ordering relief based on its erroneous finding that Reeves's need for an accommodation was "open and obvious." Even assuming that Reeves was disabled, the evidence he presented did not show that his need for an accommodation was open and obvious to ADOC.

Consider the expert testimony Reeves and the district court relied on by Dr. Kathleen Fahey, a speech pathologist who conducted a three-hour, in-person evaluation of Reeves on December 1, 2021—well after the election process had ended. Doc. 83 at 16. While the court credited Fahey's testimony when it determined that Reeves

had a cognitive disability, *id.*, it entirely ignored what Fahey's testimony teaches about whether Reeves's need for an accommodation was open and obvious.

To start, Dr. Fahey testified concerning Reeves's reading ability in general, but she did not review any of Reeves's institutional or medical files, and she did not speak to any correctional officers, other inmates, or other staff at the prison to know whether Reeves's difficulty reading was open and obvious. Doc. 78 at 42:21-43:19; 44:10. Thus, Dr. Fahey's testimony did nothing to show that any difficulties Reeves had reading were open and obvious to the staff at Holman prison.

In fact, her testimony proved the opposite. To rebut Dr. Fahey's findings, Defendants presented direct evidence of Reeves's reading ability by presenting the recording of a telephone call between Reeves and his mother that directly contradicted the core of Dr. Fahey's opinion—namely, that Reeves could only read at a fluency rate of 2.2 grade level. Doc. 70-8; Doc. 78 at 32:7-13; Doc. 78 at 60. In this call, Reeves read aloud to his mother a letter he had received. Dr. Fahey conceded that "[h]e did read fluently from that." Doc. 78 at 60:14. While she had previously maintained that Reeves's reading style involved "halting between words" and "starting and stopping" within words, she admitted that Reeves "[d]idn't have to sound out [the words] sadness or hopelessness or forgiveness." *Id.* at 60:15-17. As both Reeves's counsel and Dr. Fahey conceded, the passage Reeves fluently read was at a fifth- or sixth-grade level. *Id.* at 61:12-15; 69:13-16. He was able to easily pronounce the words *challenging*, *sadness*, *hopelessness*, *forgiveness*, *redeem*, *Jeremiah*, *declares*, *prosper*, *begotten*, *whosoever*, *perish*, *eternal*, and *Philippians*. Doc. 70-8.

Other calls also contradicted Dr. Fahey's claim that in the phone calls she listened to Reeves "was stringing together fairly simple utterances." *Id*. at 68:19. On recross-examination, she testified:

> Q. Well, some of the concepts were pretty legal. Am I fair in saying that? So, for example, he talked quite a bit about the Supreme Court. He named justices that are in his favor and the justices that are against him. Is that fair to say?
> A. He did mention that.
> Q. Yeah. He even talked about that there were four Catholics on the Supreme Court and the pope is against the death penalty and has spoken publicly against the death penalty, and therefore that could sway his cases before the Supreme Court, didn't he?
> A. He did reference that, yes.
> Q. He even talked about that President Trump was the one that appointed a couple of those Supreme Court justices, correct?
> A. Yes.
> Q. And he talked about them—the Supreme Court ruling in his favor on one case and then changing their minds; is that fair to say?
> A. Yes.
> Q. And then he also talked about Willie B. Smith and the stay of his execution and that the stay was lifted, isn't that correct?
> A. Yes.

Id. at 72:11-73:7.

Based on this evidence, the district court should not have concluded that Reeves's need for an accommodation was open and obvious. No ADOC official who regularly interacted with Reeves and heard him read letters or discuss the individual Justices of this Court would think that it was obvious that Reeves needed an accommodation to understand an election form.

The district court also failed to address evidence showing that Reeves can write. In August 2015, the ADOC provider noted, "Send writing materials so he can write family." Doc. 42-6 at 56. The evidence shows that Reeves wrote more than

seventy requests for medical care and actively managed his medical care. While the court speculated about whether Reeves actually wrote everything attributed him, it is worth noting that despite having the burden, Reeves offered no evidence that he was not the author. Nor did the court identify any such evidence. Doc. 83 at 29 n.15.

The district court also clearly erred when it came to evaluating the nature of the evidence before it regarding (1) Reeves's intellectual abilities and (2) Reeves's ability to read and write. While these concepts are related, they are not synonymous; "IQ's remain fairly constant throughout life," *Hodges v. Barnhart*, 276 F.3d 1265, 1268 (11th Cir. 2001), while a person's reading ability is not immutable. Thus, the timing of past evaluations might be relatively unimportant when considering whether Reeves had a disability, but that is not the case when it comes to determining whether, *in June of 2018,* Reeves had a reading limitation and resultant need for accommodation that was "open and obvious" to Defendants. Reeves had to show "*why* his disabilities would have been open and obvious *at the time* requiring accommodation." *Taylor*, 488 F. Supp. 3d at 545.

As to this inquiry, the district court's examination comes up short. The court relied on five ADOC records, culled from thousands of pages of prison records spanning over twenty years, to find that Reeves's need for an accommodation was "open and obvious." Doc. 83 at 30-31, 34. In doing so, the court ignored hundreds of pages in the ADOC files to the contrary and relied on outdated records to make this finding instead of looking to the more recent ADOC records and the records that were most relevant to what ADOC knew during the election period. Doc. 42-5 at 13-98, 105, 111-

14, 121-22, 127-29, 151, 154-66, 169-214, 220-26, 239; Doc. 42-6 at 25-27, 39-40, 56, 167, 172-76; Doc. 42-7 at 34, 36, 41, 54-57, 62-86, 98-122.

The district court opined that "ADOC records reflect repeated concerns regarding Reeves's cognitive abilities and literacy in 1998, 1999, and 2003." Doc. 83 at 34. In the most recent citation—*from eighteen years ago*—ADOC staff noted on a mental health referral form that Reeves represented that he had a "learning disability" Doc. 83 at 31 (citing Doc. 27-37 at 1). But in 2016, Reeves *denied* that he had a learning disability, developmental disability, or mental disorder, as noted in Reeves's report on his ADOC Classification PREA Risk Factors form. Doc. 42-7 at 86. In addition, on June 16, 2009, ADOC assessed Reeves for "Identification of Special Needs." While there was a space to mark "developmentally disabled," no needs were identified. Doc. 42-6 at 167. And on August 28, 2014, a qualified health professional completed the Special Needs Communication Form with Reeves. The form shows that the evaluation specifically considered whether Reeves was "developmentally disabled" or required "special accommodation," and that the health professional did not find either one. Doc. 42-5 at 151.

Given the totality of the circumstances, the few forms over a twenty-plus years were insufficient to put ADOC on notice that Reeves obviously needed an accommodation to understand the election form. The district court clearly erred by finding otherwise. *Cf. Windham*, 875 F.3d at 238 (information hidden in records did not render the limitation obvious and "certainly did not make obvious [to the sheriff's department] the necessary accommodation."); *Smith*, 2021 WL 4845123, at *12 (noting

that a "twenty-nine year old form is [in]sufficient to put the ADOC on notice that [an inmate] required any accommodation for this Election Form").

The district court further strayed into error by conflating the records evidencing mental health issues with those of intellectual abilities. *See* Doc. 83 at 30 n.17. While there is some logical connection between Reeves's alleged intellectual disability and his ability to read, the same is not true for the evidence regarding his various mental health problems. Nor did the court explain how such evidence was relevant to determine whether Reeves's need for an accommodation to help him read the Federal Defenders' election form. While the court discussed five documents with quotations from six pages that reference Reeves's intellectual abilities, these documents can hardly be considered "numerous." Doc. 83 at 30-31. The district court's footnote mentioning the "numerous" documents related to Reeves's mental health likewise failed to explain what, if any, relevance such issues had to finding whether it was "open and obvious" that Reeves required an accommodation regarding the form. Doc. 83 at 30, fn. 17. This failure was particularly galling considering that the court itself acknowledged that "records in Reeves's inmate file do indeed show that he was routinely evaluated as normal." Doc. 83 at 30.

The evidence that the district court failed to address included a wealth of evidence showing that Reeves has no open and obvious limitation. Mental health practitioners conduct mental health reviews on inmates in segregation. Reeves has *twelve* segregation reviews in his records, but the district court relied on the only one that listed Reeves's intellectual functioning as "slow." Doc. 27-37. The other eleven reviews

show that Reeves's intellectual functioning was listed as "low normal" on one review in December 2000 and assessed as "normal" on ten assessments in September 1998, April 2002, September 2005, December 2007, January 2011, February 2011, June 2011, September 2011, March 2013, and September 2013. Doc. 42-5 at 105, 112-13; Doc. 42-6 at 174; Doc. 42-7 at 34, 36, 41, 54-57. The district court also erred by not considering four psychological evaluation updates conducted on Reeves, all of which contemplate an assessment for "Educational Needs," but did not identify any "educational needs" for Reeves as of April 12, 2002, February 5, 2004, March 29, 2006, or February 8, 2007. Doc. 42-6 at 172-73, 175-76.

Likewise, the district court failed to grapple with evidence showing that it was not "open and obvious" to ADOC personnel that Reeves needed an accommodation for reading. Critically, this evidence was closest in time to the date that the form was distributed and thus would be most relevant to whether reading difficulties were "open and obvious" at that time. On October 18, 2016, only three months after the election form was distributed, an ADOC provider noted of Reeves: "Affect bright—states he spend a lot of time—meditating. Ask for reading materials—(book ??)." Doc. 42-6 at 40. On January 17, 2017, an ADOC provider reported: "[Reeves] said he is doing much better—reports he spend a lot of his time—exercising and reading." *Id.* at 39.

The ADOC records are consistent with the testimony from the evidentiary hearing that the need for a reading accommodation based on Reeves's alleged intellectual functioning/cognitive impairments was not obvious to ADOC. Correctional

Officer Moody, who sees Reeves daily, testified that his interaction with Reeves is no different from his interaction with any other inmate. Doc. 78 at 84:5-7, 96:18-19. He has general conversations with Reeves, and they talk about the basketball games on the yard when he takes the inmates to exercise. *Id.* at 83:19-24. He has never seen Reeves getting anyone else to read to him or write something for him. *Id.* at 98:1-12. Moody also testified that he had recently seen Reeves walking around with a legal pad and had seen reading material in his cell. *Id.* at 97:5-10, 16-19. He was familiar with inmates he considered "slow," but said that Reeves was not one of them. Indeed, it would not surprise him that many of Reeves's mental health forms say Reeves has normal intelligence. *Id.* at 97:20-25. He testified that Reeves understands instructions given him "very well" and that Reeves communicates his needs to him "very well." *Id.* at 98:13-21.

Captain Emberton testified concerning his contact with Reeves. Emberton said he attempted to make Reeves a tier runner when Reeves was on P block, where difficult inmates are placed, but that he had to remove Reeves because Reeves was scamming other inmates by charging them for the services he was supposed to provide them for free. *Id.* at 191:19-192:1, 195:21-196:7. Captain Emberton also testified that Reeves never asked him to read something for him, and he did not recall Reeves ever telling him that he could not read. *Id.* at 197:1-2. He never saw another inmate, a correctional officer, or mental health staff helping Reeves read. *Id.* at 199:17-25. He had no reason to believe that Reeves cannot read or write. *Id.* at 198:56-10. It was Captain Emberton's experience that inmates on death row turn to each other for help,

they all have attorneys, and they all have access to the phones. *Id.* at 197:5-16. Captain Emberton also testified that inmates on P tier find a way to communicate with each other about what their attorneys are saying. *Id.* at 200:21-201:12.

Cheryl Price, Assistant Deputy Commissioner for ADOC, also testified concerning an encounter she recently had with Reeves. *Id.* at 178:9-21. She was walking on the death row unit at Holman when Reeves started complaining in an irate tone about problems with the inmate phone. *Id.* Ms. Price spoke sternly to Reeves about his tone and told him to change it, and he complied. She then explained to Reeves that ADOC was aware of the problem with the phones and was working to correct it. *Id.* Reeves had no problem communicating to her his issue with the phones, and he understood her response to him. *Id.* at 178:22-179:6.

The district court also clearly erred when it relied on a 2015 request slip from Reeves as evidence that he made a "request for a reading accommodation which ADOC staff either ignored or denied." Doc. 83 at 32. As Holman prison's ADA coordinator, Richard Lewis, testified, Reeves submitted the slip to request that certain unidentified papers be returned to him. It was not a request for an ADA accommodation. Doc. 78 at 121:18-25. Lewis also testified that while Reeves had written on the request slip that he had asked a correctional sergeant to read the papers to him, Reeves asked in his request slip only that the papers be returned to him; he did not say that he could not read or ask for someone else to read the papers to him. *Id.* at 124:24-125:7. Lewis also said that he had reviewed the Holman ADA files and that Reeves had never requested an accommodation of any kind, including a request for a

reading accommodation. *Id.* at 121:7-14. And if anything, the fact that Reeves wrote his request on the request slip would indicate that he could effectively communicate with the Holman correctional staff, and cuts against the notion that it should have been obvious to the staff that Reeves was illiterate or unable to communicate.

Finally, the district court clearly erred when it found that the ADOC was on notice of Reeves's need for an accommodation simply because the former commissioner of ADOC, Jefferson Dunn, was the defendant in Reeves's federal habeas litigation and was aware of the findings in that litigation that Reeves had impaired intellectual functioning and limited reading abilities.[6] Doc. 83 at 33-34. Habeas petitions are required to name "the person who has custody" over the petitioner. *See* 28 U.S.C. § 2242. While Commissioner Dunn was nominally the "defendant" to the habeas proceedings, habeas matters are handled by the Alabama Attorney General's office. Treating evidence of service on Dunn as evidence of knowledge of Reeves's habeas allegations does not make sense. Dunn did not testify in the habeas case, did not sign any pleadings, did not appear in court, filed no affidavits, and no portion of the habeas proceedings was contained in Reeves's inmate file. Attorneys from the Attorney General's Office represented Defendants in the habeas proceedings, in the Eleventh Circuit, and in this Court. Indeed, this practice is sufficiently common that other courts have recognized that it is a mistake to assume that the nominal defendant in

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[6]. Further, to the extent the district court's opinion can be read as finding that Reeves was evaluated "during" his habeas proceedings and had been found to be illiterate "*a mere two months*" (Doc. 83 at 33-34 (emphasis in original)) before the form was distributed, it should be noted that the evaluation that the district court was referencing occurred in 2006—over a dozen years before the form was distributed.

a habeas action has any involvement in the proceedings. *See, e.g. Dahl v. Weber*, 580 F.3d 730, 734 (8th Cir. 2009) ("Moreover, it is undisputed that Weber did not simply ignore Dahl's habeas petition. As the nominal respondent, he transmitted the petition to the Attorney General, relying on that office to respond appropriately.") And in any event, a habeas petition is a mere pleading with allegations that must be proved by a petitioner. At bottom, it was wrong for the district court to impute knowledge concerning Reeves's habeas proceedings to the Commissioner or the warden at Holman in the absence of any evidence that they were aware of those matters.

In sum, the district court strayed into clear error and abused its discretion by granting "drastic and extraordinary" relief based on conclusions with little factual support and by ignoring a broad spectrum of relevant evidence that clearly refuted the conclusion that Reeves was likely to be able to demonstrate that his need for an accommodation with regard to the Federal Defenders' form was "open and obvious."

II. The Remaining Equitable Factors Favor Vacating The Injunction.

The Court should vacate the district court's injunction because it harms Defendants 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 v. McDonough*, 547 U.S. 573, 584 (2006). 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.*

The district court found that a preliminary injunction would not substantially harm Defendants because nitrogen hypoxia is only "weeks away" and would not be adverse to the public interest. Doc. 83 at 36. That is not true. Nitrogen hypoxia is not

weeks away but months away. Doc. 78 at 219; Doc. 83 at 7. And Reeves will surely file a challenge to Defendants' use of nitrogen hypoxia in a § 1983 action that could result in years of litigation rather than the "weeks" of litigation which lead the district court to find that a preliminary injunction would not be adverse to the public interest.

Reeves's suit in the end amounts to little more than regret that he did not opt for execution by nitrogen hypoxia, now that the State does not have a hypoxia execution protocol, and a thinly disguised attempt to delay his execution by any means necessary. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133-34 (2019). Given Reeves's "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 abused its discretion when it found that the equities weighed in Reeves's favor.

CONCLUSION

The Court should vacate the district court's preliminary injunction.

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Respectfully submitted,

Steve Marshall
Attorney General

Edmund G. LaCour Jr.
Solicitor General

s/ Beth Jackson Hughes
Beth Jackson Hughes
Counsel of Record
Richard D. Anderson
Assistant Attorneys General

State of Alabama
Office of the Attorney General
501 Washington Avenue

Montgomery, AL 36130-0152
Tel: (334) 242-7300
Beth.Hughes@AlabamaAG.gov