No. 24-_____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIE JAMES PYE,

Petitioner,

v.

TYRONE OLIVER, Commissioner, Georgia Department of Corrections, CHRISTOPHER CARR, in his official capacity as the Attorney General of the State of Georgia, STATE BOARD OF PARDONS AND PAROLES, SHAWN EMMONS, Warden, Georgia Diagnostic & Classification Prison

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Mr. Pye brought an action pursuant to 42 U.S.C. §1983 and contemporaneously sought a temporary restraining order or preliminary injunction to restrain Respondents from pursing his execution. He filed this constitutional challenge just days after learning that Respondents planned to execute him without any of the notice and critical procedural protections that they have accorded to another group of identically situated death-sentenced persons in Georgia, in violation of the Equal Protection and Due Process clauses.

In opposing Mr. Pye's emergency motion for a stay of execution before the Eleventh Circuit, Respondents argued only that Mr. Pye was unlikely to succeed on the merits of his underlying constitutional claims. They raised no procedural or other defenses. Nevertheless, the Eleventh Circuit *sua sponte* injected the consideration of an inapposite procedural principle and ruled that Mr. Pye was not entitled to a stay because "res judicata likely bars his federal complaint."

Therefore, the question presented is: Whether a federal court may raise a procedural affirmative defense *sua sponte* in the absence of any special circumstances, and, if so, whether it may do so to deny preliminary injunctive relief without otherwise considering the movant's likelihood of success on the merits?

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Petitioner WILLIE JAMES PYE respectfully petitions this Court for a writ of certiorari to review the orders of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW AND JURISDICTION

The March 20, 2024, order of the Eleventh Circuit denying Mr. Pye's emergency motion for panel reconsideration appears as Exhibit A to this petition. The March 19, 2024, order of the Eleventh Circuit denying his motion for stay of execution appears as Exhibit B. The decision of the United States District Court for the Northern District of Georgia dismissing Mr. Pye's action pursuant to 42 U.S.C. § 1983, Pye v. Oliver, et al., Civil Action No. 3;24-cv-48-TCB (N.D. Ga. March 15, 2024), appears as Exhibit C.

Mr. Pye invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition invokes the Fourteenth Amendment to the United States Constitution:

> No State shall…deprive any person of life [or] liberty…without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.

STATUTORY PROVISIONS INVOLVED

Section 1983 of Title 42 of the United States Code states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

> shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

"In our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, 590 U.S. 371, 140 S. Ct. 1575, 1579 (2020). Here, however, in a case with the highest possible stakes, that principle was cast aside. Notwithstanding the fact that Mr. Pye has timely raised serious constitutional violations that warrant resolution before his imminent execution or that Defendants contested those claims solely on the merits below, the Eleventh Circuit resolved his emergency motion for a stay of execution by resorting to a possible res judicata defense which it found "likely" bars Mr. Pye's claims. Exhibit B at 7. The Eleventh Circuit's *sua sponte* invocation of claim preclusion—without any "special circumstances" present—to deny Mr. Pye's motion to stay without otherwise considering his likelihood of success on the merits was error and violated "the principle of party presentation so basic to our system of adjudication." *Arizona v. California*, 530 U.S. 392, 412–13 (2000).

Mr. Pye has diligently pursued his constitutional claims in federal court in this matter of life and death. The Eleventh Circuit's grave error warrants this Court's attention. Mr. Pye respectfully petitions this Court for certiorari.

COURSE OF PROCEEDINGS

Mr. Pye was convicted and sentenced to death by the Superior Court of Spalding County in 1996. The ordinary course of state and federal appellate and habeas review of his conviction and sentence concluded on October 30, 2023. *Pye v. Emmons*, 144 S. Ct. 344, 217 L. Ed. 2d 184 (2023). On February 29, 2024, Respondents obtained an order from the Superior Court of Spalding County authorizing Mr. Pye's execution, which they scheduled for March 20, 2024.

On March 11, 2024, Mr. Pye initiated the underlying 42 U.S.C. § 1983 action in the United States District Court for the Northern District of Georgia seeking declaratory and injunctive relief. Doc. 1. Mr. Pye concurrently filed a motion for a temporary restraining order or preliminary injunction preventing his execution. Doc. 3.

Following a motions hearing on March 15, 2024, the District Court entered an order denying Mr. Pye's motion for a TRO and dismissing Mr. Pye's Complaint. Doc. 12. Mr. Pye appealed that dismissal to the Eleventh Circuit and simultaneously filed an emergency motion for an order staying his execution pending appeal on March 18, 2024. Defendants filed their response brief on March 19, 2024.

Yesterday afternoon, at approximately 1 p.m., the panel directed the parties to submit supplemental letter briefs regarding a possible affirmative defense—that Defendants had not raised—by 4 p.m. Mr. Pye filed his reply brief and supplemental letter brief by 4 p.m. The Eleventh Circuit denied Mr. Pye's motion for a stay of execution in an Order last night. Mr. Pye filed an emergency motion for panel reconsideration earlier today, which was just denied. This timely petition for certiorari follows. **Mr. Pye is scheduled for execution at 7:00 p.m. tonight.**

REASONS FOR GRANTING THE WRIT

I. Facts Supporting Mr. Pye's Constitutional Claims in the Court Below.

On April 14, 2021, the Attorney General of the State of Georgia, on behalf of the Executive, entered into a written agreement with representatives of the capital defense bar in Georgia regarding the resumption of executions following the COVID-19 pandemic (the "Agreement"). This Agreement was negotiated and drafted at the behest of the Criminal Matters Sub-Committee of the Judicial COVID-19 Task Force to ensure that the capital defense bar was able to provide adequate counsel to death-sentenced clients facing potential execution by defining the necessary client access,

public health conditions, and spacing between execution warrants.[1] The express, and obvious, intent of the Agreement was to preserve effective lawyer-client engagement and attorney representation during the frantic time period associated with execution proceedings.

In furtherance of those goals, the Agreement specified three conditions that must occur prior to the resumption of executions:

- "the final COVID-19 judicial emergency order entered by the Chief Justice of the Supreme Court of Georgia expires;
- "the Georgia Department of Corrections lifts its suspension of legal visitation, and normal visitation resumes;" an
- "a vaccination against COVID19 is readily available to all members of the public."

Fed. Defender Program, Inc., 315 Ga. at 321. The Agreement further provided that the Attorney General would "not pursue an execution warrant of any prisoner other than Mr. Raulerson[2] before a total of at least six months after the time the above-three conditions are met." *Id.*

One year later, the State attempted to move forward with the execution of Virgil Presnell—one of the prisoners Respondents now concede was explicitly protected by

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[1] As the Supreme Court of Georgia explained, the backlog of execution-eligible inmates caused by COVID 19 "not only hindered capital defense counsel's ability to prioritize clemency investigations for the growing number of inmates eligible for execution but also impaired counsel's ability to meet with their clients and conduct investigations in order to prepare for clemency proceedings and adequately represent their clients." *State v. Fed. Def. Program, Inc.*, 315 Ga. 319, 320 (2022).

[2] The Agreement specified Billy Raulerson as the first in line for an execution warrant because his appeals had run out in March 2020.

the Agreement—notwithstanding the fact that neither the second nor third condition of the Agreement had been satisfied and without providing the agreed-upon notice. Following an emergency hearing in the Superior Court of Fulton County, the trial court concluded that Mr. Presnell and his counsel the Federal Defender had a substantial likelihood of success on the merits of their breach-of-contract claim and issued an interlocutory injunction stopping Mr. Presnell's execution. On appeal, the Supreme Court of Georgia issued a unanimous decision affirming the trial court's injunction, explaining that the Agreement "formed a valid written contract," that there was evidence the prison's modified visitation procedures "continue[d] to impose significant limitations," and that vaccines were still not available to "all members of the public." *Fed. Def. Program, Inc.,* 315 Ga. at 344, 351.

These conditions, moreover, matter.[3] They were chosen, by the State, to account for the specific concerns identified by the capital defense bar at that time. The promise inherent in the Agreement, in other words, was that executions would not resume until conditions allowed for death row prisoners to receive adequate representation in their clemency proceedings and pre-execution litigation. And those conditions *still have not been satisfied*.

And yet, while Respondents now agree that the State cannot execute a certain class of death row prisoners until those conditions have been satisfied, it has simultaneously taken the position that it is free to execute all other death row

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[3] As the Supreme Court of Georgia explained, the restrictions occasioned by the pandemic "not only hindered capital defense counsel's ability to prioritize clemency investigations for the growing number of inmates eligible for execution but also *impaired counsel's ability to meet with their clients and conduct investigations in order to prepare for clemency proceedings and adequately represent their clients*." *State v. Fed. Def. Program, Inc.*, 315 Ga. 319, 320 (2022) (emphasis added).

prisoners even before the satisfaction of those conditions. Respondents procured an execution order for Mr. Pye on February 29, 2024.

Mr. Pye initiated the underlying action in federal court asserting that Respondents' attempt to create a distinct, disfavored class of death row prisoners, one without the critical procedural protections being provided to others, was in violation of the Equal Protection and Due Process Clauses.

II. The Eleventh Circuit Erred both in Invoking a Res Judicata Defense *Sua Sponte* in These Circumstances, and in Doing So To Deny a Stay Without Considering Mr. Pye's Likelihood of Success.

To be entitled to a stay of execution, Mr. Pye must demonstrate that "(1) he has a substantial likelihood of success on the merits, (2) he will suffer irreparable injury unless the injunction issues, (3) the injunction would not substantially harm the other litigant, and (4) if issued, the injunction would not be adverse to the public interest." *Bowles v. Desantis*, 934 F.3d 1230, 1238 (11th Cir. 2019). Respondents did not contest any of Mr. Pye's arguments to the Eleventh Circuit—raised in his emergency motion for an order staying execution pending appeal—as to the last three factors of the stay analysis. Respondents only disputed the first factor—substantial likelihood of success on the merits of his constitutional claims—and did not raise any procedural affirmative defenses.

Thus, in order to prevail, Mr. Pye had to make a prima facie showing of a likelihood of success on the merits. *See* Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, § 2948.3 Grounds for Granting or Denying a Preliminary Injunction—Probability of Success on the Merits, 11A Fed. Prac. & Proc. Civ. § 2948.3 (3d ed.) ("All courts agree that plaintiff must present a prima facie case but need not show a certainty of winning."). And for all the reasons included in his brief, emergency motion, and reply brief to the Eleventh Circuit, he had done that.

For all the reasons in his brief, emergency motion, and reply brief, he has done that. But instead of engaging with the merits of Mr. Pye's serious constitutional claims, the Eleventh circuit *sua sponte* raised a *possible* res judicata defense and found that it "likely bars Mr. Pye's claim in this action," thereby defeating his motion to stay. Exhibit B at 7.

A. The Eleventh Circuit Erred in *Sua Sponte* Raising a Possible Preclusion Defense.

"[A]s a general rule, our system 'is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.'" *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment). Indeed, courts "do not, or should not, sally forth each day looking for wrongs to right." *Id.* (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring). But here, where the stakes were life or death, that is precisely what the Eleventh Circuit did.

Mr. Pye is scheduled to be executed in a manner of minutes. His weighty constitutional claims have never been addressed by the state courts and he fairly presented them below. Respondents, for their part, contested Mr. Pye's arguments on the merits. But the Eleventh Circuit ignored the parties' briefing and *sua sponte* resolved Mr. Pye's emergency motion on res judicata grounds, concluding that his constitutional claims were likely barred because a state superior court had ruled, in an emergency posture, on a *state law breach of contract claim* that also arose from the same Agreement. *See* Exhibit B.

That is plainly contrary to this Court's clear guidance:

> [T]he State parties argue that even if they earlier failed to raise the preclusion defense, this Court should raise it now *sua sponte*. ***Judicial initiative of this sort might be appropriate in special circumstances***. Most notably, "if a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte,* even though the defense has not been raised. This result is fully consistent with the policies underlying res judicata: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste." *United States v. Sioux Nation,* 448 U.S. 371, 432, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980) (REHNQUIST, J., dissenting) (citations omitted). That special circumstance is not present here: While the State parties contend that the Fort Yuma boundary dispute could have been decided in *Arizona I,* this Court plainly has not "previously decided the issue presented." Therefore we do not face the prospect of redoing a matter once decided. Where no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte,* thereby eroding the principle of party presentation so basic to our system of adjudication.

Arizona v. California, 530 U.S. 392, 412–13 (2000).

Courts should only *sua sponte* raise claim preclusion "in special circumstances" not remotely present here. Neither the Eleventh Circuit, *nor any state court*, has "previously decided the issue presented." There is no prospect of redoing a matter once decided. No judicial resources have been spent on the resolution of this constitutional issue. There would be, in other words, no "unnecessary judicial waste." *Id.* And on the other side of the ledger, this is a matter of life or death, where Mr. Pye has diligently pursued his constitutional claims in federal court. The Eleventh Circuit Court profoundly erred—indeed, it "erod[ed] the principle of party presentation so basic to our system of adjudication"—when it *sua sponte* raised a claim preclusion defense here. *Id.*

The Eleventh Circuit's "radical transformation of this case goes well beyond the pale." *Sineneng-Smith*, 140 S. Ct. at 1582. Accordingly, this Court must step in.

B. The Eleventh Circuit Erred When It Improperly Shifted the Burden of Disproving an Affirmative Defense to Mr. Pye.

As noted *supra*, the only contested prong of the stay factors below was Mr. Pye's substantial likelihood of success on the merits. The Eleventh Circuit ignored the parties' arguments as to likelihood of success on the merits, *sua sponte* injected a possible res judicata defense into the case, and then "conclude[d] that Mr. Pye cannot demonstrate that he is substantially likely to prevail on the merits of his appeal because he has previously litigated a claim arising out of the agreement in state court, and res judicata likely bars his federal complaint." Exhibit B at 4. This was error. As this Court's precedent makes clear, it was not Mr. Pye's burden to disprove Defendants' unraised affirmative defenses.

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, this Court assessed the grant of a preliminary injunction based on, what the lower court had deemed, "evidentiary equipoise" relating to the compelling interests asserted by the government. 546 U.S. 418, 428 (2006). The government asserted that such equipoise was an insufficient basis for issuing a preliminary injunction and argued that while it would have to "bear the burden of demonstrating a compelling interest as part of its affirmative defense at trial on the merits, the [movant] should have borne the burden of disproving the asserted compelling interests at the hearing on the preliminary injunction." *Id.* at 429. This Court rejected that argument, finding that it was "foreclosed" by *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004).

Id.[4] This Court concluded that "*the burdens at the preliminary injunction stage track the burdens at trial*." *Gonzales*, 546 U.S. at 429 (emphasis added).

The law is clear. If a preliminary injunction movant makes a prima facie showing of a substantial likelihood of success on the merits, then the burden shifts to the non-movant to prove any affirmative defense. Just as at trial. And if the non-movant correctly raised and briefed such a defense, the court must decide it. But what the Eleventh Circuit did here: 1) jump straight to an analysis of an affirmative defense (that had never been raised), skipping the prima facie substantial likelihood of success analysis altogether, and 2) flip the burden of proof on to Mr. Pye to rebut that unraised affirmative defense is all plainly contrary to clear precedent from this Court.

CONCLUSION

The Court should grant Mr. Pye's petition for a writ of certiorari.

Respectfully Submitted,

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March 20, 2024

[4] In *Ashcroft*, this Court held that "[a]s the Government bears the burden of proof on the ultimate question of [the challenged Act's] constitutionality, [the movants] must be deemed likely to prevail unless the Government has shown that [their] proposed less restrictive alternatives are less effective than [enforcing the Act]." *Id.* at 666.