No. 21A-372

IN THE

Supreme Court of the United States

JOHN Q. HAMM, COMMISSIONER
TERRY RAYBON, WARDEN,

Applicants,

v.

MATTHEW REEVES

Respondent.

OPPOSITION TO EMERGENCY APPLICATION TO VACATE PRELIMINARY INJUNCTION

EXECUTION SCHEDULED FOR JANUARY 27, 2022

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INTRODUCTION

In 2020, there were 11,852 non-employment related American with Disabilities Act ("ADA") cases filed in United States District Courts.[1] This was one of them. Like many of those, a motion to dismiss was filed and an amended complaint followed. Again, like many of those, a motion to dismiss the amended complaint came next. It was denied. Eventually, Applicants filed an answer and the case began. Unlike any of those other 11,851 cases, Applicants also went to their state supreme court and asked for an order to execute the plaintiff. The District Court granted the plaintiff a preliminary injunction to maintain the status quo until he, like those other 11,851 plaintiffs, could have his claim heard on the merits at trial. In sum, this is how a garden variety 42 U.S.C. § 1983 lawsuit, alleging a single violation of 42 U.S.C. §§ 12101, *et. seq.*, reached this Court today.

After hearing from eight witnesses, reviewing thousands of pages of exhibits, holding oral argument, and reviewing supplemental briefing, the District Court concluded—in a thorough 37-page order—that Mr. Reeves had satisfied the requirements to obtain a preliminary injunction. Three days later, Applicants filed a Motion to Stay Judgment Pending Appeal and a notice of appeal. They then

[1] In accordance with 28 U.S.C. § 604(a)(2), each year the Administrative Office of the United States Courts is required to provide a report of statistical information on the caseload of the federal courts for the 12-month period ending March 31. Therefore, the statistics cited herein contain caseloads from April 1, 2019 - March 31, 2020. Mr. Reeves' case was filed January 10, 2020. *See* Table C-3, U.S. District Courts-Civil, *Federal Judicial Caseload Statistics*, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020-tables (last visited January 27, 2022).

sought (and were granted) an expedited briefing schedule and oral argument. While the appeal was pending, the District Court denied the stay motion, having concluded that Applicants had failed to establish a substantial likelihood of success on appeal.

Applicants' briefing before the Eleventh Circuit Court of Appeals consisted mainly of quibbling about the way the District Court weighed the evidence and disputing redressability. Following full briefing and oral argument, the Court of Appeals issued a unanimous, published 28-page decision reviewing Applicants' arguments in detail, rejecting them and denying the stay motion.

Now, without citing to any standards of review or articulating the procedural posture, Applicants rehash their attack on the District Court, inserting the word "clear" before "error" from time to time, and asks this Court to act as an error review court—while bypassing certiorari—in a matter involving a highly fact bound and discretionary decision. The Application barely acknowledges the Court of Appeals' opinion and is little more than a restatement of the issues already raised and rejected by each court to have considered them. The Application is not worthy of consideration and should be denied.

STATEMENT

On or about June 26, 2018, Holman Warden Cynthia Stewart—acting at the direction of her superiors with the Alabama Department of Corrections ("ADOC")[2]—

[2] While, to date, no one currently or formerly employed by the ADOC has admitted to instructing Warden Stewart to distribute these forms, it is undisputed that occurred. *See Smith v. Dunn*, 19-cv-927 ECM (M.D. Ala. Sept. 24, 2021), ECF No.

implemented a program to notify death row inmates at William C. Holman Correctional Institution ("Holman") that they had a right to select nitrogen hypoxia as their method of execution. She instructed a corrections officer to distribute a nitrogen hypoxia election form, along with an envelope, to all death row prisoners.[3]

If a prisoner wished to be executed by nitrogen hypoxia, he was to sign and date the form and put it in the provided envelope to be delivered to Warden Stewart. The ADOC's Nitrogen Hypoxia Election Form had specific wording which not only affirmatively elected nitrogen hypoxia as one's method of execution but also granted the signatory more than was provided in the statutory language. Namely, it preserved "the status of any challenge(s) (current or future) to my conviction(s) or sentence(s)" and reserved the "right to challenge the constitutionality of any [nitrogen hypoxia] protocol."[4]

This benefit was provided to all death row prisoners but with no reasonable accommodations to persons, like Mr. Reeves, with open and obvious disabilities. The ADOC did not provide even minimal assistance or information.[5]

On January 10, 2020, Mr. Reeves filed an initial complaint, alleging that Applicants deprived him of rights and privileges secured by the Constitution and laws of the United States.[6] Specifically, he alleged that Applicants deprived him of

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[3] *Smith v. Dunn*, 19-cv-927-ECM (M.D. Ala. Aug. 20, 2021), ECF No. 119-9.

[4] *Reeves v. Hamm*, 20-cv-00027 (M.D. Ala. Jan. 7, 2022), ECF No. 83 at 6 (quoting ECF No. 70-5).

[5] *Smith v. Dunn*, 19-cv-927 ECM (M.D. Ala. Aug. 20, 2021), ECF Nos. 119-27, 119-28.

[6] *Reeves v. Hamm*, 20-cv-00027 (M.D. Ala. Jan. 10, 2020), ECF No. 1.

his rights under the ADA when they provided a benefit to death row inmates that Mr. Reeves could not take advantage of because of his intellectual disability.

On February 19, 2020, Applicants filed their first Motion to Dismiss.[7] Mr. Reeves responded on March 12, 2020.[8] Applicants replied on March 25, 2020.[9] On August 4, 2020, the District Court partially granted the Motion to Dismiss, holding that an Eighth Amendment challenge to lethal injection was time-barred on the face of the complaint, but because the issue of whether Mr. Reeves was intellectually disabled remained unresolved in his federal habeas proceedings, a determination of whether the ADA applied was premature.[10]

On August 26, 2021, with leave of the District Court, Mr. Reeves filed an Amended Complaint, raising two claims:

1. Failing to provide a reasonable accommodation to Mr. Reeves, a qualified individual with a disability, with respect to the Nitrogen Hypoxia Election Program, violates the ADA (the ADA claim).

2. Alabama's method of execution by lethal injection violates Mr. Reeves' Eighth Amendment right to be free from cruel and unusual punishment because employing midazolam as the intended anesthetic creates a substantial risk of pain when compared to Mr. Reeves' alternative of nitrogen hypoxia (the Eighth Amendment claim).[11]

On September 9, 2021, Applicants filed a Second Motion to Dismiss.[12] Within seven days of filing it, counsel for Applicants also filed a Motion to Set Execution

[7] *Id.,* ECF No. 11.
[8] *Id.,* ECF No. 15.
[9] *Id.,* ECF No. 16.
[10] *Id.,* ECF No. 17.
[11] *Id.,* ECF No. 21.
[12] *Id.,* ECF No. 23.

Date ("Execution Motion") at the Alabama Supreme Court.[13] Mr. Reeves filed his Response to the Second Motion to Dismiss on October 25, 2021,[14] and a motion for preliminary injunction ("PI Motion") on November 4, 2021.[15]

Applicants responded to the PI Motion[16] and the District Court held an evidentiary hearing on December 9, 2021.[17] At that hearing, Mr. Reeves called eight witnesses: Dr. Kathleen Fahey (a speech pathologist), Richard Lewis (current ADA coordinator at Holman), Deidre Prevo (current statewide ADA coordinator for ADOC), former Holman Warden Cynthia Stewart, ADOC employees Cheryl Price and Lori McCullough, Correctional Officer Isaac Moody, and Correctional Captain Jeff Emberton.[18]

Applicants initially indicated that they would call an attorney for ADOC and one of Mr. Reeves' attorneys.[19] Ultimately, after failing to satisfy the requirements to call opposing counsel as a witness, Applicants called *no* witnesses.[20] After review of more than two thousand documents, argument on the motion, and post-hearing supplemental briefing, the District Court granted the PI Motion, and enjoined Applicants "from executing Matthew Reeves by any method other than nitrogen hypoxia until further order from this Court."[21] Three days later, Applicants filed a

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[13] *Id.,* ECF No. 25.
[14] *Id.,* ECF No. 26.
[15] *Id.,* ECF No. 27.
[16] *Id.,* ECF No. 42.
[17] *Id.,* ECF No. 57.
[18] *Id.,* ECF No. 78 at 3.
[19] *Id.*
[20] *Id.* at 206.
[21] *Id.,* ECF No. 83 at 37.

motion to stay the effectiveness of the preliminary injunction pursuant to Federal Rule of Civil Procedure 62[22] and a notice of appeal.[23] The District Court denied the motion to stay the effectiveness of the preliminary injunction.[24]

Following full briefing and oral argument, the Court of Appeals found no error in the District Court's lengthy and well-reasoned decision granting Mr. Reeves a preliminary injunction.

The Court of Appeals began with plenary review of Article III standing. Pet. App. 9 ("Although the defendants challenge only redressability, we address Article III standing in full to ensure that the case is justiciable."). As to the uncontested prongs—injury in fact and causation--the Court found that Mr. Reeves had established both. Pet. App. at 11-13.

On the contested prong—redressability—the Court found "defendants' arguments as to redressability [] untenable for a number of reasons." Pet. App. 14. First, it held, "[I]n evaluating whether Mr. Reeves has standing we must assume that his ADA claim is valid on the merits," and that "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." *Id.* at 14-15 (citing *Chafin v. Chafin*, 568 U.S. 165 (2013)). "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." *Id.* at 15. Finally, "The defendants offer no

[22] *Id.,* ECF No. 84.
[23] *Id.,* ECF No. 86.
[24] *Id.,* ECF No. 94.

support for the proposition that Alabama law limits the remedies available to the district court for a violation of the ADA." *Id.*

The Court of Appeals began its merits review by summarizing the legal standards governing both the decision to grant a preliminary injunction and its review of such a decision. *Id.* at 16-18. It then explained, "Given the procedural posture of the case and the limited scope of review, we address only the issues raised by the defendants," which it identified as follows:

> 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.

Pet. App. 19.

On the first issue, the Court concluded that "the district court did not conflate Mr. Reeves' disability with the limitations flowing from that disability" because "[i]t dealt with both issues separately and addressed them over eight pages of its order." Pet. App. 20 (citation omitted). Moreover, the order "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)." *Id.* As such, "The court did not clearly err (or

otherwise abuse its discretion) in finding that the defendants knew of Mr. Reeves' limitations." *Id.*

Next, "turn[ing] 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 Court of Appeals noted it was based "on numerous pieces of evidence in the record," which it reviewed. *Id.* at 21-24.

Addressing Applicants' challenge to whether Mr. Reeves is a qualified individual with a disability, the Court began by holding, "[T]he fact that the district court did not expressly discuss all of their evidence in its order is not problematic" because "[i]t is well-settled that a court is not required to exhaustively discuss every piece of evidence or every argument presented by a party." *Id.* at 24-25. With respect to their "detail[ing] the contrary evidence they presented to the district court," the Court noted, "Again, this evidence shows only that the district court could have made a different finding." *Id.* at 25 ("Clear error requires much more than a different, plausible finding to compel reversal.").

With respect to the district court's finding that Mr. Reeves was substantially likely to succeed in establishing that he "was excluded from or denied access to a public benefit,"[25] Applicants "have not provided any persuasive argument why" the district court's reliance on the principle set forth in *Olmstead v. L.C. ex rel.*

[25] The Court found that Applicants waived the argument that the district court erred in finding that distribution of the form was "a service subject to the ADA." *Id.* at 26 n.7.

Zimring,[26] "constituted error." *Id.* at 27. Finally, Applicants "cannot show clear error" with respect to the testimony of Dr. Fahey because they "did not present expert testimony or other evidence that directly contradicted Dr. Fahey's testimony." *Id.*

Finally, with respect to the equities, the Court of Appeals found no abuse of discretion, based in part on Applicants' concessions as to the imminent availability of nitrogen hypoxia, and because "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." *Id.* at 28. Moreover, "Any delay in executing Mr. Reeves and any other death row inmate who elected nitrogen hypoxia is at this point attributable to Alabama," a "fact [that] certainly weighs against the defendants." *Id.*

Vacatur or stay of this preliminary injunction is improper because there is no pending _certiorari_ petition in this Court and the preliminary injunction has been upheld on appeal by the Court of Appeals.

Applicants pay virtually no attention to the Court of Appeals' published opinion in this case, and instead ask this Court to vacate the District Court's grant of a preliminary injunction, without citing to any jurisdictional basis or standards of review. This Court typically reviews the grant of a preliminary injunction in two different ways: via *certiorari*[27] or through a motion to stay the preliminary injunction to allow further proceedings in the lower courts.[28] The present application involves neither.

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[26] 527 U.S. 581 (1999).
[27] *See, e.g.*, *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008).
[28] *See, e.g.*, *Barr v. Lee*, 140 S. Ct. 2590 (2020).

A. *Certiorari*

It is well established that c*ertiorari* jurisdiction is appropriate when reviewing the grant of an injunction. For example, in *Winter*, as in this case, the District Court granted an injunction and the Court of Appeals affirmed. Secretary Winter sought, and this Court granted, *certiorari* to review the injunction.[29] In such a case, the party seeking *certiorari* must, of course, meet the requirements of Rule 10 for granting *certiorari*, a standard which Applicants here make no attempt to meet.

While couched as a *vacatur*, they really ask this Court to stay the effectiveness of the preliminary injunction—something they failed to persuade the District Court and the Court of Appeals to do. Because Applicants appealed the grant of the preliminary injunction in this case to the Court of Appeals and lost, the proper procedure for Applicants would be to file a petition for writ of *certiorari* challenging the basis for the Court of Appeals' decision and a request for stay of the enforcement of the preliminary injunction pending the resolution of the *certiorari* petition.[30] They have not done so, and this Application must be rejected.[31]

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[29] *Winter*, 555 U.S. at 19.

[30] *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2406-07 (2018).

[31] This is not to say that such a procedure would be proper. To obtain a stay, the applicant must show, among other things, that there is a reasonable probability that this Court would grant certiorari. *Hollingsworth v. Perry*, 558 U.S. 183, 190, 130 S.Ct. 705, 175 L.Ed.2d 657 (2010) (*per curiam*). Because a stay of the effectiveness of the preliminary injunction would moot any pending *certiorari* petition by leading to Mr. Reeves' death, such an application must logically fail.

Therefore, the appropriate standard of review is the standard for stays of lower court judgments. However, as discussed below, those cases also do not provide an avenue for the relief Applicants seek.

B. Motion to Stay Effectiveness in the Court of Appeals

This Court's authority to stay the effectiveness of an injunction or vacate that injunction derives from the All Writs Act[32] and is implemented by Rule 23 of this Court's rules. That authority is typically exercised in the context of stays pending appeals to the Circuit Courts of Appeals. For example, in *Barr v. Roane*,[33] the government sought to vacate a preliminary injunction which enjoined it from executing Mr. Roane and three other individuals. This Court denied that application to allow the Court of Appeals to resolve the underlying legal question.[34] *Id.*

In *Lee*, the government asked for a stay and *vacatur* of a District Court order granting a preliminary injunction on the morning of an execution. Simultaneously with that application, the government sought a stay pending appeal in the Court of Appeals[35] and argued in this Court that they had a likelihood of success on the merits of the appeal in the Court of Appeals.[36] This Court agreed that the District Court erred and vacated the order before any ruling from the Court of Appeals.[37]

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[32] 28 U.S.C. § 1651.
[33] 140 S. Ct. 353 (2019) (mem.).
[34] *Id.*
[35] *Lee*, Application for Stay or Vacatur at 2 n.1.
[36] *Id.* at 19-20.
[37] *Lee*, 140 S. Ct. at 2591-92.

It is unquestioned that this Court has supervisory authority over the federal courts.[38] However, the standard for exercising such authority is even more daunting than the stay standard,[39] a standard that Applicants do not cite, let alone meet. "We may not vacate a stay entered by a [lower] court ... unless that court clearly and 'demonstrably' erred in its application of 'accepted standards.'"[40] Those accepted factors are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[41]

There can be no question that the District Court in this case did not clearly and demonstrably err in applying the standards set out by this Court. There is also no question that the Court of Appeals applied the appropriate standards when it reviewed the decision of the District Court and reached that conclusion. Unlike Applicants here, the Court of Appeals set out the appropriate standard of review and applied it. Pet. App. 17.

Both the District Court and the Court of Appeals found that Mr. Reeves showed a substantial likelihood of success on the merits and the equities were in his

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[38] *Dickerson v. United States*, 530 U.S. 428, 437 (2000).
[39] *Gray v. Kelly*, 564 U.S. 1301 (2011).
[40] *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. 1061 (2013) (Scalia, J., concurring in denial of application to vacate stay) (quoting *Western Airlines, Inc. v. Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers)).
[41] *Nken v. Holder*, 556 U.S. 418, 426, 129 S. Ct. 1749 (2009) (internal quotation marks omitted).

favor. The Court of Appeals explicitly found that Applicants were responsible for any delay in this case, given that they have not developed a protocol for nitrogen hypoxia in the almost four years since it has been authorized.

Further, "[w]hen a matter is pending before a court of appeals, it long has been the practice of Members of this Court to grant stay applications only 'upon the weightiest considerations.'"[42]

This case has gone beyond "pending in the Court of Appeals." The Court of Appeals has considered it and has unanimously affirmed both the grant of the preliminary injunction and a denial of the stay of effectiveness of that preliminary injunction. Applicants have no basis upon which to seek a *vacatur* or stay in this Court. Unlike *Lee*, where the applicants sought a stay of a preliminary injunction simultaneously in the Court of Appeals and this Court and argued to this Court that they would win in the Court of Appeals, Applicants here sought, as was their right, an appeal in the Court of Appeals. They lost. They are now, through this motion for *vacatur*, improperly attempting to "appeal" the ruling they have already lost four times in the lower courts.

CONCLUSION

For the above reasons, the Application should be denied.

Respectfully submitted,

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[42] *Fargo Women's Health Organization v. Schafer,* 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay application) (quoting *O'Rourke v. Levine,* 80 S. Ct. 623, 624, 4 L.Ed.2d, 615, 616 (1960) (Harlan, J., in chambers)); *see also Beame v. Friends of the Earth,* 434 U.S. 1310, 1312 (1977) (Marshall, J., in chambers) (a stay applicant's "burden is particularly heavy when ... a stay has been denied by the District Court and by a unanimous panel of the Court of Appeals").

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