No. 22A____

In the Supreme Court of the United States

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

APPENDIX TO EMERGENCY APPLICATION TO VACATE PRELIMINARY INJUNCTION

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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[PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-10064

MATTHEW REEVES,

Plaintiff-Appellee,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:20-cv-00027-RAH

Before WILSON, JORDAN, and BRANCH, Circuit Judges.

JORDAN, Circuit Judge:

The Commissioner of the Alabama Department of Corrections (the Commissioner or the ADOC) and the Warden of Holman Correctional Facility (collectively, the defendants) appeal the district court's order granting Matthew Reeves' motion for a preliminary injunction under 42 U.S.C. § 1983 and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. They also seek a stay of the district court's order. Following oral argument and a review of the record, we discern no abuse of discretion. We therefore affirm the district court's grant of preliminary injunctive relief and deny the motion for a stay.

I

Mr. Reeves, who was sentenced to death in Alabama for murder, *see Reeves v. State*, 807 So. 2d 18, 23–24 (Ala. Crim. App. 2000), is presently incarcerated at Holman Correctional Facility. He is scheduled to be executed by lethal injection on January 27, 2022.[1]

[1] We granted habeas relief to Mr. Reeves on an ineffective assistance of counsel claim related to sentencing, but the Supreme Court reversed. *See Reeves v. Comm'r, Ala. Dep't of Corr.*, 836 F. App'x 733 (11th Cir. 2020), *reversed sub nom.*, *Dunn v. Reeves*, 141 S. Ct. 2405 (2021).

A

Alabama Act 2018-353 went into effect on June 1, 2018. As the district court explained, the Act "grants death row inmates a single opportunity to elect that their execution be carried out by . . . nitrogen hypoxia, in lieu of Alabama's default method, lethal injection." D.E. 83 at 5 (internal citations omitted). *See* Ala. Code § 15-18-82.1(a). Inmates like Mr. Reeves, who were sentenced to death prior to the Act's effective date, had until June 30, 2018, to elect nitrogen hypoxia in writing. *See* § 15-18-82.1(b)(2). The failure to do so operates as waiver of that method of execution under Alabama law. *See id.*

At some point between June 26, 2018, and the statutory deadline of June 30, 2018, Cynthia Stewart—who was then the Warden at Holman—obtained an election form created by the Federal Defenders for the Middle District of Alabama and had it distributed by Captain Jeff Emberton to every Holman death row inmate. She did so at the "direction of someone above her at the ADOC." D.E. 83 at 7. Inmates who wanted to elect that their execution be by nitrogen hypoxia rather than lethal injection were to sign, date, and return the form. *See* D.E. 70-5. Mr. Reeves made no election.

On January 10, 2020, more than 22 months before his execution date was set, Mr. Reeves filed suit against the Commissioner and the Warden, alleging that the ADOC and Holman were violating his rights under the ADA in their enforcement and implementation of Ala. Code § 15-18-82.1(b)(2). Mr. Reeves alleged that

"with IQ scores in the upper 60s and low 70s, his general cognitive limitations and severely limited reading abilities rendered him unable to read and understand the election form without assistance." D.E. 83 at 8. The Commissioner and the Warden, he asserted, failed to provide him—an intellectually disabled inmate—with a reasonable accommodation under the ADA.[2]

B

On November 4, 2021, before his execution date was set, Mr. Reeves filed a motion for a preliminary injunction requesting that the district court "enjoin the ADOC from executing him by any method other than nitrogen hypoxia while his ADA claim remain[ed] pending." D.E. 83 at 9–10 (citing D.E. 27 at 2). Following supplemental briefing and an evidentiary hearing, the district court issued an order setting out its findings of fact and granting Mr. Reeves' motion. The district court preliminarily enjoined the ADOC from executing Mr. Reeves by any method other than nitrogen hypoxia. *See id.* at 37.

First, the district court determined that Mr. Reeves had Article III standing to assert his ADA claim. The district court cited to our unpublished decision in *Smith v. Commissioner, Alabama Department of Corrections*, No. 21-13298, 2021 WL 4817748, at *2–4 (11th Cir. Oct. 15, 2021) (concluding that an Alabama death row inmate with a similar ADA claim had standing), and "[saw] no

[2] Mr. Reeves also asserted an Eighth Amendment claim, which the district court dismissed. That claim is not before us in this appeal.

reason to depart from that [case]." D.E. 83 at 11. The court concluded that "[Mr.] Reeves, like [Mr.] Smith, ha[d] alleged an injury, established causation, and his alleged injury [was] redressable by an order from th[e c]ourt." *Id.* at 11–12.

Second, the district court addressed Mr. Reeves' motion for a preliminary injunction. The court concluded that Mr. Reeves showed that he was substantially likely to succeed on the merits by proving that "(1) he is a qualified individual with a disability; (2) he lacked meaningful access to the benefits of a public entity's services, programs, or activities by reason of his disability; and (3) the public entity failed to provide a reasonable accommodation for his disability." *Id.* at 14 (citations omitted). We set out the district court's analysis in detail below.

With respect to the first element of the ADA claim, the district court found that the record contained evidence that Mr. Reeves is disabled "under the broad construction of the ADA." *Id.* at 15. Neurological testing found Mr. Reeves' IQ to be between 68 and 71. Additionally, one expert previously opined that Mr. Reeves was "essentially illiterate" and that it was "quite apparent" that he had never adequately learned to read or write. *See* D.E. 27-28. And a state expert had concluded that Mr. Reeves' reading and spelling were at a 5th grade level.

Dr. Kathleen Fahey, a speech pathologist retained by Mr. Reeves, also testified that his "language competency was that of someone between the ages of 4 and 10." D.E. 83 at 16. She determined that Mr. Reeves could read at a 4th grade level but could

only comprehend at a 1st grade level. The election form, which she ran through software programs designed to calculate the readability of the language utilized, "required an 11th grade reading level to be understood." *Id.* She testified that, in her professional opinion, Mr. Reeves was unable to comprehend the election form because of this "language disorder." *See* D.E. 78 at 38–39. The defendants failed to contradict Dr. Fahey's opinions, and the district court found that "[t]he evidence presented at this stage demonstrate[d] that [Mr.] Reeves'[ ] cognitive impairments and low intellectual functioning affect several major life activities, such as reading, writing, and comprehension, placing [Mr.] Reeves under the ambit of the ADA." D.E. 83 at 18.

As to the second element of the ADA claim, the district court found that Mr. Reeves was a qualified individual because Holman implemented a program, service, or activity (as broadly defined under the ADA) from which he was excluded due to the defendants' failure to provide an accommodation. Captain Emberton, at then-Warden Stewart's direction, distributed over one hundred copies of the election form with over one hundred envelopes, giving one to each death row inmate. Captain Emberton also made an announcement on each tier where death row inmates are housed. "His only criterion [for distribution of the election form], and thus the only apparent eligibility requirement for this service, was whether an inmate was on death row at Holman at the time of the form's distribution." *Id.* at 21. As a death row inmate in June of 2018, Mr. Reeves was "clearly eligible to receive an election form

and participate in the benefits tied to the form and its distribution." *Id.*

In addition, the district court determined that the form provided benefits, including notice of the new method of execution, the ease and ability of electing this new method, the avoidance of the "substantially painful" lethal injection, and the reservation of an inmate's right to challenge the constitutionality of the new execution protocol. *See id.* at 23. Mr. Reeves was denied meaningful access to these benefits because of his disability. Despite the ADOC's contentions, Captain Emberton's announcement was insufficient to constitute meaningful access to the form's benefits because there was no evidence that the explanation "was directed at or heard by [Mr.] Reeves." *Id.* at 25. Indeed, Captain Emberton testified that inmates who were not present or were sleeping would not have received his explanation. The court noted that although § 15-18-82.1 did not require the ADOC to distribute the election form, in voluntarily undertaking to do so the ADOC "imposed upon itself a duty to ensure that all inmates were able to meaningfully access [the] benefits tied to that service." *Id.* at 24.

On the third element of the ADA claim, the district court found that the defendants failed to provide Mr. Reeves with a reasonable accommodation, and his need for an accommodation was open and obvious. The defendants were aware of Mr. Reeves' low IQ scores given prior litigation on the matter. And numerous documents in Mr. Reeves' prison file contained notations by ADOC staff that he had "poor communication" and "trouble processing

information." *Id.* at 30 (citing D.E. 42-1 at 126). ADOC staff also noted that Mr. Reeves was "fragile and easily confused" and "may have limited intel[lectual] abilities." *Id.* (citing D.E. 42-1 at 126). A prison mental health evaluation, for example, noted that Mr. Reeves "possibly cannot read." *Id.* (citing D.E. 27-37). Numerous other documents revealed that prison staff at Holman knew of Mr. Reeves' disability, specifically his low reading level and comprehension abilities. "[M]ost informative," explained the court, was a 2015 inmate request slip from Mr. Reeves asking that some documents be read to him because he did not understand what they were. *See id.* at 31. In combination, these records "support[ed] [Mr.] Reeves'[ ] contention that the ADOC should have known [he] required a reasonable accommodation to utilize the election form." *Id.* at 32.

Finally, the district court evaluated the remaining preliminary injunction factors. On balance, the court concluded that the equities favored Mr. Reeves, particularly given the ADOC's representation that a final nitrogen hypoxia protocol was going to be ready soon. *See id.* at 36 (citing D.E. 78 at 219). The court ruled that Mr. Reeves "established his right to a preliminary injunction that prevents the ADOC from executing him by any method other than nitrogen hypoxia before his ADA claim can be decided on its merits." *Id.* at 36–37.

The defendants appealed and moved for a stay of the district court's order. We expedited briefing and heard oral argument on January 21, 2022.

II

The defendants contend that Mr. Reeves does not have Article III standing to pursue his ADA claim because his injury is not redressable. Although the defendants challenge only redressability, we address Article III standing in full to ensure that the case is justiciable. Exercising plenary review on this issue, *see, e.g., Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1112 (11th Cir. 2021), we disagree with the defendants. *See Smith*, 2021 WL 4817748, at *2–4 (concluding that an Alabama death row inmate with a similar ADA claim had standing).

We begin our analysis with the recognition that we "must not confus[e] weakness on the merits with absence of Article III standing." *Arizona State Legislature v. Arizona Ind. Redistricting Comm'n*, 576 U.S. 787, 800 (2015) (citation and internal quotation marks omitted). Indeed, we "must be careful not to decide the questions on the merits for or against [Mr. Reeves], and must therefore assume that on the merits [he] would be successful in [his ADA] claim[ ]." *Culverhouse v. Paulson & Co.*, 813 F.3d 991, 994 (11th Cir. 2016) (citation omitted). *See also Warth v. Seldin*, 422 U.S. 490, 502 (1975) (assuming the validity of the plaintiff's claims in determining the question of standing); *Moody v. Holman*, 887 F.3d 1281, 1286 (11th Cir. 2018) ("[W]e . . . have endeavored to treat the concepts of [standing and the merits] distinctly[.]").

To have Article III standing, a plaintiff must show (1) injury in fact, (2) causation, and (3) redressability. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Mr. Reeves, the party

invoking federal jurisdiction, bears the burden of establishing each of these elements. *See id.* at 561. "[E]ach element must 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." *Id.* (citations omitted).

At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice to establish standing. *See id.*; *Moody*, 887 F.3d at 1286. That is because "we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561.[3]

To establish injury in fact, a plaintiff must show that he suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotation marks omitted). An injury is particularized when it "affects the plaintiff in a personal and individual way," and concrete if it is "real, and not abstract." *Sierra*, 996 F.3d at 1113. In the context of a preliminary injunction, a plaintiff must adequately demonstrate "that a future injury is imminent." *Id.* (emphasis omitted). This entails a showing "that there is a sufficient likelihood that [the plaintiff] will be affected by the allegedly unlawful conduct in the future." *Id.*

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[3] In addition to the pleadings, where appropriate we consider the evidence presented to the district court in the preliminary injunction proceedings. *See, e.g., Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 n.22 (1979).

At this stage of the proceedings, Mr. Reeves has demonstrated an injury in fact. He alleges in his amended complaint that lethal injection is significantly more painful than nitrogen hypoxia. *See* D.E. 21 at ¶¶ 59, 62–63, 72, 79, 81–82. And he alleges that, as a result of the defendants' violation of the ADA, he will be executed by lethal injection, a more painful method he would not have chosen if he understood the election form. Alabama gave Mr. Reeves the right to choose his method of execution, *see* Ala. Code § 15-18-82.1(a), and by distributing the form the ADOC provided prisoners an easy way to do so. Assuming Mr. Reeves will succeed on his ADA claim, he was unable to use the form due to the defendants' failure to provide him a reasonable accommodation.

We therefore conclude that Mr. Reeves has satisfied the injury in fact element of Article III standing. And that injury is imminent because his execution is set to take place this week by a more painful method he would not have chosen. *Cf. Baze v. Rees*, 553 U.S. 35, 53 (2008) ("It is uncontested that, failing a proper dose of sodium thiopental [the first drug in a three-drug protocol] to would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and of pain from [the injection of] potassium chloride.").

Because Mr. Reeves has demonstrated an injury in fact that is imminent, we proceed to the causation element. Causation requires Mr. Reeves to show that his injury (the impending execution by lethal injection, a method he would not have chosen) is "fairly

traceable" to the challenged action (i.e., the failure of the defendants to offer him a reasonable accommodation as required by the ADA). *See California v. Texas*, 141 S. Ct. 2104, 2113–14 (2021); *Lujan*, 504 U.S. at 560.

We start with some background principles about causation. First, "[p]roximate cause is not a requirement of Article III standing." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014). Second, there is no need for a plaintiff to "demonstrate a connection between the injur[y] [he] claim[s] and the . . . rights being asserted." *Duke Power Co. v. Carolina Envt'l Study Grp.*, 438 U.S. 59, 78 (1978) (rejecting the argument that injuries that do not "directly relate[ ] to the constitutional attack" cannot "supply a predicate for standing").

Assuming—as we must—the validity of his ADA claim, Mr. Reeves has sufficiently established causation. Mr. Reeves alleged that the defendants' failure to offer him a reasonable accommodation under the ADA for a program, service, or activity prevented him from receiving the benefit of choosing nitrogen hypoxia as a method of execution and thereby "avoiding a substantially painful execution via lethal injection." D.E. 21 at ¶ 72. In addition, Mr. Reeves alleged that he is a qualified individual with a disability, i.e., an intellectual disability, and that he was therefore "unable to personally make" the election in favor of execution by nitrogen

hypoxia in the manner specified by Alabama law. *See id.* at ¶¶ 29–36, 70.[4]

Mr. Reeves alleged in his amended complaint that the defendants were responsible for developing and implementing the procedures governing the execution of death-sentenced inmates in Alabama, and that the Commissioner has the authority to alter, amend, or make exceptions to these procedures. *See id.* at ¶¶ 7–8. In their answer, the defendants admitted these allegations. *See* D.E. 52 at ¶¶ 7–8. Moreover, the defendants' answer and record evidence included concessions regarding the scope of their roles in connection to Mr. Reeves' alleged ADA violation. If we assume that Mr. Reeves will succeed on his ADA claim, he has sufficiently demonstrated that his injury is traceable to, or caused by, the defendants' violation of the ADA.

Having concluded that Mr. Reeves has satisfied the first two elements of standing, we proceed to the third and final element: redressability. Redressability simply requires a plaintiff to seek a "remedy that is likely to redress [the] injury" which is fairly traceable to the challenged conduct. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021). The remedy need not be complete or relieve every injury alleged in order to satisfy Article III standing. *See id.* at 801 ("[T]he ability to effectuate a partial remedy satisfies

[4] To the extent that the defendants challenge the district court's finding that Mr. Reeves is a qualified individual under the ADA, we address that contention later.

the redressability requirement.") (citation and internal quotation marks omitted); *Moody*, 887 F.3d at 1287 ("Article III . . . does not demand that the redress sought by a plaintiff be complete."); 35A C.J.S. Fed. Civ. Proc. § 67 (2021) ("To meet the redressability standing requirement, a plaintiff must show that a favorable judgment will relieve a discrete injury although it need not relieve his or her every injury.").

Mr. Reeves has successfully established redressability for his claimed injury. He requests that the district court require the defendants to re-open the 30-day statutory opt-in period and allow him an opportunity to understand and complete the election form with the benefit of the accommodation he was previously denied. This would allow him to choose nitrogen hypoxia as his method of execution.

The defendants counter that Alabama law does not grant them the power to re-open the election period. Given the language of Ala. Code § 15-18-82.1, they contend that they "have no official power to ignore, alter, or amend" the 30-day election window. *See* Appellants' Br. at 20–24. They also assert that Mr. Reeves has not shown that his requested accommodation is reasonable under the ADA. *See id.* at 23.

The defendants' arguments as to redressability are untenable for a number of reasons. We set these reasons out below.

First, as noted earlier, in evaluating whether Mr. Reeves has standing we must assume that his ADA claim is valid on the merits.

See, e.g., Culverhouse, 813 F.3d at 994. "If Alabama were correct, then a plaintiff who ultimately loses on the merits (and by definition did not have a substantive right to relief) would never have had standing to pursue his or her claims in the first place. The law does not countenance, much less demand, such a result." *Moody*, 887 F.3d at 1287. Moreover, arguments about the authority of a court to fashion certain relief or the legal availability of such relief go to the merits, and not justiciability. *Cf. Chafin v. Chafin*, 568 U.S. 165, 174 (2013) (addressing mootness: "Ms. Chafin argues that this case is moot because the District Court lacks the authority to issue a re-return order either under the Convention or pursuant to its inherent equitable powers. But that argument—which goes to the meaning of the Convention and the legal availability of a certain kind of relief—confuses mootness with the merits.").

Second, the defendants have admitted that they have the authority to alter, amend, or make exceptions to the procedures governing the execution of death-sentenced prisoners in Alabama. *See* D.E. 52 at ¶ 8 (admitting the allegation in the amended complaint that the Commissioner "has the authority to alter, amend, or make exceptions to the protocol and procedures governing the execution of death-sentenced prisoners in the State of Alabama"). "[T]he general rule [is] that a party is bound by the admissions in his pleadings," *Best Canvas Prods. & Supplies, Inc. v. Ploof Truck Lines,*

Inc., 713 F.2d 618, 621 (11th Cir. 1983) (citations omitted), and we see no reason why that general rule should not apply here.[5]

Third, it is hornbook federal law that the authority of a "federal court to fashion effective relief for a violation of federal law is not limited by what state law permits." *Smith*, 2021 WL 4817748, at *4. *See Bd. Of Comm'rs of Jackson Cnty. v. United States*, 308 U.S. 343, 350 (1939) ("Nor are the federal courts restricted to the remedies available in state courts in enforcing . . . federal rights."). The defendants offer no support for the proposition that Alabama law limits the remedies available to the district court for a violation of the ADA.

In sum, "a favorable decision" from the district court "would amount to a significant increase in the likelihood that [Mr. Reeves] would obtain relief that directly redresses the injury suffered." *Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1303–04 (11th Cir. 2011). Because this is all that is required to show redressability, Mr. Reeves has satisfied this element as well.

III

To obtain a preliminary injunction, Mr. Reeves had to establish (1) a substantial likelihood of success on the merits; (2) that irreparable injury would result unless the injunction were issued; (3) that the threatened injury to him outweighs whatever damage the

[5] Because of their admission, the defendants' reliance on *Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1203–06 (11th Cir. 2021), is misplaced.

proposed injunction might cause the defendants; and (4) that, if issued, the injunction would not be adverse to the public interest. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931–32 (1975); *Lebron v. Sec'y, Fla. Dep't of Child. & Fams.*, 710 F.3d 1202, 1206 (11th Cir. 2013). Our standard of review on appeal is deferential, and we ask only whether the district court abused its discretion. *See, e.g., Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018); *United States v. Alabama*, 691 F.3d 1269, 1281 (11th Cir. 2012). "[W]hile the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review simply is whether the issuance of the injunction in light of the applicable factors constituted an abuse of discretion." *Doran*, 422 U.S. at 931–32. *See also Robinson v. Ala. Att'y Gen.*, 957 F.3d 1171, 1177 (11th Cir. 2020) ("Because a preliminary injunction is reviewed under the deferential abuse of discretion standard, the narrow question for us is whether the state has made a strong showing that the district court abused its discretion.") (internal citation omitted). In conducting abuse-of-discretion analysis, legal determinations receive plenary review, but factual findings stand unless they are clearly erroneous. *See, e.g., Ind. Party of Fla. v. Secretary*, 967 F.3d 1277, 1280 (11th Cir. 2020).

Although we can sometimes decide legal issues conclusively in preliminary injunction appeals, *see Burk v. Augusta-Richmond Cnty.*, 365 F.3d 1247, 1250 (11th Cir. 2004), the Supreme Court has said that "limited [abuse of discretion] review normally is appropriate." *Thornburg v. Am. Coll. of Obstetricians & Gynecologists*, 476

U.S. 747, 755 (1986). *See also Ashcroft v. A.C.L.U.*, 542 U.S. 656, 666 (2004) (concluding that the district court's determination as to likelihood of success "was not an abuse of discretion"); *Brown v. Chote*, 411 U.S. 452, 457 (1973) ("In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion. . . . In doing so, we intimate no view as to the ultimate merits of appellee's contentions."); *Callaway v. Block*, 763 F.2d 1283, 1287 n.6 (11th Cir. 1985) ("[W]hen an appeal is taken from the grant or denial of a preliminary injunction, the reviewing court will go no further into the merits than is necessary to decide the interlocutory appeal."); *Martinez v. Matthews*, 544 F.2d 1233, 1242–43 (5th Cir. 1976) ("Appellate courts especially must not go beyond a very narrow scope of review, for these preliminary [injunction] decisions necessarily entail very delicate trial balancing.").

We follow the traditional path of limited review in this appeal. We do not decide any of the ADA issues definitively, and ask only whether the district court abused its discretion in concluding that Mr. Reeves was entitled to a preliminary injunction. Importantly, "[t]he application of [the abuse of discretion standard] recognizes the range of possible conclusions the [district court] may reach." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc). It "allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." *Id.* (citations and internal quotation marks omitted).

Given the procedural posture of the case and the limited scope of review, we address only the issues raised by the defendants. First, they argue that the district court abused its discretion because it "conflated the question of whether [Mr.] Reeves'[ ] disability was 'open and obvious' with the question of whether his alleged limitations as a result of his alleged disability were 'open and obvious.'" Appellants' Br. at 24. Second, they contend that the district court abused its discretion in finding that Mr. Reeves' need for an accommodation was "open and obvious." *See id.* at 41–51. In this respect, they assert that the district court clearly erred in finding (1) that Mr. Reeves is a qualified individual with a disability, (2) that he was excluded from or denied access to a public benefit, and (3) that his need for an accommodation was "open and obvious." *See id.* at 32–51. Third, the defendants maintain that the equitable preliminary injunction factors weighed against Mr. Reeves rather than in his favor. *See id.* at 51–53.

A

In a series of cases, the Fifth Circuit has held that, to establish a Title II ADA claim for failure to provide a reasonable accommodation, a plaintiff must show that the entity knew of his disability and its consequential limitations, either because the plaintiff requested an accommodation *or* because the nature of the limitation was open and obvious. *See, e.g., Cadena v. El Paso Cnty.*, 946 F.3d 717, 724 (5th Cir. 2020); *Windham v. Harris Cnty.*, 875 F.3d 229, 236–37 (5th Cir. 2017). Relying on *Windham*, the defendants argue that the district court conflated the question of whether Mr.

Reeves' disability was open and obvious with the question of whether the limitations resulting from that disability were open and obvious.

We do not have any published opinions on whether there is an "open and obvious" method for accommodation claims under Title II of the ADA. Assuming without deciding that cases like *Windham* lay out the correct ADA principle, the district court did not conflate Mr. Reeves' disability with the limitations flowing from that disability. It dealt with both issues separately and addressed them over eight pages of its order. *See* D.E. 83 at 27–34. For example, the court discussed numerous notations by ADOC employees in Mr. Reeves' prison file. The employees wrote that Mr. Reeves had "poor communication," was "easily confused," and had "trouble processing information." *Id.* at 30–31. An ADOC counselor also noted that Mr. Reeves reads at "probably 4th [to] 5th grade level." *Id.* at 31. These observations, which are distinct from notations that Mr. Reeves was "slow" and had a "learning disability," set out the limitations that resulted from his disability. They also show that ADOC employees were sufficiently aware of the limitations to note them in Mr. Reeves' file.

The district court touched on both Mr. Reeves' disability and its limitations, and its order demonstrates why it found that the defendants specifically knew of the resulting limitations (as opposed to merely Mr. Reeves' intellectual disability). The court did not clearly err (or otherwise abuse its discretion) in finding that the defendants knew of Mr. Reeves' limitations.

B

We now turn to the defendants' related argument that the district court clearly erred in finding that Mr. Reeves' need for an accommodation was open and obvious. The district court relied on a case from the Southern District of Georgia, *Arenas v. Georgia Department of Corrections*, No. CV416-320, 2020 WL 1849362 (S.D. Ga. Apr. 13, 2020), for the proposition that absent a request for an ADA accommodation, Mr. Reeves can succeed on his ADA claim only "if his disability, limitations, and need for an accommodation were 'open, obvious, and apparent.'" D.E. 83 at 27 (quoting *Arenas*, 2020 WL 1849362, at *12). As noted, we have never addressed whether Title II of the ADA can be satisfied in an accommodation case by an "open and obvious" disability and its limitations. Because it is not necessary to weigh in on this question definitively to decide this case, we do not opine on it today. Assuming again without deciding that *Arenas* and cases pronouncing similar propositions, *see, e.g., Windham*, 875 F.3d at 236–37, are correct, the district court's findings in Mr. Reeves' case were not clearly erroneous.[6]

The district court based its "open and obvious" determination on numerous pieces of evidence in the record. The court

[6] The defendants do not argue that the "open and obvious" method is incorrect under the ADA. They instead assert that the district court made clearly erroneous findings in support of its conclusion that Mr. Reeves' need for an accommodation was open and obvious. So we leave the question of the application of an "open and obvious" method for another day.

looked at all the notations by ADOC staff in Mr. Reeves' prison file, which demonstrated knowledge that Mr. Reeves had difficulties processing information and trouble reading. The defendants argue that these notations were outdated and therefore stale, but "[a] suggestion that . . . evidence is too old goes to its relevance and to its weight," and "[a]ny question as to the weight to be accorded a relevant document is a matter for the [fact finder]." *Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d 1033, 1038 (2d Cir. 1992).

In any event, the district court did not consider these notations in isolation. The court also relied on a 2015 inmate request slip which showed that Mr. Reeves had received some paperwork to sign that he did not understand. He wrote in his slip that he "did not know" what the papers were and that he "wanted to have [them] read to [him]." D.E. 27-2.

The defendants say that this document was not an official ADA accommodation request and that it cannot establish that Mr. Reeves had an obvious need for an accommodation. In support of their position, the defendants rely on the testimony of Holman's ADA coordinator. The district court, of course, did not have to accept the testimony of the coordinator. And when asked by the court whether Mr. Reeves' "exact same language" would have been treated as an accommodation request if submitted on an ADA form, the coordinator said "yes." D.E. 78 at 126. Although the court expressly recognized that the slip was not a formal accommodation request, it found that the slip "memorialize[d] [Mr.] Reeves'[ ] verbal request for a reading accommodation which

ADOC staff either ignored or denied." D.E. 83 at 32. The defendants fail to explain why the district court could not have relied on the 2015 request, particularly in combination with the notations by ADOC staff in Mr. Reeves' prison file.

Furthermore, the district court had access to and relied on the memorandum filed by the Commissioner in April of 2018—just two months before the election form was distributed to Holman's death row inmates—in Mr. Reeves' federal habeas proceedings. *See id.* at 33 (citing *Reeves v. Dunn*, No. 1:17-cv-00061-KD-MU, D.E. 25 (S.D. Ala. Apr. 4, 2018)). In his response to the habeas petition, the Commissioner acknowledged the conclusions of several experts that Mr. Reeves "had impaired intellectual functioning and limited reading abilities." *Id.* The Commissioner specifically cited to findings that Mr. Reeves was "functionally illiterate, had an IQ of 71, and could read at only a 3rd grade level." *Id.* (internal quotation marks omitted). The district court was free to rely on these statements by the Commissioner in his memorandum given that both he and Mr. Reeves were parties to the habeas proceeding. *See Purgess v. Sharrock*, 33 F.3d 134, 143–44 (2d Cir. 1994); *United States v. Kattar*, 840 F.2d 118, 130–31 (1st Cir. 1988).

The defendants point to the fact that Mr. Reeves signed numerous medical request forms during his time in prison, and argue that because of these forms ADOC staff could not have known that he "could not read, write, or communicate his needs." D.E. 83 at 29. As the district court noted, however, "many of these forms also include notations that the document was reviewed with [Mr.

Reeves] . . . or that [he] confirm[ed] he had been 'fully informed' about what he was signing." *Id.* at 29 n.14 (citations omitted). Other forms included notations that Mr. Reeves had refused to sign. *See id.* Further still, some forms were unsigned, and others stated that they had been filled out by another person and just signed by Mr. Reeves. *See id.* These documents, then, merely show that the district court could have decided the issue differently. On this record, there is no clear error. *See Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) ("A finding that is plausible in light of the full record—even if another is equally or more so—must govern.") (citation and internal quotation marks omitted); *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

C

Next, we address the defendants' argument that the district court clearly erred in determining that Mr. Reeves is a qualified individual with a disability under the ADA. According to the defendants, Mr. Reeves "failed to prove that he suffers from an intellectual or cognitive disability sufficient to render him unable to make the nitrogen hypoxia election in June 2018." Appellants' Br. at 32.

The defendants contend that the error was the district court's alleged failure to explicitly mention evidence that they presented. But the fact that the district court did not expressly discuss all of their evidence in its order is not problematic. It is well-settled that a court is not required to exhaustively discuss every piece of

evidence or every argument presented by a party. "We do not insist that trial courts make factual findings directly addressing each issue that a litigant raises, but instead adhere to the proposition that findings should be construed liberally and found to be in consonance with the judgment, so long as that judgment is supported by evidence in the record." *United States v. $242,484.00*, 389 F.3d 1149, 1154 (11th Cir. 2004) (en banc) (citation and internal quotation marks omitted). *See also United States v. Tinker*, 14 F.4th 1234, 1241 (11th Cir. 2021) (stating that, despite the defendant's assertions, the district court was not required to address all mitigating evidence or every argument as to mitigation).

In their brief, the defendants detail the contrary evidence they presented to the district court. Again, this evidence shows only that the district court could have made a different finding. *See Anderson*, 470 U.S. at 573 (explaining that the clear error standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently"). Clear error requires much more than a different, plausible finding to compel reversal. On this record, the district court did not clearly err in finding that Mr. Reeves was a qualified individual under the ADA.

D

The defendants also challenge the district court's determination that Mr. Reeves was excluded from or denied access to a public benefit. The defendants argue that this finding was clearly

erroneous because Mr. Reeves failed to produce evidence that he lacked meaningful access to that benefit.[7]

According to the defendants, because Ala. Code § 15-18-82.1 gave inmates 30 days during which to elect nitrogen hypoxia and did not require the use of any particular form, Mr. Reeves cannot show that their failure to accommodate him prevented him from receiving the benefit of making the election. More particularly, they argue that they provided the form at the end of the election period and that the form was not the only writing by which Mr. Reeves could have made the election. They also note that Mr. Reeves had counsel throughout the statutory election period, and nothing prevented him from understanding that he should discuss the election decision with his attorneys.

Though the defendants may be correct that they did not have a statutory obligation to provide death row inmates with any election form, once they undertook to do so they were required to comply with the ADA. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603 n.14 (1999) (although the ADA does not require States

[7] In a single, conclusory sentence in the merits portion of their brief the defendants say that the district court clearly erred in finding that the ADOC provided a service subject to the ADA by voluntarily deciding to distribute the election form to Holman's death row inmates. *See* Appellants' Br. at 37. This sentence, unsupported by any legal argument whatsoever, is insufficient to present the issue for our review. *See, e.g., Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 682 (11th Cir. 2014) (explaining that appellants abandon an issue when they make only "passing references" to it in the argument section of their brief).

to "provide a certain level of benefits to individuals with disabilities[,] . . . States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide") (citation omitted). The district court relied on this established principle, and the defendants have not provided any persuasive argument why that constituted error.

The defendants also contend that the district court clearly erred in relying on Dr. Fahey's opinions "to find that [Mr.] Reeves'[ ] cognitive disability rendered him unable to understand the form" because there was contradictory evidence. *See* Appellants' Br. at 38. We disagree. Dr. Fahey testified that Mr. Reeves' reading comprehension level was at least ten grade levels below that required to understand the election form that the defendants provided. The defendants did not present expert testimony or other evidence that directly contradicted Dr. Fahey's testimony. As a result, they cannot show clear error.

E

Finally, the district court did not abuse its discretion in concluding that the equities in this case weighed in favor of Mr. Reeves. During the preliminary injunction proceedings, counsel for the defendants represented that the nitrogen hypoxia protocol would be "completely ready to go" within "the first three or four months of [2022]." D.E. 78 at 219. Weighing "this arguably short delay against the irreparable harm to [Mr.] Reeves if he is forced to face execution by a method he so greatly fears—and one he would not have chosen absent the ADOC's alleged ADA violation," the

district court determined that the equities favored Mr. Reeves. *See* D.E. 83 at 36.

There is no reversible error. Notably, this is not a case where a defendant has asked a district court to enjoin a state from executing him altogether, regardless of the method of execution. Mr. Reeves requested only that the court prevent the ADOC from executing him by any method other than the one he would have chosen but for the defendants' alleged violation of the ADA, pending resolution of his ADA claim.

It is also worth pointing out that the Alabama Legislature agreed on nitrogen hypoxia as a permissible method of execution in June of 2018. Three and a half years later, Alabama has yet to develop, let alone implement, a protocol for this method of execution. Any delay, then, in executing Mr. Reeves and any other death row inmate who elected nitrogen hypoxia is at this point attributable to Alabama. This fact certainly weighs against the defendants, and even if the issue is close the district court did not abuse its discretion in finding that the equitable preliminary injunction factors favored Mr. Reeves. *Cf. Doran*, 422 U.S. at 932 ("While we regard the issue as a close one, we believe that the issuance of a preliminary injunction . . . was not an abuse of the District Court's discretion.").

IV

Given the record in this case, the district court did not abuse its discretion in granting Mr. Reeves' motion for a preliminary

injunction. We therefore affirm the district court's order and deny the defendants' motion for a stay.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MATTHEW REEVES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 2:20-cv-027-RAH
	)	[WO]
JEFFERSON S. DUNN, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Plaintiff Matthew Reeves is an Alabama death row inmate in the custody of the Alabama Department of Corrections (ADOC) at Holman Correctional Facility.[1] On January 10, 2020, Reeves filed this lawsuit under 42 U.S.C. § 1983 and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq*. (ADA) against Defendants Jefferson Dunn, the Commissioner of the ADOC, and Terry Raybon, the Warden at Holman (collectively, the ADOC). Both defendants are sued in their official capacities.

[1] Holman is the primary correctional facility for housing death row inmates in Alabama and is the only facility in the state that performs executions.

In his Amended Complaint (Doc. 21), Reeves alleges the ADOC violated his rights under the ADA.[2] He seeks declaratory and injunctive relief.

This matter is before the Court on Reeves's Motion for Preliminary Injunction (Doc. 27), wherein Reeves seeks to enjoin the ADOC from executing him by any method other than nitrogen hypoxia before the conclusion of this litigation. The motion has been fully briefed (Docs. 42, 48), and the parties have submitted over two thousand pages of evidence. On December 9, 2021, the Court conducted an evidentiary hearing, during which it heard over seven hours of testimony and oral argument on the motion. Following this hearing, the parties submitted supplemental briefing in support of their respective positions. (Docs. 81, 82.) This matter is ripe for review.

For the following reasons, Reeves's motion for preliminary injunction is due to be granted.

II. BACKGROUND

A. Reeves's Capital Litigation History

In 1998, Reeves was convicted of murdering Willie Johnson during a robbery in the first degree. By a vote of 10–2, the jury recommended that Reeves be sentenced to death. The trial court followed the jury's recommendation.

[2] Reeves's Amended Complaint also alleged a violation of his constitutional rights under the Eighth Amendment. On November 24, 2021, the Court dismissed this claim. (Doc. 41.)

On appeal, the Alabama Court of Criminal Appeals affirmed Reeves's conviction and sentence. *Reeves v. State*, 807 So. 2d 18 (Ala. Crim. App. 2000). The Alabama Supreme Court denied Reeves's petition for certiorari review and on June 8, 2001, the appeals court issued a certificate of judgment. *Id*. Reeves's direct appeal concluded on November 13, 2001, when the United States Supreme Court denied his petition for a writ of certiorari. *Reeves v. Alabama*, 534 U.S. 1026 (2001).

In October 2002, Reeves filed a petition in the trial court for collateral relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. Reeves raised an *Atkins* claim in this petition. In *Atkins v. Virginia*, the Supreme Court held that executing a person with an intellectual disability violates the Eighth Amendment. 536 U.S. 304 (2002). In his petition, Reeves claimed that the *Atkins* decision prohibited his execution because he is intellectually disabled. In November 2006, the state circuit court held an evidentiary hearing on Reeves's claims. *See Reeves v. State*, 226 So. 3d 711, 722 (Ala. Crim. App. 2016). At this hearing, Reeves's medical expert, Dr. John Goff, testified that Reeves suffered from significantly subaverage intellectual functioning, while the State's expert, Dr. Glen King, testified that Reeves falls within the borderline range of intellectual functioning. The circuit court found that Reeves's intellectual functioning, while subaverage, was not so low that he would meet the first prong of his *Atkins* intellectual disability claim. It also found that Reeves failed to prove that he suffered from significant deficits in at least

two areas of adaptative functioning. On appeal, the Alabama Court of Criminal Appeals affirmed the circuit court's decision. *Reeves*, 226 So. 3d at 741. The Alabama Supreme Court denied Reeves's petition for a writ of certiorari, as did the United States Supreme Court. *Reeves v. Alabama*, 138 S. Ct. 22 (2017) (Sotomayor, J., dissenting).

Reeves then filed a federal habeas corpus petition, pursuant to 28 U.S.C. § 2254, again raising an *Atkins* claim. Ultimately, the district court denied Reeves's habeas petition, concluding that he was not entitled to relief on any of his claims. The district court did, however, grant Reeves a Certificate of Appealability with respect to the claim that his trial counsel was ineffective for failing to hire an expert to investigate his intellectual disability. *Reeves v. Dunn*, Case No. 1:17-cv-061-KD-MU, 2019 WL 12469769 (S.D. Ala. Jan. 8, 2019).

In May 2019, Reeves appealed the denial of his habeas petition to the Eleventh Circuit. *See Reeves v. Comm'r Ala. Dep't of Corr.*, No. 19-11779-P (11th Cir. 2019). The Eleventh Circuit affirmed the denial of Reeves's intellectual disability claim, but reversed on the issue of ineffective assistance of counsel at the penalty phase. *Reeves v. Comm'r*, 836 F. App'x 733 (11th Cir. 2020). The U.S. Supreme Court granted certiorari, reversed the Eleventh Circuit's decision, and remanded the case for further proceedings. *See Dunn v. Reeves*, 141 S. Ct. 2405 (2021). Thereafter, the Eleventh Circuit affirmed the district court's denial of habeas relief, concluding

Reeves's appeals. *See Reeves v. Comm'r Ala. Dep't of Corr.*, 855 F. App'x 657 (Mem) (11th Cir. 2021).

B. Backdrop of the Present Action

1. Nitrogen Hypoxia Becomes an Alternative Method of Execution

On June 1, 2018, Alabama Act 2018-353 went into effect. *See* 2018 Ala. Laws Act 2018-353; ALA. CODE § 15-18-82.1(b). This law grants death row inmates a single opportunity to elect that their execution be carried out by a new method called nitrogen hypoxia, in lieu of Alabama's default method, lethal injection. ALA. CODE § 15-18-82.1(b). The process requires any inmate who wants to elect nitrogen hypoxia to notify his or her warden of that choice in writing within thirty days after a certificate of judgment is issued affirming the inmate's conviction. *Id.* Inmates, like Reeves, whose certificates of judgment issued prior to June 1, 2018, had from June 1 until June 30, 2018, to elect nitrogen hypoxia in writing. *Id.* at § 15-18-82.1(b)(2).

Any writing from the inmate is sufficient under the statute. An inmate's failure to elect nitrogen hypoxia within the thirty-day period operates as a waiver of that method of execution. Other than requiring that a warden accept written elections from death row inmates during the statutory election period, the statutory language imposes no other duty—or restriction—on the ADOC. The statute's language does not preclude the ADOC from honoring a late election. Indeed, in its Answer to

Reeves's Amended Complaint, the ADOC admits that "Commissioner Dunn has the authority to alter, amend, or make exceptions to the protocol and procedures governing the execution of death-sentenced prisoners in the State of Alabama." (Doc. 21 at 2; Doc. 52 at 3.)

2. Distribution of the Election Form

On June 26, 2018, the attorneys with the Federal Defenders for the Middle District of Alabama's Capital Habeas Unit traveled to Holman to meet with their clients, notify them of the change in the law, and answer questions regarding nitrogen hypoxia. (Doc. 21 at 4.) During this meeting, the Federal Defenders provided a typewritten form that their clients could sign and submit to the warden to effectuate a nitrogen hypoxia election. (*Id*.) This "election form" read as follows:

> 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 execution by nitrogen hypoxia.
>
> Dated this _____ day of June, 2018.
>
> _____ _____
> Name/Inmate Number Signature

(Doc. 70-5.) After this meeting, many of the Federal Defenders' clients opted into nitrogen hypoxia. Some of them did not.

Sometime after this June 26, 2018 meeting, but before the statutory deadline of June 30, 2018, Holman's then-warden, Cynthia Stewart, obtained the Federal Defenders' election form and, at the direction of someone above her at the ADOC, instructed Correctional Captain Jeff Emberton to distribute a copy of the form along with an envelope to every inmate on Holman's death row. (Doc. 27 at 15; Doc. 42 at 33.) As he handed out the forms, Emberton claims he told inmates that the law had changed and that if they wanted to elect nitrogen hypoxia, they needed to fill out the form, put it in the envelope, and that he would return later to collect any signed forms. (Doc. 21 at 4; Doc. 42-4 at 124, 193–94.) Numerous inmates used the form to elect nitrogen hypoxia. A few others elected nitrogen hypoxia by a different writing. Many inmates, including Reeves, made no election at all.

3. No Execution Protocol Developed for Nitrogen Hypoxia

When the Alabama Code was amended to add nitrogen hypoxia as an alternative method of execution, and throughout the June 2018 election period, the ADOC had not yet developed a protocol for performing nitrogen hypoxia executions. And as of the date of this order, "[a]lthough the ADOC has been working on a hypoxia protocol for more than three years, there is still no working protocol in place . . . ." (Doc. 23 at 37.) During oral argument on the pending motion, counsel for the ADOC represented that she expects to "have everything completely ready to go" within "the first three or four months" of 2022. (Doc. 78 at

219.) Based on this representation, the Court understands that the ADOC expects to be able to perform executions by nitrogen hypoxia by the end of April 2022.

4. Reeves's ADA Claim

It is undisputed that Reeves did not elect, or attempt to elect, nitrogen hypoxia during the 30-day statutory opt-in period. In his Amended Complaint, Reeves claims his "cognitive deficiencies" rendered him unable to "personally make the decision to elect a method of execution" because he could not read and understand the election form provided to him by the ADOC "absent reasonable accommodation." (Doc. 21 at 5.)

Reeves claims that, with IQ scores in the upper 60s and low 70s, his general cognitive limitations and severely limited reading abilities rendered him unable to read and understand the election form without assistance. (*Id.* at 6.) His inability to understand, Reeves alleges, prevented him from enjoying the benefits of the form and left him unable to elect nitrogen hypoxia before the statutory deadline. (*Id*. at 7–8.) Because Reeves asserts he could not receive the benefit of the form without a reasonable accommodation, he brings a claim against the ADOC under Title II of the ADA.

Title II bars discrimination by reason of disability from the "benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. Reeves alleges that in handing out the election form, the ADOC established a public program

or service, the benefits from which he was excluded due to his intellectual disability. (Doc. 21 at 7–8.) Reeves contends that the ADOC should have provided reasonable accommodations to aid Reeves in understanding the form and its implications. (*Id.* at 11–12.) He asserts that the ADOC could have, among other things, read the form to him, given him more time to understand it, performed a comprehension check, or used assistive technology. (*Id.* at 7.)

Reeves seeks two kinds of relief. The first is declaratory: he asks the Court to declare the ADOC "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." (Doc. 21 at 14.) The second is equitable: he asks the Court to order the ADOC to implement a reasonable accommodation for the opt-in, and to enjoin the ADOC from executing him "by lethal injection to permit him time to avail himself of the reasonable accommodations developed and implemented as to the nitrogen hypoxia opt-in and the Election Form." (*Id.*)

On September 9, 2021, the ADOC moved to dismiss Reeves's Amended Complaint. (Doc. 23.) Days later, the Alabama Attorney General moved the Alabama Supreme Court to set Reeves's execution date. (Doc. 25.) Reeves filed the pending Motion for Preliminary Injunction on November 4, 2021, asking this Court to enjoin the ADOC from executing him by any method other than nitrogen hypoxia

while his ADA claim remains pending. (Doc. 27 at 2.) On November 18, 2021, the Alabama Supreme Court scheduled Reeves's execution for January 27, 2022. (Doc. 37 at 3–4.) The Court turns now to Reeves's Motion for Preliminary Injunction.

III. JURISDICTION AND VENUE

The Court has original subject matter jurisdiction of this case pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 2201, and 42 U.S.C. § 12133.

Personal jurisdiction and venue are uncontested, and the Court concludes that venue properly lies in the Middle District of Alabama. *See* 28 U.S.C. § 1391.

IV. DISCUSSION

A. Standing

As an initial matter, the Court will address the ADOC's argument that Reeves lacks Article III standing to bring his ADA claim. (Doc. 42 at 5.) In its opposition to Reeves's Motion for Preliminary Injunction, the ADOC asserts that Reeves has not established an injury-in-fact, fails to show that any alleged injury was caused by the ADOC, and that this Court lacks the authority to redress Reeves's claimed injury. (*Id.* at 5–17.)

In his reply to the ADOC's opposition, Reeves appears perplexed by the ADOC's contention that he lacks standing given that the Eleventh Circuit held otherwise in a similar case several months ago. Reeves and the ADOC agree, as does this Court, that the standing issues in this lawsuit are nearly identical to those

in the Willie B. Smith III litigation, wherein Smith advanced the same ADA claims regarding the ADOC's distribution of the election form. *See Smith v. Dunn*, Case No. 19-CV-00927-ECM (M.D. Ala. 2021). Yet, the ADOC asks this Court to adopt the factual findings of the district court in the *Smith* litigation, and in turn, ignore the holding made by the Eleventh Circuit on appeal.

In *Smith*, the district court sua sponte dismissed Smith's ADA lawsuit after finding he lacked Article III standing to bring his claim. *Id.* On appeal, the Eleventh Circuit unanimously vacated the district court's decision, holding that Smith had sufficiently alleged an injury, established causation, and that his injury was redressable by an order from the district court. *Smith v. Comm'r, Ala. Dep't of Corr.,* Case No. 21-13298, 2021 WL 4817748 (11th Cir. 2021). The ADOC chose not to seek a rehearing or appeal to the United States Supreme Court.

The ADOC urges this Court to disregard the Eleventh Circuit's holding in *Smith* because the unpublished opinion is not binding (Doc. 42 at 17), it offers "little . . . persuasive value" (Doc. 81 at 7), and was issued following an "extremely compressed time schedule" (Doc. 42 at 17–18). Regardless, the Eleventh Circuit's *Smith* decision is, at a minimum, persuasive to this Court and is factually indistinguishable. The Court sees no reason to depart from that holding. Reeves, like Smith, has alleged an injury, established causation, and his alleged injury is

redressable by an order from this Court.[3] Now on to the matter of a preliminary injunction.

B. Preliminary Injunction

The purpose of a preliminary injunction is to "preserve the relative positions of the parties until a trial on the merits can be held." *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983). A preliminary injunction "is meant to keep the status quo for a merits decision, not replace it." *Brown v. Sec'y, U.S. Dep't of Health & Human Servs.,* 4 F.4th 1220, 1225 (11th Cir. 2021).

Reeves is entitled to a preliminary injunction if he demonstrates that: (1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the threatened injury outweighs the harm the injunction would cause the other litigant; and (4) if issued, the injunction would not be adverse to the public interest. *Chavez v. Fla. SP Warden*, 742 F.3d 1267, 1271 (11th Cir. 2014). However, "when the [State] is the party opposing the preliminary injunction, its interest and harm merge with the public interest," and so the third and fourth elements are the same. *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020) (citing *Nken v. Holder* 556 U.S. 418, 435 (2009)).

[3] As in *Smith*, Reeves's alleged injury is his being excluded from the benefit of electing what he believes is a less painful method of execution. (Doc. 21 at 7-8.) And like Smith, Reeves has alleged that his injury is the result of the ADOC developing and implementing a program without providing an accommodation for Reeves's cognitive disability. (*Id.* at 7.) As to redressability, the Eleventh Circuit held in *Smith* that the ability of this Court to "fashion effective relief for a violation of federal law is not limited by what state law permits." *Smith,* 2021 WL 4817748 at *4.

A preliminary injunction is an "extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion for each prong of the analysis." *America's Health Ins. Plans v. Hudgens*, 742 F.3d 1319, 1329 (11th Cir. 2014) (quotations and citation omitted). Reeves, as the movant, must satisfy his burden on all requirements "by a clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam).

For the following reasons, Reeves has successfully demonstrated he is entitled to a preliminary injunction.

1. Substantial Likelihood of Success on the Merits

Reeves alleges that the ADOC violated Title II of the ADA by failing to reasonably accommodate his disability in the distribution and use of the election form. As a result, Reeves argues that he was unable to utilize the form to exercise his statutory right to elect nitrogen hypoxia as his preferred method of execution.

Title II of the ADA bars discrimination by reason of disability from the "benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. Title II supports claims under three theories of discrimination: intentional discrimination, disparate treatment, or a failure to make reasonable accommodations. *See Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1212 n.6 (11th Cir. 2008); *see also Friedson v. Shoar*, 479 F. Supp. 3d 1255, 1263 n.6 (M.D. Fla. 2020) (citing the same). To succeed on a Title II claim under a failure to

reasonably accommodate theory, a plaintiff must demonstrate that (1) he is a qualified individual with a disability; (2) he lacked meaningful access to the benefits of a public entity's services, programs, or activities by reason of his disability; and (3) the public entity failed to provide a reasonable accommodation for his disability. *Todd v. Carstarphen*, 236 F. Supp. 3d 1311, 1327–28 (N.D. Ga. 2017) (citing *Nadler v. Harvey*, 2007 WL 2404705, at *5 (11th Cir. 2007)); *Redding v. Nova Se. Univ., Inc.*, 165 F. Supp. 3d 1274, 1299 (S.D. Fla. 2016) (stating that the ADA "requires only those accommodations that are necessary to ameliorate a disability's effect of preventing meaningful access to the benefits of, or participation in, the program at issue.").

Reeves argues that he has satisfied his burden and shown by clear evidence that he is substantially likely to succeed on all three elements. The ADOC disputes Reeves's ability to prove any of these elements. The Court addresses each element in turn.

a. Qualified Individual with a Disability

To sustain an ADA claim, Reeves must demonstrate that he is a (1) qualified individual with (2) a disability cognizable under the statute. There is a substantial likelihood that he is both.

The ADA defines "disability" as a "physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A).

Such activities include "speaking, breathing, learning, reading, concentrating, thinking, communication, and working." *Id.* at § 12102(2)(A). The term "disability" is to be construed broadly. *Id.* at § 12102(4)(A).

Although the ADOC contests that Reeves suffers from a disability, the record contains evidence that he is indeed disabled under the broad construction of the ADA. Previous neurological testing found Reeves's IQ to be between 68 and 71. (Doc. 44-3 at 1; Doc. 44-4 at 1.) Because he raised an *Atkins* claim in both his state post-conviction and federal habeas litigation, Reeves was independently assessed by a neuropsychologist retained by his own counsel as well as one retained by the State of Alabama.

In 2006, when Reeves was 28 years old, Dr. John Goff administered numerous tests, including, among others, the Wechsler Adult Intelligence Scale and the Speech Sounds Perception Test. (Doc. 27 at 9.) Dr. Goff determined that Reeves had an IQ of 71, was "essentially illiterate," and that it was "quite apparent" Reeves had never adequately learned to read or write. (Doc. 27-28.) Dr. Goff ranked Reeves in the 5th percentile for vocabulary, the 1st percentile for letter sequencing, and the 0.4th percentile for comprehension. (*Id.*) The State's expert, Dr. Glenn King, performed similar testing and determined that Reeves had a full-scale IQ score of 68, could read

and spell at a 5th grade level, and had borderline intellectual functioning, but opined that he did not believe Reeves was "mentally retarded."[4] (Doc. 27-5 at 10.)

More recently, in support of his ADA claim, Reeves retained Dr. Kathleen Fahey, a speech pathologist who conducted a three-hour, in-person evaluation of Reeves on December 1, 2021. Dr. Fahey likewise evaluated the election form itself, running its text through software programs designed to calculate the readability of the language used in the form. Dr. Fahey testified at the December 9, 2021 evidentiary hearing as to her findings and opinions.

Following her evaluation of Reeves, Dr. Fahey determined that Reeves has "a significant and severe language disorder." (Doc. 78 at 38.) She testified that Reeves's language competency was that of someone between the ages of 4 and 10. (*Id.* at 39.) She also determined that his reading accuracy was at the 4th grade level and his reading comprehension was at the 1st grade level. (*Id.*) The election form, on the other hand, required an 11th grade reading level to be understood. (*Id.* at 33–34.) All told, Dr. Fahey testified that in her professional opinion, Reeves's language disorder rendered him unable to comprehend the election form. (*Id.* at 39.)

[4] As the Supreme Court noted in *Hall v. Florida*, both law and medicine have now moved away from the terms 'mentally retarded' and 'mental retardation.'" *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1303 n.1 (11th Cir. 2015) (citing *Hall v. Florida*, 572 U.S. 701, 704–05 (2014)).

For its part, the ADOC presented no evidence to contradict the opinions of Dr. Fahey.[5] In its supplemental brief on the pending motion, the ADOC calls Dr. Fahey's conclusions "incredible," pointing out that her opinion of Reeves remained unchanged even after hearing a recording of Reeves reading aloud to his mother a letter that was scored at a 5th grade reading level. (Doc. 81 at 20–22.) But the ADOC did not retain its own expert to rebut Dr. Fahey's conclusions, or offer expert testimony of any sort, and does not contest the findings of Dr. Goff or Dr. King.[6] Instead, the ADOC repeatedly points out that, despite the opinions of these doctors, no court has ever found Reeves to be intellectually disabled under the standard set out in *Atkins v. Virginia*. This argument, however, improperly conflates Alabama's *Atkins* standard[7] with that of the ADA's rather broad, and much lower, standard.

The bar to be considered "disabled" under the ADA is not a high one. *See, e.g.*, *Mazzeo v. Color Resolutions Int'l, LLC*, 746 F.3d 1264, 1268 & n.2 (11th Cir.

[5] During her cross examination of Dr. Fahey, counsel for the ADOC attempted to dispute Dr. Fahey's findings as to the readability of the election form. Counsel indicated that she had performed her own evaluation using the same software programs and the results showed the form read at a 10th grade level, rather than 11th grade as Dr. Fahey found. (Doc. 78 at 51-52.) This assertion within a question presented by counsel is not evidence.

[6] The ADOC cites to numerous medical request forms it claims were filled out by Reeves as evidence that he is not disabled. Because these records have not been interpreted by an expert or given context as to the circumstances in which they were completed, they are more appropriately weighed as evidence regarding whether or not Reeves's disability was obvious to the ADOC rather than evidence that he was not, in fact, disabled.

[7] "[T]o be intellectually disabled under *Atkins*, a defendant must prove by a preponderance of the evidence: (1) 'significantly subaverage intellectual functioning (an IQ of 70 or below),' (2) 'significant or substantial deficits in adaptive behavior,' and (3) that both the subaverage intellectual functioning and the deficits in adaptive functioning manifested before the age of eighteen." *Smith v. Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330, 1340 (11th Cir. 2019) (quoting *Ex Parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002)).

2014) (explaining that Congress instructed that "the establishment of coverage under the ADA should not be overly complex nor difficult" (quoting H.R. Rep. No. 110-730, at 9 (2008))). Given the broad construction the ADA demands, Reeves is likely to win on this point. Though he may not have been found to be so severely impaired to qualify for relief under *Atkins*, the ADA's disability standard is much lower. The evidence presented at this stage demonstrates that Reeves's cognitive impairments and low intellectual functioning affect several major life activities, such as reading, writing, and comprehension, placing Reeves under the ambit of the ADA.

Although he is likely to succeed in demonstrating his disability, Reeves must also demonstrate that he is a qualified individual under the ADA. A "qualified individual," as defined by the ADA, is one who "with or without reasonable modifications to rules, policies or practices, . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). To be a qualified individual, Reeves must demonstrate that the prison was offering a program, service, or activity in which he was eligible to participate.[8]

The parties disagree on whether a program, service, or activity was offered here. Reeves maintains that then-Warden Stewart established a "policy, protocol,

[8] Prisons are "public entities," which the statute defines as "any department, agency, . . . or other instrumentality of a State . . . or local government." 42 U.S.C. § 12131(1)(B); *see also Yeskey*, 524 U.S. 206 (holding that state prisons are "public entit[ies]" under Title II of the ADA).

and program whereby corrections staff were instructed to distribute the Election Forms . . . to all death row prisoners." (Doc. 21 at 4). The ADOC disagrees that its distribution of the election form constituted a public benefit or service under the ADA, noting that although then-Warden Stewart directed that the forms be handed out, she "does not recall who told her to pass out the forms, when that instruction was given, or the circumstances of that conversation." (Doc. 42 at 33.) In briefing and during oral argument, counsel for the ADOC argued that use of the election form was not required to effectuate a nitrogen hypoxia election under the statute and that the form's distribution was not "a formalized process" (Doc. 78 at 207), but rather was merely a "courtesy at the end of the election period" (Doc. 42 at 31).

The ADOC's framing of what constitutes a program, service, or activity under the ADA is far too narrow. As courts across the country have long emphasized, "[t]he ADA, as a remedial statute, must be broadly construed to effectuate its purpose." *Soto v. City of Newark*, 72 F. Supp. 2d 489, 493 (D.N.J. 1999) (citations omitted); *see also Niece v. Fitzner*, 922 F. Supp. 1208, 1217 (E.D. Mich. 1996) (explaining that, "to give effect to the ADA's purpose of eliminating discrimination . . . most courts have given a broad reading to the term 'service.'" (citations omitted)). Activities as diverse as planning municipal weddings,[9]

[9] *Soto*, 72 F. Supp. 2d at 494.

facilitating prisoner access to phone calls,[10] or holding county quorum meetings[11] have all been found to constitute "services" under the ADA.

Department of Justice regulations, promulgated pursuant to the ADA, are similarly expansive.[12] The Department instructs that Title II and its own regulations apply "to all services, programs, and activities provided or made available by public entities." 28 C.F.R. § 35.102(a). At least one court interpreted this "broad language [as] intended to 'appl[y] to *anything a public entity* does.'" *Yeskey v. Penn. Dep't of Corrs.*, 118 F.3d 168, 171 (3d Cir. 1997) (second alteration in original) (emphasis added) (quotation and citations omitted).

The record here makes clear the non-trivial nature of the ADOC's decision to distribute the election form. Captain Emberton took over one hundred copies of this form, with over one hundred envelopes, and gave every inmate on death row one of each. (Doc. 42-4 at 128-131.) Emberton says he made an "announcement on each tier" of the area where death row inmates are housed that the law had changed and that they now had a new choice of execution method. (Doc. 78 at 194.) He was directed to do this by Holman's then-warden, who herself was directed by someone above her in the ADOC's chain of command, reasoning that the form's distribution

[10] *Niece*, 922 F. Supp. at 1218–19.

[11] *Layton v. Elder*, 143 F.3d 469, 472–73 (8th Cir. 1998).

[12] Title II of the ADA directs the Attorney General to "promulgate regulations in an accessible format that implement [that Title]." 42 U.S.C. § 12134.

was in the "best interest" of the inmates. (Doc. 42-4 at 176.) Whether formal or informal, or merely a courtesy, the record at this stage sufficiently establishes that the ADOC's distribution of the election form was just the sort of "service," "program," or "activity" the ADA, in its broad sweep, was intended to include.

Treating the form's distribution as a "service," Reeves must still demonstrate that he was eligible to receive that service. *See* 42 U.S.C. § 12131(2) (defining a qualified individual as one who "meets the essential eligibility requirements for the receipt of services"). Reeves argues that he meets the eligibility requirements because the election form "was provided to all death row inmates," and he is a death row inmate. (Doc. 27 at 14.)

The record confirms Reeves's contention. Captain Emberton handed out a form to every inmate on death row. Nothing in the record indicates that Emberton attempted to discern whether a particular inmate wanted to opt into nitrogen hypoxia before handing him a form. His only criterion, and thus the only apparent eligibility requirement for this service, was whether an inmate was on death row at Holman at the time of the form's distribution. Reeves, a death row inmate in June 2018, was clearly eligible to receive an election form and participate in the benefits tied to the form and its distribution. Reeves is likely to succeed in showing that he is a qualified individual with a disability under the ADA.

b. Lack of Meaningful Access Due to Disability

Though the Court agrees that Reeves can likely show he is a qualified individual with a disability under the ADA, he must still demonstrate that he lacked meaningful access to the benefits of the service for which he was eligible. *Alexander v. Choate*, 469 U.S. 287, 301 (1985) ("[A]n otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers."); *see also Mason v. Corr. Med. Servs., Inc.*, 559 F.3d 880, 888 (8th Cir. 2009) (explaining that to bring a valid Title II claim, a plaintiff "must specify a benefit to which he was denied meaningful access based on his disability").

"However, mere difficulty in accessing a benefit is not, by itself, a violation of the ADA." *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1216 (N.D. Ala. 2020) (citing *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1088 (11th Cir. 2007)). Indeed, "equal access is not the standard under the law." *Medina v. City of Cape Coral*, 72 F. Supp. 3d 1274, 1280 (M.D. Fla. 2014); *see also A.M. ex rel. J.M. v. NYC Dep't of Educ.*, 840 F. Supp. 2d 660, 680 (E.D.N.Y. 2012) ("'Meaningful access' . . . does not mean 'equal access' or preferential treatment.").

Here, Reeves must identify a specific benefit the form provided, and then demonstrate that he lacked meaningful access to that benefit. *Mason*, 559 F.3d at 888. Reeves is substantially likely to satisfy both requirements.

First, Reeves can likely demonstrate that the election form provided specific benefits. Reeves argues that those benefits include (1) notice of the new method of execution to the inmates (Doc. 21 at 4), (2) ease and ability of electing the new method of execution, (3) "avoiding a substantially painful execution via lethal injection" (Doc. 27 at 16), and (4) reservation of an inmate's right to "challenge the constitutionality of any [execution] protocol" (Doc. 27 at 15–16).

While there is general agreement between the parties that the form at least made a nitrogen hypoxia election easier, the ADOC argues that the form itself provided no benefit to Reeves because the benefits of notice and choosing one's method of execution were provided by the state statute, not by the form. Reeves's statutory right to elect nitrogen hypoxia vested on June 1, 2018, the day ALA. CODE § 15-18-82.1 became effective. That right continued, unimpeded, until the statutory period expired. During that time, the ADOC asserts, Reeves had the ability to elect nitrogen hypoxia by submitting any writing he wished. (Doc. 42 at 31.)

True enough, the form was not required to effectuate an election. But also true is that the statute did not require the ADOC to distribute the election form. 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. But when the ADOC voluntarily made the decision to distribute a form which not only

made electing nitrogen hypoxia easier, but also included notice about the change in the law and reservation of rights language beyond what the state statute required, 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.

But even where Reeves adequately defines the form's benefits, he must also demonstrate that he lacked meaningful access to those benefits. To do so, Reeves relies on Dr. Fahey's testimony to show that his cognitive disability rendered him unable to understand the election form. Dr. Fahey evaluated the readability of the form at an 11th grade level (Doc. 78 at 33–34) and testified that Reeves's "severe" language disorder prevented him from comprehending the form's language (*Id.* at 39). She also determined Reeves's literacy abilities to fall between the 1st and 4th grade levels. (*Id.*) Other experts have evaluated Reeves's reading ability as high as 5th grade level. No matter his true ability, all evaluations fall far below the 11th grade readability level Dr. Fahey determined the form to require. And this evidence is largely unrebutted—the ADOC denies that the form's required reading level was that high, but it produced no actual evidence to contradict Dr. Fahey's findings.[13]

[13] The ADOC produced no evidence that the form read at any level below the 11th grade level other than ADOC counsel's aforementioned assertion that her own testing revealed the form read at a 10th grade level.

Despite Reeves's inability to comprehend the election form, the ADOC notes that the record contains support for the proposition that Reeves did receive information about the form sufficient to satisfy the ADOC's obligation to provide him meaningful access. When he distributed the election forms, Captain Emberton says that he explained the form's purpose and notified the inmates that because the law had changed, they now had a new choice of execution method. (Doc. 42-4 at 148.)

Although the ADOC argues that Emberton's explanation made clear what the form was for and how it was to be utilized, there is no evidence that Emberton's explanation was directed at or heard by Reeves. During the December 9, 2021 evidentiary hearing, Emberton testified that he announced the form's purpose to groups of inmates on "each tier" of the death row housing area, not to each inmate individually. In fact, when deposed, he testified that if an inmate was not present during the form's distribution, that inmate would not have received a copy or heard his explanation. (Doc. 78 at 189.) Or if an inmate was sleeping, Emberton says he simply slipped the form through the bars of the cell, knocked the bars, and told the inmate he had something to fill out. (Doc. 42-4 at 151.) Contrary to the ADOC's suggestion, this is not the sort of "explanation" that would have provided *meaningful* access to the form's benefits.

What's more, Reeves stated in his sworn declaration that it was not actually Emberton who gave him the election form, but rather a "hall runner," and that he never spoke to Emberton about the form or the new law. (Doc. 27-14.) Instead, Reeves avers, had he understood the form's language, he would have signed and timely submitted it in June 2018. (*Id*.)

Although true that Reeves was not entitled to a more comprehensive explanation of the form's legal or factual implications than his fellow inmates received, *see A.M. ex rel. J.M.*, 840 F. Supp. 2d at 680 ("'Meaningful access' . . . does not mean . . . preferential treatment."), he was entitled to a basic understanding of the form such that he could actually utilize it and meaningfully access its benefits. Regardless of the efficacy of Emberton's "explanation," and whether or not Reeves even heard it, an inmate who could read and comprehend the election form would have been able to utilize and benefit from the form. But Reeves, because of his disability, avers that he did not have even a rudimentary understanding of the form's language or its purpose. As a result, it appears likely Reeves could prove that he lacked meaningful access to the form's benefits of notice, ease and ability of election, and reservation of rights.

c. Failure to Provide Reasonable Accommodation

Having found that Reeves is likely to succeed in showing that he was denied meaningful access to the election form's benefits, Reeves must now establish that

he was denied a reasonable accommodation as required by the ADA. If Reeves's disability prevented him from receiving the form's benefits, the ADOC is required to "provide reasonable accommodations to ensure that [he] is permitted access to the same benefits and services as others." *Arenas v. Ga. Dep't of Corr.*, Case No. CV416-320, 2020 WL 1849362, at *11 (S.D. Ga. Apr. 13, 2020). However, no duty to provide such accommodations is triggered before a claimant makes a specific demand for one. *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 (11th Cir. 1999). The claimant himself must explain what it is that he requires—public entities are not required to "guess at what accommodation they should provide." *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999); *see also Hedberg v. Ind. Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995) (noting the "ADA does not require clairvoyance").

It is undisputed that Reeves did not make any such request of the ADOC. (Doc. 27 at 18, 19.) Absent a request, Reeves can only succeed if his disability, limitations, and need for an accommodation were "open, obvious, and apparent." *Arenas*, 2020 WL 1849362, at *12; *see also Nattiel v. Fla. Dep't of Corr.*, 2017 WL 5774143, at *1 (N.D. Fla. Nov. 28, 2017) (explaining a plaintiff does not have to request an accommodation if "the defendant otherwise had knowledge of an individual's disability and needs but took no action").

Reeves argues that the ADOC could have accommodated his disability by, among other things, reading the form to him, giving him more time to understand it, performing a comprehension check, or using assistive technology. (Doc. 21 at 7.) But because Reeves did not request an accommodation, his need for one must have been obvious to the ADOC. Reeves is likely to successfully demonstrate that it was.

Reeves builds his argument on three key assertions: (1) the ADOC was on notice that Reeves was cognitively disabled and struggled to read based on numerous records in his prison file, dating back to his first week in custody (Doc. 27 at 10, 21), (2) Reeves had made a prior request for reading assistance (Doc. 27-1), and (3) the ADOC was on notice of his low IQ scores and inability to read because one of the defendants here, Commissioner Jefferson Dunn, was the defendant in Reeves's federal habeas litigation. *See Reeves,* 2019 WL 12469769 at *1.

The ADOC attempts to rebut these assertions by pointing to Reeves's inmate record and his behavior while incarcerated to show that Reeves knew how to read, write, and effectively communicate. The ADOC notes that for years, its staff evaluated Reeves's intellectual functioning, memory, speech, and concentration as "normal" and "good," and his behavior as "rational." (Doc. 42 at 35; Doc. 42-5 at 111, 112, 122.) The ADOC argues the record also proves Reeves's history of understanding and completing forms and other paperwork. During his time at Holman, Reeves signed numerous forms, many containing legal jargon and

complicated medical terminology (*id.* at 36; Doc. 42-5 at 7, 10),[14] and filled out numerous medical request forms (Doc. 42-5 at 27, 49, 71, 80, 85, 193, 226).[15] Completing and signing these forms, the ADOC argues, could not have given ADOC staff the impression that Reeves could not read, write, or communicate his needs. (Doc. 42 at 38–39.)

To further support its position, the ADOC presented testimony at the December 9, 2021 evidentiary hearing from several of its non-medical staff members who stated they had no reason to believe Reeves suffered from a cognitive disability. Captain Emberton, Deputy Commissioner Cheryl Price, Holman ADA Coordinator Richard Lewis, and Correctional Officer Issac Moody each testified that there was no indication that Reeves struggled to read things, that he spoke and communicated clearly, and that he had never requested help with understanding a document. (Doc. 78 at 84, 98, 121, 138–39, 178–79.) They further testified that if Reeves needed an

[14] Worth noting is that many of these forms also include notations that the document was reviewed with the patient (Doc. 42-5 at 40, 42, 87) or that the inmate confirms he had been "fully informed" about what he was signing (*E.g., Id.* at 132). Still others include notations that Reeves refused to sign the form (Doc. 42-6 at 64, 65, 87, 90, 98, 99, 100, 110), or the form had no signature (*Id*. at 86, 88, 89, 91, 92, 101) or was filled out by another person and signed by Reeves (*Id*. at 97, 102, 107, 138, 139, 140, 149, 150).

[15] Although the ADOC cites to dozens of forms it purports were filled out by Reeves, there is a question as to whether all of these forms were written by Reeves himself. The parties agree that the 2015 inmate request slip (Doc. 27-1) was drafted by Reeves. When comparing numerous other request forms with the handwriting on the inmate request slip, it appears that Reeves may not have been the one who drafted those forms. (*Compare* Doc. 42-5 at 14, 15, 16, 29, 31, 38, 52, 97, 129 *with* Doc. 42-5 at 27, 49, 50, 71, 180, 185, 193, 226.) Reeves having another inmate fill out prison forms on his behalf is consistent with testimony from Captain Emberton in the *Smith* litigation that death row inmates often "help each other out" because they see it as "demeaning and degrading" to ask staff for help. (Doc. 42-4 at 133.) Neither party has made an argument or presented evidence that these forms were or were not drafted by Reeves, but with the benefit of additional discovery, some light could be shed on this observed discrepancy.

accommodation, he could have found information on how to request one in the prison's ADA Handbook; a copy of which was kept in the prison library and was also available online. (Doc. 78 at 123, 179.)[16]

Although records in Reeves's inmate file do indeed show that he was routinely evaluated as normal, Reeves points to numerous other documents in his file as evidence that ADOC staff had repeated concerns about his mental health,[17] intellectual abilities, and literacy, dating back to his first days in custody and continuing throughout his incarceration. For example, in July 1998, during a mental health intake screening, ADOC staff commented that Reeves had "poor communication," was "fragile and easily confused," had "trouble processing information," and "may have limited intel[ectual] abilities." (Doc. 42-1 at 126.) Following Reeves's placement in segregation later that year, a mental health review form evaluates Reeves's intellectual functioning as "slow" and indicates that Reeves "possibly cannot read." (Doc. 27-37.) The next year, in March 1999, following an inmate interview, ADOC staff noted that Reeves suffered from "mild retardation" and was a "special education prospect." (Doc. 27-36.) Later in 1999, following a

[16] This testimony fails to recognize that if Reeves struggles to read, he could not have read and understood this handbook in order to educate himself on how to properly request assistance.

[17] Reeves's inmate file includes numerous records documenting his mental health struggles while incarcerated. Various records indicate Reeves suffers from a mood disorder (Doc. 42-1 at 241, 244, 245), hears voices (*Id*. at 231), was placed on suicide watch (*Id*. at 227), "remains psychotic" (*Id*. at 242), and once set fire to his cell, burning himself in the process (Doc. 42-5 at 38). Although Reeves refers to his mental health issues in support of his ADA claim, the evidence he has presented appears to focus on his cognitive disability and reading difficulties.

psychological interview, an ADOC counselor listed recommendations for Reeves that included "reading" and "special education" and remarked that Reeves reads at "probably 4th - 5th grade level." (Doc. 42-6 at 178.) And in 2003, on a mental health referral form, ADOC staff noted that Reeves had a "learning disability." (Doc. 27-37 at 1.)

The most informative record that his disability was obvious, Reeves asserts, is an inmate request slip he submitted in 2015. On this form, Reeves wrote "I would like to have those papers to sign. I did not know what they were and wanted to have it read to me but Sgt. said he did not have time. So will you bring the papers back to me?" (Doc. 27-2.) This document, Reeves argues, proves that not only had he previously requested a reading accommodation, but that his request was denied. (Doc. 27 at 21–22.) However, the ADOC disagrees, arguing that "a single document indicating that Reeves once asked a single ADOC employee to read a document to him . . . does not indicate any likelihood of establishing an 'obvious' need for accommodation . . . ." (Doc. 42 at 38 n. 177.)

To bolster this contention, the ADOC relies on Holman ADA Coordinator Lewis's testimony regarding this request slip. At the December 9, 2021 evidentiary hearing, Lewis testified that he would not consider this document a formal request

because it was not written on an actual accommodation form.[18] (Doc. 78 at 118.) But when asked to identify what request was written in the form, Lewis confirmed that Reeves was "making a statement saying that an officer did not accommodate a request he asked of him." (*Id.* at 121.) Lewis then testified, had a request like Reeves's been brought to his attention, he would have gone to speak with the inmate to "see what does he need" (*Id.* at 119) and agreed that if an inmate said he could not read a document, Lewis would have found a way to assist him. (*Id*.) At the conclusion of his testimony, when asked by the Court if "that exact same language was put by Mr. Reeves on a form that said 'ADA request form,' would you have treated that as an accommodation request," Lewis answered "yes." (*Id.* at 126.)

The Court agrees that this inmate request slip does not make a formal request for an ADA accommodation. But importantly, this form memorializes Reeves's verbal request for a reading accommodation which ADOC staff either ignored or denied. This request slip, along with numerous other ADOC records in which staff express concerns regarding Reeves's ability to read and his intellectual functioning, support Reeves's contention that the ADOC should have known Reeves required a reasonable accommodation to utilize the election form "had they just looked." (Doc. 27 at 20.)

[18] Reeves's inmate request form was submitted in 2015. Holman's ADA program, and the forms to request an accommodation, were not implemented until 2016. (Doc. 78 at 157.) Therefore, Reeves's 2015 request to have documents read to him could not have been on an official ADA accommodation request form.

What's more, Reeves asserts, is that in the months preceding the election form's distribution, the ADOC was aware of his low IQ scores and inability to read because ADOC Commissioner Dunn was the defendant in Reeves's federal habeas litigation.[19] During this litigation, Reeves asserted an *Atkins* claim and was evaluated by Dr. Goff and Dr. King, both of whom found Reeves had impaired intellectual functioning and limited reading abilities. The ADOC was clearly aware of these findings because Commissioner Dunn cited to them in his April 2018 response to Reeves's habeas petition. *Reeves v. Dunn,* Case No. 1:17-cv-00061-KD-MU, Doc. 25 (S.D. Ala. Apr. 4, 2018). Specifically, this response cites to the results of Reeves's neurological testing, including Dr. Goff's finding that Reeves was "functionally illiterate," had an IQ of 71, and could read at only a 3rd grade level. *Id.* The brief also highlighted Dr. King's determination that Reeves could read at only a 5th grade level, had an IQ of 68, and fell within the borderline range of intellectual functioning. *Id.* Dunn likewise cited to the state circuit court's finding that Reeves's intellectual functioning was "subaverage." *Id.* Although this evidence was insufficient to support Reeves's *Atkins* claim, in the present case, under the ADA, it demonstrates that the ADOC was on notice that Reeves had IQ scores in the high 60s or low 70s, subaverage intellectual functioning, and had been found to be

[19] Evidence submitted during Reeves's habeas litigation also included his primary school records, which show that Reeves repeated the 1st, 4th, and 5th grades and was placed into special education classes. Although the ADOC argues that Reeves's academic problems were due to behavioral issues, not disability, no evidence has been presented as to whether or not these childhood behavioral struggles were the result of Reeves's subaverage intellectual functioning.

functionally illiterate *a mere two months* before it handed him the election form and expected him to comprehend and utilize it without accommodation.

All told, ADOC records reflect repeated concerns regarding Reeves's cognitive abilities and literacy in 1998, 1999, and 2003. In 2015, Reeves asked prison staff for assistance reading documents, a request that Holman's ADA Coordinator would today consider a request for an accommodation. And in 2018, Commissioner Dunn filed a brief acknowledging Reeves's low IQ scores and functional illiteracy. Weighing all of this evidence against the documents and testimony cited by the ADOC, the Court finds that Reeves is likely to succeed in proving his need for an accommodation was open and obvious to the ADOC.

2. Equitable Factors

The remaining considerations in deciding whether to grant a preliminary injunction involve the equities. This Court must (1) weigh whether the moving party will suffer irreparable harm without the injunction, in addition to (2) "assessing the harm to the opposing party," and (3) "weighing the public interest." *Nken*, 556 U.S. at 435. The last two factors "merge when the [State] is the opposing party." *Id.* "[E]quity must be sensitive to the [State's] strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

Without an injunction, in less than three weeks, Reeves would face execution by lethal injection, a method he expects would be "torturous." (Doc. 27 at 23.) Reeves avers that absent the alleged ADA violation at issue here, he would have instead chosen his death be by nitrogen hypoxia. He urges that his execution by lethal injection would prematurely moot his ADA claim before it can be decided on the merits, a harm Reeves contends is "real and irreparable." (*Id.*)

Reeves further argues that an injunction will not harm the opposing party because the ADOC has represented, on multiple occasions, that it is in the final days of developing a protocol for nitrogen hypoxia executions. (Doc. 27 at 25.) Reeves notes that should the ADOC finalize a constitutionally acceptable protocol, it can execute him by nitrogen hypoxia. If the ADOC fails to do so, Reeves's claim can instead be resolved at trial. Either way, Reeves points out, any injunction issued by this Court would eventually be dissolved, Reeves would be executed, and the ADOC would not be harmed. (*Id.*)

In response, the ADOC counters that lethal injection is a constitutional method of execution, and therefore what Reeves claims would be an irreparable injury is merely his lawful execution. (Doc. 42 at 40.) The ADOC further notes that Reeves has been on death row for over twenty-five years (*Id.* at 42) and argues that a preliminary injunction would harm the public interest because "[b]oth the State

and the victims of crime have an important interest in the timely enforcement of a sentence." (*Id*. at 41).

On balance, the equities favor Reeves. Although an injunction that further delays his execution "impose[s] a cost on the State and the family and friends of the murder victim," *Bowles v. DeSantis*, 934 F.3d 1230, 1248 (11th Cir. 2019), counsel for the ADOC represented to this Court that a final nitrogen hypoxia protocol is only weeks away. (Doc. 78 at 219.) Balancing this arguably short delay against the irreparable harm to Reeves if he is forced to face execution by a method he so greatly fears—and one he would not have chosen absent the ADOC's alleged ADA violation—the equitable scales tip in favor of Reeves.

After all, Reeves is correct that the "public has an interest in persons aggrieved by ADA violations receiving judicial review." (Doc. 27 at 26.) Congress enacted the ADA to, among other things, "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(6)(1). If it did violate the ADA, the ADOC has no interest in conducting an execution that contravenes the statute's intent to protect individuals with disabilities.

Reeves has shown a substantial likelihood of success on the merits of his ADA claim and the equities weigh in his favor. Reeves has therefore established his right to a preliminary injunction that prevents the ADOC from executing him by any

method other than nitrogen hypoxia before his ADA claim can be decided on its merits.

V. CONCLUSION

For the foregoing reasons, it is ORDERED as follows:

1. The Motion for Preliminary Injunction (Doc. 27) is GRANTED; and
2. Defendants Jefferson Dunn and Terry Raybon are hereby ENJOINED from executing Matthew Reeves by any method other than nitrogen hypoxia until further order from this Court.

DONE on this the 7th day of January, 2022.

/s/ R. Austin Huffaker, Jr.
R. AUSTIN HUFFAKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MATTHEW REEVES, Plaintiff, v. JEFFERSON DUNN, Commissioner, Alabama Department of Corrections, & TERRY RAYBON, Warden, Holman Correctional Facility, Defendants.	**No. 2:20-cv-00027-RAH** **CAPITAL CASE**

DECLARATION OF MATTHEW REEVES

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.

Executed on this 27th day of October, 2021.

Matthew Reeves

INMATE REQUEST SLIP

Name MATTHEW REEVES Quarters P-8 Date 8-18-15

AIS # 012-636

( ) Telephone Call ( ) Custody change ( ) Personal Problem

( ) Special Visit ( ) Time Sheet ( ) Other _____

Briefly Outline Your Request – Then Drop In Mail Box

I would like to have those papers to sign I did not know what they were and wanted to have it read to me but Sgt said he did not have time [redacted] So will you bring the papers back to me?

Do Not Write Below This Line – For Reply Only

Mr Reeves, it was for yesterday and the attorneys are gone.

GG 8.18.15

Approved Denied Pay Phone Collect Call

Request Directed to: (Check One)

( ) Warden ( ) Deputy Warden ( ) Captain

( ) Classification Supervisor ( ) Legal Officer – Notary Public ( ) Record Office

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