In the Supreme Court of the United States

No. _____

CHRISTOPHER LEE PRICE, PETITIONER,

v.

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE: EXECUTION SCHEDULED FOR APRIL 11, 2019 AT 7:00 PM EDT

AARON M. KATZ*
**Counsel of Record*
ROPES & GRAY LLP
800 Boylston Street
Boston, MA 02199
(617) 951-7419

JONATHAN R. FERENCE-BURKE
ROPES & GRAY LLP
2099 Pennsylvania Avenue,
NW Washington, DC 20006
(202) 508-4731
jonathan.ference-burke@ropesgray.com

Counsel for Petitioner Christopher Lee Price

QUESTIONS PRESENTED

On April 11, 2019, at 7:00 p.m. EDT, the State of Alabama will—unless this Court intervenes—execute Christopher Lee Price by lethal injection, using a three-drug cocktail that will cause him severe pain and needless suffering, has been implicated in numerous "botched" executions, and the State of Ohio abandoned due to constitutional concerns.

The Eleventh Circuit below agreed with Petitioner, however, that Alabama has an available, readily implemented, and statutorily authorized alternative method of executing Petitioner—nitrogen hypoxia, which Alabama has expressly agreed to use as the method of execution for at least 48 of its 177 death row prisoners. Nevertheless, the Eleventh Circuit held that Petitioner was not entitled to a preliminary injunction staying his execution by lethal injection because, in its view, the district court "clearly erred" in finding that nitrogen hypoxia would be a significantly less painful and more humane way to die. The Eleventh Circuit reached this conclusion despite the fact that the State did not dispute in the district court or on appeal that death by nitrogen hypoxia would be both quick and essentially painless.

This petition presents the following questions:

(1) Whether a district court, in deciding a motion for a preliminary injunction, is entitled to make factual findings based on evidence that, even if not admissible at trial, demonstrates that the moving party would have little difficulty proving such facts at trial.

(2) Where a plaintiff, in moving for a preliminary injunction, submits evidence in support of an essential factual element of his claim, and the defendant does not question the plaintiff's evidence or dispute the plaintiff's allegation, whether a district court is in those circumstances entitled to conclude that the plaintiff has demonstrated a substantial likelihood of prevailing on that factual element.

(3) Whether, under *Bucklew v. Precythe*, an inmate must have an expert specifically testify that his proposed alternative method of execution will be significantly less painful compared to the method the State intends to use, or whether a district court can make that required factual finding based on other evidence that the inmate has put forward.

(4) Whether a court of appeals may affirm a district court's judgment by reversing the district court's finding of fact on an issue that the appellee did not contest in the district court and waived on appeal.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioner Christopher Lee Price is an inmate sentenced to death and currently incarcerated at the Holman Correctional Facility in Atmore, Alabama. Petitioner's execution is scheduled for 7:00 p.m. EDT on April 11, 2019.

Respondents are the Alabama Department of Corrections (ADOC), ADOC Commissioner Jefferson Dunn, Holman Warden Cynthia Stewart, and other unknown employees and agents of the ADOC.

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OPINION BELOW

The opinion of the court of appeals (App. at 1a) is not yet published and is available at No. 19-11268, 2019 WL 1550234 (11th Cir. Apr. 10, 2019). The opinion of the district court denying Petitioner's renewed motion for a preliminary injunction (App. at 27a) is unreported and available at No. 19-cv-00057 (S.D. Ala. Apr. 6, 2019). The opinion of the district court denying Petitioner's motion for a stay (App. at 30a) is unreported and available at No. 19-cv-00057, 2019 WL 1509610 (S.D. Ala. Apr. 5, 2019).

JURISDICTION

The court of appeals had jurisdiction under 28 U.S.C. § 1292(a)(1). This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Alabama's execution statute, Ala. Code § 15-18-82, provides, in relevant part, that "[i]f lethal injection is held unconstitutional or otherwise becomes unavailable, the method of execution shall be by nitrogen hypoxia."

STATEMENT OF THE CASE

A. The Alabama Legislature Authorizes Nitrogen Hypoxia as a Method of Execution.

On March 20, 2018, the Alabama legislature passed a bill amending the State's execution statute to add nitrogen hypoxia as an enumerated method of execution. Senator Trip Pittman, the bill's sponsor, explained that "nitrogen hypoxia is a very humane way to implement [a death] sentence." App. at 173a. Alabama Governor Kay Ivey signed the bill into law two days later. As amended, § 15-18-82(a) of the Alabama Code now provides that "[i]f lethal injection is held unconstitutional or otherwise becomes unavailable, the method of execution shall be by nitrogen hypoxia."

The Alabama Department of Corrections ("ADOC")—the agency that the Alabama legislature has charged with developing the State's execution protocols—is in the midst of developing the State's nitrogen hypoxia protocol. Although the ADOC zealously guards the secrecy of its execution protocols, see *Comm'r v. Advance Local Media, LLC*, ___ F.3d ___, ___ (11th Cir. Mar. 18, 2019), the Alabama Attorney

General's Office ("AAGO") acknowledged in the district court below that the ADOC may finalize the State's nitrogen hypoxia protocol by the "end of the summer." App. at 48a; App. at 61a. Indeed, the State is so confident in its ability to carry out executions by nitrogen hypoxia that, by July 2018, it already had agreed to use nitrogen hypoxia as the execution method for at least 48 of the State's inmates, several of whom have been on death row and out of habeas corpus for longer than Petitioner has been. App. at 188a-191a.

B. Petitioner Requests That He Be Executed by Nitrogen Hypoxia.

Petitioner has been challenging the constitutionality of the State's lethal injection protocol in federal court since October 2014, less than a month after the ADOC announced that it was replacing pentobarbital with midazolam hydrochloride as the first drug in its three-drug cocktail. Petitioner's October 2014 federal civil rights lawsuit is the subject of a separate petition for certiorari that is currently pending before the Court.

In January 2019—wishing to avoid the added pain and terror of a tortuous execution by the State's current lethal injection protocol—Petitioner sent the warden of Holman Correctional Facility a written request that the State execute him by nitrogen hypoxia, rather than by lethal injection. App. at 177a. Petitioner's request came just a few days after he learned that the State had filed with the Alabama Supreme Court a motion to set an execution date (and more than a month before the Alabama Supreme Court acted on the motion). App. at 136a. On February 4, 2019, the Alabama Attorney General's Office ("AAGO") refused Petitioner's request. The AAGO's sole explanation for its refusal was that Petitioner had not submitted his

written request by June 30, 2018, which was his putative deadline under § 15-18-82.1(b)(2) of the Alabama Code to "affirmatively elect[ ]" to be executed by nitrogen hypoxia. App. at 178a.

C. Petitioner Files a Civil Rights Complaint Seeking to Require the State to Execute Him by Nitrogen Hypoxia.

On February 8, 2019, prior to the Alabama Supreme Court setting an execution date, Petitioner filed a civil rights complaint in the United States District Court for the Southern District of Alabama, challenging the State's lethal injection protocol under the Eighth Amendment and its refusal to execute him with nitrogen hypoxia. The State answered the complaint on February 26, 2019.

Anticipating that the Alabama Supreme Court would soon set an execution date for Petitioner, the district court on February 28, 2019 set an expedited schedule for discovery, motions for summary judgment, and motions for preliminary injunctive relief. The following day, the Alabama Supreme Court issued an order setting Petitioner's execution for 7 p.m. EST on April 11, 2019.

D. The District Court Denies Petitioner's Motions for a Preliminary Injunction Enjoining His Execution by Lethal Injection.

On March 29, 2019, Petitioner filed a motion for a preliminary injunction, seeking a stay of his execution pending final judgment on the merits of his complaint. As one of the items of evidence in support of that motion, Petitioner introduced a copy of a draft report regarding execution by nitrogen hypoxia that scholars at East Central University prepared at the request of the State of Oklahoma. That draft report concluded that "[a]n execution protocol that induced hypoxia via nitrogen inhalation would be a humane method to carry out a death sentence." App. at 157a.

Petitioner also attached a newspaper article in which Senator Trip Pittman, the sponsor of the bill that added nitrogen hypoxia as a specifically enumerated method of execution in Alabama, was quoted as saying that "nitrogen hypoxia is a very humane way to implement [the death] sentence." App. at 173a. In response to Petitioner's motion for a preliminary injunction, the State did not contest that an execution by nitrogen hypoxia, if performed properly, would result in a humane and essentially painless death.

On April 4, 2019, the district court held an expedited hearing on Petitioner's motion. At the hearing, Petitioner's counsel explained to the district court why, based on fundamental scientific principles, nitrogen hypoxia would not cause Petitioner to experience any significant pain. App. at 69a-70a. Petitioner's counsel also specifically highlighted the conclusions of the East Central University report on that issue. App. at 68a-69a. The State did not dispute Petitioner's counsel's arguments, nor did it question the reliability of the East Central University report.

On April 5, 2019, the district court issued an order denying Petitioner's motion. App. at 30a. On April 6, 2019, Petitioner filed a renewed motion for a preliminary injunction, bringing forth additional facts that the district court thought necessary in light of this Court's April 1, 2019 decision in *Bucklew* v. *Precythe*, No. 17-8151 (April 1, 2019) (slip op.). App. at 27a. The district court denied Petitioner's renewed motion later that day. *Ibid.*

In its April 5 and April 6, 2019, orders, the district court found that Petitioner has a substantial likelihood of succeeding on his allegation that the State's lethal

injection protocol—which involves a 500-milligram dose of midazolam hydrochloride, followed by the paralytic rocuronium bromide and a lethal dose of potassium chloride—is substantially likely to cause Petitioner severe pain. App. at 52a. According to the district court, the State presented no facts to challenge Petitioner's evidence that "the current lethal injection protocol would cause him serious harm and needless suffering" and that "execution by nitrogen would likely not result in substantial physical discomfort." App. at 52a. The district court also agreed that, as a matter of law, nitrogen hypoxia is an "available" alternative method of execution, regardless of the fact that Petitioner did not "elect" it by June 30, 2018. App. at 48a.

The district court nevertheless denied Petitioner's preliminary injunction motions based on its reading of this Court's April 1, 2019 opinion in *Bucklew*, No. 17-8151 (slip op.). First, the district court concluded that, under *Bucklew*, nitrogen hypoxia is not a "readily implemented" method of execution, because the ADOC will not have finalized its nitrogen-hypoxia protocol before the end of summer and the protocol that Petitioner affirmatively proposed in his April 6, 2019 pleading was not sufficiently detailed. App. at 48a-49a. Second, the district court held that, because Petitioner had not made a nitrogen hypoxia "election" by June 30, 2018, the State has a "legitimate penological justification" for refusing to execute him with that humane method, regardless of how excruciatingly painful the State's lethal injection protocol is. App. at 49a-50a.

E. The Eleventh Circuit Holds That the State Could Carry Out Petitioner's Execution Relatively Easily and Reasonably Quickly Using Nitrogen Hypoxia, But It *Sua Sponte* Overrules the District Court's Uncontested Factual Finding That Death by Nitrogen Hypoxia Is Essentially Painless.

Petitioner immediately appealed the district court's denial of his motion for a preliminary injunction. As in the district court, the State in its appellee's brief to the Eleventh Circuit did not dispute that execution by nitrogen hypoxia would result in a humane and essentially painless death for Petitioner.

On April 10, 2019, the Eleventh Circuit affirmed. App. at 2a. It found that Petitioner "has shown that nitrogen hypoxia is an available alternative method of execution that is feasible and readily implemented." *Id.* at 15a. The Eleventh Circuit held that, as a matter of law, when "a State adopts a particular method of execution—as the State of Alabama did in March 2018—it thereby concedes that the method of execution is available to its inmates." *Id* at 18a. The Eleventh Circuit therefore held that the State could not have a legitimate reason to decline to use nitrogen hypoxia because it had already statutorily authorized the method. *Ibid.* The Eleventh Circuit also "reject[ed]" the State's argument that Petitioner's failure to affirmative elect nitrogen hypoxia as his method of execution by the putative June 30, 2018 statutory deadline did not provide the State a legitimate penological reason to deny that method of execution to Petitioner in the event Petitioner satisfied all of *Bucklew*'s other requirements. *Id.* at 19a-20a. In doing so, the Eleventh Circuit explained that *Bucklew* "renders a state's time limit on a given execution option of no moment to whether that option is 'available.'" *Ibid.* The Eleventh Circuit also found that *Bucklew* does not require Petitioner to develop and come forward with his own

nitrogen hypoxia protocol. The Eleventh Circuit explained that, because the State has expressly adopted nitrogen hypoxia as a method, the "the State bears the responsibility to formulate a protocol." *Id.* at 21a.

The Eleventh Circuit then turned to the questions of whether the district court had abused its discretion in finding as a matter of fact that (1) the State's lethal injection protocol carries a substantial risk of causing Petitioner severe pain, and (2) by comparison, nitrogen hypoxia will result in a significantly less painful and significantly more humane death. With respect to the former, the Eleventh Circuit held that the district court did not commit any error. *Id.* at 23a-24a. As to the latter, however, the Eleventh Circuit held that the district court clearly erred. *Id.* at 24a–25a. The Eleventh Circuit held that the district court committed "clear error" in relying on the East Central University draft report, because the version of the report that Petitioner's counsel introduced was stamped with the words "Do Not Cite." *Id.* at 24a. Because the East Central University report was the only evidence Petitioner had presented in his preliminary injunction motion with respect to whether death by nitrogen hypoxia would be relatively painless, the Eleventh Circuit concluded that Petitioner had presented "no reliable evidence" on that issue. *Id.* at 25a.

REASONS TO GRANT THE PETITION

Preliminary injunction motions are typically brought early in the litigation, sometimes within days or weeks after the plaintiff files his complaint. A district court typically must act upon a preliminary injunction motion reasonably quickly, in order to ensure that the moving party does not sustain irreparable injury while the motion is pending. For these and other reasons, a preliminary injunction hearing is not a

trial on the merits. A plaintiff seeking a preliminary injunction is not required to conclusively prove his case, and, in determining questions of fact, a district court consideration is not limited to evidence that would be admissible at a trial. A court of appeals cannot disturb a district court's factual findings other than for an abuse of discretion.

In this case, the Eleventh Circuit held that the district court, in finding that execution by nitrogen hypoxia would result in a humane and essentially painless death, abused its discretion even though (1) the only evidence in the record on that question of fact favored Petitioner, (2) the State did not question the reliability of that evidence or the district court's entitlement to consider it, and (3) the State did not even argue that the district court should not find in Petitioner's favor on that fact. The Eleventh Circuit's holding fundamentally distorts the role of the appellate court in reviewing a district court's factual findings on a preliminary injunction motion. The Eleventh Circuit's holding, if left intact, suggests that plaintiffs must treat preliminary injunction motions as if they were motions for summary judgment. This will deter plaintiffs from bringing timely preliminary injunction motions based on evidence that, though reliable and capable of demonstrating a likelihood of success on the merits, might not be admissible at trial. Moreover, the Eleventh Circuit's holding suggests that, in making findings of fact, a district court is not entitled to rely on the adversary process to determine which facts truly are in dispute and which are not. The Eleventh Circuit's holding below instead suggests that a district court, in deciding a preliminary injunction motion, is required to scrutinize a plaintiff's

evidence even as to factual issues that the defendant does not making any real effort to contest, which will impede district courts' ability to decide preliminary injunction motions with the necessary efficiency.

The Court should grant the petition to make clear that (1) district courts, in deciding a motion for a preliminary injunction, have ample discretion in what evidence they may consider in making findings of fact, and (2) a court of appeals should not find that a district court abuses its discretion in making an uncontested factual finding that the only evidence in the record supported. This case presents an ideal vehicle for addressing those issues.

I. This Case Presents Important Questions Regarding Preliminary Injunction Procedures in the District Courts and an Appellate Court's Review of a District Court's Factual Findings.

A. The Court Should Grant the Petition to Make Clear That, in Making Factual Findings at the Preliminary Injunction Phase, a District Court Is Entitled to Rely on Evidence that Might Not Be Admissible at Trial.

The Eleventh Circuit's decision places a new, unprecedented evidentiary burden on a party moving for a preliminary injunction. Preliminary injunctions, by their nature, typically are filed early in a case and are oftentimes brought without the benefit of any discovery. The evidence that a district court has before it at the preliminary injunction phase is not necessarily the same evidence (either in quantity or quality) that the moving party will have by the time discovery ends, or that the moving party would present at trial. But on a preliminary injunction motion, the question is merely whether the moving party has demonstrated a substantial likelihood of success on the merits, should the matter proceed to trial. Thus, if the evidence in the record demonstrates that the moving party would have little difficulty

in prevailing on a particular factual issue at trial, the district court is entitled to find that the moving party has demonstrated a substantial likelihood of success on the merits on that issue—even if that evidence would not itself be admissible at a trial.

Here, the district court appropriately accepted and relied on the East Central University report entitled "Nitrogen Induced Hypoxia as a Form of Capital Punishment" to find that Petitioner would be likely to prevail at trial on the factual question of whether nitrogen hypoxia would be a humane and essentially painless death. App. at 51a-52a. The district court noted that that the Oklahoma legislature relied on this same report when it decided to amend its execution statute to add nitrogen hypoxia as a method of execution. App. at 51a. And the State never questioned the reliability of the report's conclusions on this discrete factual issue, nor did it argue that the district court could not rely on the report.

In finding that the district court committed "clear error" in placing any reliance on the East Central University report, the Eleventh Circuit's decision fundamentally changes and severely heightens the evidentiary requirements at the preliminary injunction phase of a federal litigation. *See* App. at 23a-25a. By rendering the report as entirely "unreliable" evidence simply because it said "Do Not Cite," the Eleventh Circuit essentially imposed a trial admissibility standard on evidence presented in support of a preliminary injunction motion. *See* App. at 24a. This is directly contrary to the Ninth Circuit's holding in *Herb Reed Enters., LLC* v. *Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 n.5 (9th Cir. 2013). In that case, the Ninth Circuit rejected the nonmoving party's argument "that the district court may rely only on admissible

evidence to support" a factual finding at the preliminary injunction phase. *Ibid.* The Ninth Circuit explained that, "[d]ue to the urgency of obtaining a preliminary injunction at a point when there has been limited factual development, the rules of evidence do not apply strictly to preliminary injunction proceedings." *Ibid.* (citing *Repub. of the Philippines* v. *Marcos*, 862 F.2d 1355, 1363 (9th Cir.1988)).

The Eleventh Circuit's decision below, if left intact, will make motions for preliminary injunctive relief more costly and time consuming to bring and more difficult for district courts to resolve quickly and efficiently. The Court should grant the petition to resolve the split that the Eleventh Circuit has created with the Ninth Circuit on this issue.

B. The Eleventh Circuit's Decision Forces District Courts to Hypothesize What Arguments a Nonmoving Party Could Have Made Had It Contested a Moving Party's Assertion of Fact.

Litigation is an adversarial system. This is no less true at the preliminary injunction phase than it is at any other phase of a litigation. If a nonmoving party does not contest a factual assertion that a moving party has made and supported with some evidence, a district court is entitled to credit the moving party's factual assertion. *See, e.g.*, *Elrod* v. *Burns*, 427 U.S. 347, 350 n. 1 (1976) ("For purposes of our review, all of the well-pleaded allegations of respondents' complaint and uncontroverted affidavits filed in support of the motion for a preliminary injunction are taken as true.").

The Eleventh Circuit's decision below, however, tells district courts that they must now question uncontested evidence *sua sponte*. Here, Petitioner presented evidence that nitrogen hypoxia would result in an essentially painless death. The

State did not dispute Petitioner's evidence on this issue, nor did it argue that Petitioner's factual assertion was wrong. The district court therefore should have been entitled to making a factual finding in Petitioner's favor on that discrete issue. In concluding otherwise, and holding that the district court abused its discretion, the Eleventh Circuit essentially tells district courts that they are not entitled to rely on the adversary system in making factual findings. The Eleventh Circuit's decision suggests that a district court must *sua sponte* question factual assertions that the nonmoving party has not. Under the Eleventh Circuit's decision, a district court will need to hypothesize what arguments the nonmoving party might have made had it wished to contest the moving party's factual assertion—stripping a district court of the ability to treat the nonmoving party's silence as a conclusive signal that the factual issue is not genuinely in dispute. The Eleventh Circuit's decision, if left intact, will do nothing but bog down a district court's resolution of factual issues, contrary to the need for efficiency at the preliminary injunction phase.

C. The Court Should Make Clear That, Under *Bucklew*, an Inmate Does Not Need to Introduce Expert Testimony Comparing Methods of Execution, So Long as He Introduces Other Evidence That Provides a Basis of Comparison.

In resolving an Eighth Amendment method-of-execution challenge, a court must undertake a "comparative exercise" measuring the State's intended method of execution against the alternative method that the inmate has proposed. See *Bucklew* v. *Precythe*, No. 17-8151 (April 1, 2019) (slip op. at 17); see also *Glossip* v. *Gross*, 135 S. Ct. 2726, 2737 (2015); *Baze* v. *Rees*, 553 U.S. 35, 62 (2008).

The Eleventh Circuit faulted Petitioner for not introducing, in support of his preliminary injunction motion, expert testimony specifically comparing the pain and suffering that Petitioner would feel if executed with Alabama's three-drug lethal injection protocol to the pain (if any) that he would feel during a nitrogen hypoxia execution. App. at 24a-25a. Nothing in the Court's Eighth Amendment jurisprudence, however, suggests that such expert testimony is needed. It is ultimately for a court to perform the "comparative exercise" that *Bucklew* requires. While an inmate might be entitled to submit expert testimony on the issue, he should not be required to do so. If the inmate's evidence is sufficient for a court to conclude that the State's intended method of execution poses a substantial risk of causing severe pain, and that the alternative method that the inmate has proposed would pose almost no risk of causing the inmate to feel any pain, a district court is entitled to find in favor of the inmate on the first prong of the *Bucklew* test.

D. The Court Should Resolve the Deep Circuit Split Regarding Whether a District Court's Judgment May Be Affirmed on a Ground That the Appellee Did Not Argue in the District Court or On Appeal.

The circuits are deeply split on the question of whether a district court's judgment may be affirmed based on a ground that the appellee did not argue in the district court or on appeal. Some courts of appeals hold that a district court's judgment may be affirmed on "any ground that is supported by the record," *Algarin* v. *Town of Wallkill*, 421 F.3d 137, 139 (2d Cir. 2005), including grounds "not raised in the district court * * * ." *Griffith* v. *Colo. Div. of Youth Servs.*, 17 F.3d 1323, 1328 (10th Cir. 1994). Other courts of appeals, by contrast, hold that a district court's judgment can be "affirm[ed] on any ground not waived or forfeited in the district

court." *Schultz* v. *Page*, 313 F.3d 1010, 1015 (7th Cir. 2002). Here, had the Eleventh Circuit followed this latter view, it would not even have addressed—let alone affirmed the district court's order on the basis of—whether death by nitrogen hypoxia is humane and essentially painless. The Court should grant this petition to resolve the circuit split on this issue.

II. This Case Is an Ideal Vehicle for Addressing the Questions Presented.

Petitioner introduced in the district court uncontested evidence in support of a discrete factual issue—whether nitrogen hypoxia results in a humane, essentially painless death—and the district court unsurprisingly found that Petitioner had satisfied his preliminary injunction burden on that factual issue. On appeal, the State did not argue that the district court clearly erred in finding that Petitioner was substantially likely to prevail on the factual question of whether nitrogen hypoxia results in a humane, essentially painless death. The Eleventh Circuit's determination otherwise, in the face of the State's silence, was plainly outcome determinative to its decision to affirm the district court's denial of Petitioner's preliminary injunction motion.

CONCLUSION

For the reasons stated above, the Court should grant this petition and stay Petitioner's execution pending this case's resolution.

Respectfully submitted,

Aaron M. Katz*
Jonathan Ference-Burke
ROPES & GRAY LLP
**Counsel of Record*

APRIL 11, 2019