No. 22A258

IN THE

Supreme Court of the United States

JOHN Q. HAMM ET AL.,

Applicants,

v.

ALAN EUGENE MILLER,

Respondent.

Opposition to Emergency Application to Vacate Preliminary Injunction

TO THE HONORABLE JUSTICE CLARENCE THOMAS AS CIRCUIT JUSTICE

******EXECUTION SCHEDULED FOR SEPTEMBER 22, 2022******

JAMES BRADLEY ROBERTSON
BRADLEY ARANT BOULT CUMMINGS
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203

DANIEL J. NEPPL*
KELLY J. HUGGINS
JEFFREY T. GREEN
ROBERT N. HOCHMAN
MARA E. KLEBANER
STEPHEN SPECTOR
SIDLEY AUSTIN LLP
One South Dearborn St.
Chicago, IL 60603
(312) 853-7000
dneppl@sidley.com

Counsel for Respondent

* Counsel of Record

September 22, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES Page

STATUTES

INTRODUCTION

Alabama Code § 15-18-82.1(b) provided Alan Miller with the right to elect execution by nitrogen hypoxia. Alan Miller timely submitted a form to the State of Alabama, exercising his right to choose nitrogen hypoxia. The State lost it. To the State, that loss was of no moment, because as the State repeatedly represented to the District Court, it was prepared to go forward with nitrogen hypoxia. It was only on September 15 that the State finally declared that it could not do so but would go forward with Miller's execution in spite of his authorized election.

Mr. Miller filed a Section 1983 lawsuit claiming, among other things, that the State could not, consistent with the Equal Protection Clause, execute him by lethal injection. In the district court, the State repeatedly admitted that if Mr. Miller had submitted a form, then they could not execute him by lethal injection. Dkt. 58 at 123-24 (State's counsel arguing that the State would not execute a death row inmate by lethal injection if the inmate had in fact elected nitrogen hypoxia); *id.* at 127 (same); *id.* at 196 (same); *id.* at 197 (same).

After carefully reviewing hundreds of pages of evidence, weighing live in-court testimony, and sifting through nearly half-a-dozen deposition transcripts, the district court found as a matter of fact that Miller likely elected execution by nitrogen hypoxia in the time provided by Alabama law. At no time before the district court did the State ever suggest that it did not matter whether Mr. Miller had, in fact, timely submitted his form choosing nitrogen hypoxia. The district court entered a preliminary injunction preventing the State from executing Mr. Miller by any method other than

nitrogen hypoxia, which is precisely what the State has agreed it must do for every other inmate who timely elected nitrogen hypoxia.

On appeal to the Eleventh Circuit, the State changed legal strategy. It sought to stay the preliminary injunction even as it did not (because it could not) dispute the factual finding that Mr. Miller had timely elected nitrogen hypoxia. Instead, the State argued all that mattered was that it did not have Mr. Miller's form, and that Mr. Miller did not have evidence that the State considered sufficient to corroborate his testimony. The State's new, Kafkaesque argument in favor of forcing an illegal execution tonight is that the truth of whether Mr. Miller timely submitted his nitrogen hypoxia election form does not matter. A panel of the Eleventh Circuit saw through this.[1]The whole point of the hearing was to determine the factual question that the parties, including the State, agreed was dispositive: did Mr. Miller in fact timely select nitrogen hypoxia? The State was now saying that fact did not matter only because Mr. Miller had credibly explained that he had timely submitted the form, and the State's efforts to undermine his credibility had uniformly failed. The

[1] The Eleventh Circuit pointed out the absurdity of the State's position, writing: "[T]he State's argument attempts to circumvent the district court's finding that it is substantially likely that Mr. Miller timely submitted his form electing nitrogen hypoxia, without challenging the finding as clearly erroneous. The State apparently takes an *ex ante* view of the world, looking only at whether it acted reasonably according to its understanding of the circumstances prior to the preliminary injunction hearing. But this is not the proper approach in a legal regime where facts are proved in court. . . . When a district court, sitting as the trier of fact, determines that X did Y at some point in the past, it is not "creating" a new reality. It is instead, determining what actually happened at that prior point in time. If the finding of X doing Y goes unchallenged—as it does here—then that is what the past consisted of for appellate purposes."

State cannot submit to a court hearing to determine the dispositive fact, and then pretend that the proceeding was a waste of time because the fact the State previously agreed was dispositive turns out to be irrelevant. The district court's factual determination was the equivalent of the State actually uncovering in its files on September 19 the form from Mr. Miller that it lost years ago. If the State's made-for-appeal legal position were taken seriously, the State could lose the form, decide to execute Mr. Miller by lethal injection, find the form 3 days before the execution, and execute him by lethal injection anyway.

The Eleventh Circuit rightly rejected the State's new theory. And it refused to stay the preliminary injunction not only because Mr. Miller's equal protection claim is likely to succeed—the State has no reason to treat Mr. Miller differently from every other inmate who timely submitted their election of nitrogen hypoxia, and has never claimed it has any reason to treat him differently if it is true that he timely submitted his form. The Eleventh Circuit refused to stay the preliminary injunction for the additional reason that the State will suffer no irreparable harm, indeed, has never even argued it will suffer irreparable harm, if the injunction remains in place. The State has been saying throughout this litigation that it is very close to implementing a nitrogen hypoxia protocol. Indeed, until late in this litigation, the State maintained that it was likely it could execute him by nitrogen hypoxia tonight. There is no reason to believe that the delay imposed by the district court's preliminary injunction will be long. That was a freestanding basis for denying the requested relief—a stay—in the Eleventh Circuit.

In its submission to this Court, the State has now even more radically altered its legal position. It no longer seeks a "stay" of the preliminary injunction, but asks this Court to vacate it, relief it never sought from the appellate court. That is a transparent effort to evade the State's failure to argue irreparable harm below. The State also mischaracterizes the relief Mr. Miller seeks as something akin to a "commutation" of his sentence. This is absurd, especially in light of the State's repeated representations to the district court that it will soon have a nitrogen hypoxia protocol in place for inmates. Regardless, none of the other inmates who timely submitted their election of nitrogen hypoxia have had their sentences "commuted." Their executions will take place. It is disingenuous in the extreme to suggest that nitrogen hypoxia is not an "available" method of execution when state law gave inmates the option to choose it four years ago. Any delay in the timing of executions of all of the inmates who chose nitrogen hypoxia is due to the State's failure to produce a nitrogen hypoxia protocol in the four years since the legislature gave inmates the right to choose it.

The relief the State seeks here—vacatur of the preliminary injunction—is waived. The State did not ask for that relief from the Eleventh Circuit. The basis upon which the State seeks such relief is waived—the State never argued to the district court that it could execute Mr. Miller if, in fact, he timely chose nitrogen hypoxia, and they did not dispute the district court's factual finding in the Eleventh Circuit and they do not do so in this Court. The legal theory the State has concocted for appeal has nothing to recommend it on the merits, if this Court considers the

merits. And it bears emphasis: Mr. Miller will be executed, and there is every reason to believe he will be executed soon. All he asks is that the State respect the choice the legislature gave him: to die by nitrogen hypoxia instead of lethal injection. This Court should deny the State's request to vacate the preliminary injunction.

STATEMENT

A. The Nitrogen Hypoxia Election in Alabama

On June 1, 2018, Alabama amended its laws to provide death-sentenced inmates the *right* to choose the manner by which they are executed. Ala. Code § 15-18-82.1(b)(2); App. 1239a. Inmates whose death sentences were final prior to the amendment's enactment, like Mr. Miller, were given 30 days to make this election. App. 1334a. The statute provides that an inmate must make his election "in writing," but it does not specify the type or manner of writing required, only that the writing must be delivered to the warden. *See id.*

Applicants did not establish any procedures governing the election process. The election period at Holman Correctional Facility was extremely disorganized. *See, e.g,* App. 1281a, 1184a; *Smith v. Comm'r, Ala. DOC.*, 2021 WL 4916001, at *5 (11th Cir. Oct. 21, 2021) (Pryor, J., concurring) ("It disturbs me that ADOC, which took on the responsibility to inform prisoners about their right to elect death by nitrogen hypoxia within 30 days, did so in such a feckless way.").

The warden at Holman in 2018, Cynthia Stewart, never made election forms for the people on death row. *See* App. 1240a. However, the local Federal Public Defender's Office created a form and distributed it to its clients. *See id.* After Stewart obtained a copy of the Federal Defender's form, and based on instructions from the

Alabama Department of Corrections ("ADOC"), Stewart directed Captain Jeff Emberton to distribute the form to those on death row. App. 1240a, 1246a. Even though the law gave inmates 30 days to elect their method of execution, Emberton distributed and collected the forms over the span of a single day. App. 1240a, 1246a. Neither Emberton nor anyone else created a list or otherwise recorded the names of people who received a copy. App. 1246a, 87a. In fact, Stewart explicitly told Emberton not to log the names of the individuals from whom he collected a form. App. 1246a. Emberton therefore simply returned a box with the forms to Stewart. App. 1246a–47a. Put simply, Applicants never established any system to memorialize which inmates exercised their right to execution by nitrogen hypoxia. App. 1261a ("[T]he Court has before it no evidence of a standardized policy or procedure for ADOC officials to collect and transmit completed forms . . . logging and retention, nor is there evidence of a chain of custody from the time forms were collected by Captain Emberton or other ADOC officials.").

B. Mr. Miller's Election

Miller received an election form in June 2018 while confined in his cell. App. 1250a. After reading the form, Miller elected nitrogen hypoxia based on his previous experiences with needles and gas. *Id.* Miller is adverse to needles because when officials have "jabbed" him with needles in the past, "[t]hey have a hard time finding my veins. And they'll poke around or stick it in there, move it around, or sometimes they'll nick a nerve, or they'll pull it out and go after the hands or the other arm. And then they'll send me somewhere to sit down for a while . . . Then call me back, go back at it again." App. 1249a–50a, 1102a–03a. These "painful" encounters left Miller with

many bruises, including a large bruise that stretched across his arm. App. 1249a–50a, 1104a.

Based on these experiences, Miller chose nitrogen hypoxia, which he believed would be like being put to sleep before surgery. App. 1250a, 1109a–10a. Miller is familiar with nitrogen because prior to his incarceration, he delivered medical oxygen and nitrous to dental offices and hospitals. App. 1250a, 1110a. When Miller received his election form years later in prison, he associated nitrogen hypoxia with the types of gas he encountered from his previous job and decided he would elect that form of execution because he "didn't want to be stabbed with needles and stuff." App. 1110a.

Accordingly, Miller completed and signed his election form, and left it in the "bean hole" of his cell—a slot in the cell door where inmates often leave paperwork. App. 1251a. The prison official collected Miller's form at the same time that he collected election forms from others. App. 1250a–51a, 1111a. Miller asked the official to have his form copied and notarized, but both requests were denied. App. 1250a–51a, 1111a.

C. The Alabama Supreme Court Proceedings

On April 19, 2022, Applicant Attorney General Marshall moved the Alabama Supreme Court to schedule Miller's execution by lethal injection. App. 1240a. Miller filed a brief in opposition, attesting in an affidavit that he completed and timely returned his nitrogen hypoxia election form. App. 1240a–41a, 832a–39a. Marshall responded on May 27. App. 1241a, 846a–54a. Through an affidavit signed by Applicant Raybon, the State claimed that it has not found a record of Miller's form. App. 1241a, 853a. Miller then filed a reply, emphasizing that the State's response had created a factual dispute regarding the existence of Miller's form that must be resolved by an Alabama trial court before he can be executed by lethal injection. App. 1241a, 855a–65a. On July 18, the Alabama Supreme Court granted the State's motion (Chief Justice Parker dissented) and set Miller's execution for September 22. App. 1241a, 866a–68a.

D. In Addition to Mr. Miller's Form, the State of Alabama Has Also Lost Other Inmate Forms

In addition to Miller, Applicants have lost the nitrogen hypoxia forms of other people on death row. App. 1252a. Jarrod Taylor gave his completed form to a prison official at Holman. *Id.* But the State lost the form and proceeded to set an execution date. *Id*. The State withdrew its motion for Taylor's execution date only after learning it had lost his form. App. 1278a. Petitioner Marshall has admitted that neither his office nor ADOC had Taylor's election form in their files, but that he nevertheless decided to honor Taylor's election because Taylor's attorneys offered privileged

communications and work product that supported the "assertion that [Taylor] made a timely election of nitrogen hypoxia." App. 27a.

The privileged attorney communications that Taylor's counsel provided as proof of his nitrogen hypoxia election can be located at App. 111a–36a. These communications make clear that, just like Miller, Taylor turned in his election form to a prison official, and just like Miller, the prison lost his form. *Id.* at 130a (email from Taylor's attorney confirming that Taylor gave a signed copy of his election form "to Lieutenant Franklin to deliver to the warden").

Petitioner also mishandled the nitrogen hypoxia election form of Calvin Stallworth. App. 1028a. Stallworth gave his completed election form to a prison official at Holman, but that official refused to deliver his form to the Warden. App. 1028–29a, 191a–93a.

E. Mr. Miller's Lawsuit

Miller initiated this litigation on August 22, 2022. On September 1, Miller moved for a preliminary injunction. App. 38a–58a. The district court held a day-long evidentiary hearing on September 12. On September 19, the court granted Miller's motion for a preliminary injunction, and enjoined Applicants from executing Miller via any method other than nitrogen hypoxia. At 9 pm ET on September 20, Applicants filed near-identical motions to stay the district court's preliminary injunction in both the district court and this Court. App. 1296a–1321a. The district court issued its ruling on September 21, rejecting the State's motion for a stay of the preliminary injunction. App. 1322a–32a. The Eleventh Circuit also denied the State's motion for a stay the preliminary injunction, on September 22, 2022 at 2:30 p.m. ET.

* * * * *

This litigation does not concern *if* Miller can be executed, but rather *when* (*i.e.*, once the State is ready to use nitrogen hypoxia). The State represented to the district court that if the court issued an injunction requiring Miller's execution by nitrogen hypoxia, the execution would be conducted by nitrogen hypoxia on September 22. App. 1253a. At the September 12 evidentiary hearing, Applicants revealed that any delay in executing Miller in accordance with his nitrogen hypoxia election would be short, and further represented that the nitrogen hypoxia protocol is prepared but not quite final because it must be "nested" within an existing electrocution and lethal injection protocol document. App. 1018a ("[T]he [nitrogen hypoxia] protocol is there."); App. 1016a–17a ("I will say if the Court enters a narrowly drawn, tailored injunction saying go forth only with nitrogen hypoxia, that it is very, very likely that Miller would be executed by nitrogen hypoxia."); App. 1252a.

Applicants have now suggested that the State would make an announcement about the availability of nitrogen hypoxia in October 2022. App. 1253a; 1019a–23a. As the district court observed, "the State intends to announce its readiness to conduct executions by nitrogen hypoxia in the upcoming weeks." App. 1254a; *see also* App. 1383a. The preliminary injunction is not, as Applicants claim for the first time in their motion before this Court, an "effective commutation" of Mr. Miller's death sentence. Pet. Mot. at 1. It is a minor delay that will only last as long as the *State* takes to finalize its own nitrogen hypoxia protocol.

ARGUMENT

"This Court, like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction." *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 336 (1985) (O'Connor, J., concurring). This means that the district court's factual findings are reviewed under the deferential "clear error" standard. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). That standard "does not entitle us to overturn a finding simply because [we are] convinced that [we] would have decided the case differently." *Id.* Indeed, "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* This Court's function, then, "is not to decide factual issues de novo." *Id.* And where, as here, an intermediate court reviews, and affirms, a trial court's factual findings, "this Court will not 'lightly overturn' the concurrent findings of the two lower courts." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

As demonstrated below, Applicants cannot show that their application should be granted. Moreover, vacating the district court's injunction would alter the status quo, with an immediate, life-ending impact on Mr. Miller. Therefore, like the Eleventh Circuit, this Court should find that the district court did not abuse its discretion by ordering the preliminary injunction at issue.

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A PRELIMINARY INJUNCTION

The District Court and the Eleventh Circuit correctly held that Mr. Miller is likely to succeed on his claims that the State of Alabama is violating his rights to equal protection of law under the Fourteenth Amendment.

a. The District Court Did Not Commit Clear Error By Resolving Factual Questions in Mr. Miller's Favor.

A critical legal proposition, ignored by Applicants, is not in dispute. Applicants acknowledged before the district court that if Mr. Miller in fact timely elected nitrogen hypoxia, he should not be executed except by nitrogen hypoxia. App. 1137a ("I feel very confident saying that if Mr. Miller showed up with his counsel saying, here's what we sent him, here are the notes of our conversations, here's where we FedEx'd it, here's where we got it back, that he would get the same exact result that Mr. Taylor got."). It follows, as the district court recognized, that Miller's claim hinges on one central factual issue—whether he made a timely written election of nitrogen hypoxia under Ala. Code § 15-18-82.1(b); App. 1255a ("All parties agree that . . . a material issue of fact must first be resolved: whether Miller timely elected nitrogen hypoxia—or, at this stage, whether it is substantially likely that Miller timely elected nitrogen hypoxia."); The district court, after considering all the evidence, concluded that it is "substantially likely that Miller timely elected nitrogen hypoxia." *Id.* at 1275a. As the Eleventh Circuit held, "Given the district court's unchallenged finding that it is substantially likely that Mr. Miller timely submitted the election form for

nitrogen hypoxia, he was similarly situated to the other inmates who did the same thing." 11th Cir. at 15.

The court's decision repeatedly emphasized its determination that Mr. Miller's live testimony was credible.

- "[T]he Court finds substantially credible Miller's testimony that he timely submitted a nitrogen hypoxia election form." App. 1257a.
- "The Court finds compelling and credible Miller's consistent explanation that he elected nitrogen hypoxia primarily to avoid needles." *Id.* at 1258a.
- "Miller 'thought' that nitrogen hypoxia would be "a more humane thing.' The Court finds this testimony compelling and credible." *Id.* at 1259a.
- "I]n live testimony before the Court and in deposition testimony, Miller has presented consistent, credible, and uncontroverted direct evidence that he submitted an election form in the manner he says was announced to him by the ADOC." *Id.* at 1274a.
- "The Court has also assessed Miller's credibility at this stage in light of the evidence presented, and in light of the evidence not presented by the State, and it has carefully considered the State's arguments about Miller's credibility separately and together. [T]he Court concludes . . . it is substantially likely that Miller timely elected nitrogen hypoxia." *Id.* at 1275a.

Applicants do not make any attempt to argue that the court's factual findings are clearly erroneous. Nor do they argue that the court's determination that Miller likely completed and submitted his form was clearly erroneous. Applicants' inability and failure to challenge the district court's factual findings should put an end to their motion to vacate. As the district court pointed out in denying Applicants' motion to stay pending appeal, "the State does not argue that the Court's finding was clearly

erroneous. Rather, the State presents legal arguments as if the Court had not made that finding." App. 1327a. Applicants thus cannot satisfy the standard of review.

b. Mr. Miller is likely to succeed on his Equal Protection claim

The Eleventh Circuit correctly determined that the district court did not abuse its discretion in finding that Mr. Miller is likely to succeed on his equal protection claim. To state such a claim, Mr. Miller must show that he is being treated "disparately from other similarly situated persons" and the disparate treatment is not "rationally related to a legitimate government interest." *Arthur v. Thomas*, 674 F.3d 1257, 1262 (11th Cir. 2012). The relevant question, then, is whether Miller's rights are violated "if the State execute[s] him by lethal injection even though he timely elected nitrogen hypoxia, while not pursuing execution by lethal injection for other inmates who timely elected nitrogen hypoxia." App. 1278a.

The answer to that question is "yes." *Id*. As the Eleventh Circuit recognized, Mr. Miller is "similarly situated to other capital inmates who turned in a timely election form" because they all complied with the statutory requirements for making such an election. App. 1345a. Applicants have not executed (or attempted to execute) by lethal injection other inmates who timely elected nitrogen hypoxia, App. 1279a., and they did not argue below that they would have any rational basis to execute Miller by lethal injection if he timely submitted his election for execution by nitrogen hypoxia. For that reason, once the district court determined as a matter of fact that Mr. Miller likely timely submitted his election, it followed that he was likely to succeed on the merits of his equal protection claim. 1381a ("Given the district court's

unchallenged finding that it is substantially likely that Mr. Miller timely submitted the election form for nitrogen hypoxia, he was similarly situated to the other inmates who did the same thing.").

It bears emphasis: Applicants are *not* challenging this reasoning—the actual reasoning of the district court when entering its preliminary injunction—on appeal. They *still* offer no reason why they should be permitted to execute Mr. Miller by lethal injection *given that* the district court has concluded he likely elected nitrogen hypoxia. Instead, they continue to argue a different point: that they have good reasons for not believing Mr. Miller's testimony about having timely submitted his election. Applicants contend that Mr. Miller does not meet the "multifactor standard" purportedly applied "to all death row-inmates seeking nitrogen hypoxia" because an election form from Miller is not in "ADOC's records" and there is no "credible evidence" that Miller timely completed and submitted his election. **Mot. 27.**

But as the Eleventh Circuit correctly concluded, that is an "*ex ante* view of the world, looking only at whether [the State] acted reasonably according to its understanding of the circumstances prior to the preliminary injunction hearing." 1345a. The facts that matter are the ones that are proven in court. *Id.* And at the preliminary injunction hearing, Mr. Miller was required to prove by a preponderance of the evidence that he turned in his election form in June of 2018. "He did that to the district court's satisfaction." 1380a ("When a district court, sitting as the trier of fact, determines that X did Y at some point in the past, it is not 'creating' a new reality. It is instead, determining what actually happened at that prior point in time. If the

finding of X doing Y goes unchallenged—as it does here—then that is what the past consisted of for appellate purposes."

The district court's determination was the equivalent of Applicants finding Mr. Miller's form after misplacing it all this time. Nobody could defend the notion that if Applicants lost the form, and then found it just days before the execution, that they could go forward with lethal injection. That is no different from what is happening here. The fact that Applicants have not (and cannot) challenge the factual finding that Mr. Miller likely submitted his election form in a timely manner means that they "found" his form on the date that finding was made. Applicants admitted below that if Miller timely submitted his form, they cannot execute him by lethal injection. App. 1137a. Having lost on the factual question that their own admission teed up, they cannot shift gears on appeal and argue that factual issue is beside the point. The argument Applicants present here can be rejected not only because they are wrong, but also because they have waived it. *See Nevada Comm'n on Ethics v. Carrigan,* 564 U.S. 117, 128–29 (2011).

Applicants' admissions before the district court also contradict any suggestion that they will be prejudiced by delay in executing Mr. Miller. There is no reason to execute Miller by lethal injection tonight when—based on Applicants' own admissions—the State may be ready to carry out executions by nitrogen hypoxia in a matter of weeks. App. 1253a. And any "delay" from having lost Miller's form is likewise of their own making. Miller's form is not in "ADOC's records" because the official who collected his form likely failed to put it there—the same way the officials

who collected inmates Calvin Stallworth's and Jarrod Taylor's election forms either failed or refused to deliver them to the warden. *Id.* at 1261a–62a.

That Miller did not submit what Applicants deem "credible, contemporaneous evidence" of his election—i.e., attorney-client communications—is of no moment. Mot. 27. Ala. Code § 15-18-82.1(b) does not require death row inmates to submit attorney-client communications to ensure that Applicants honor their election. In fact, the reason Taylor submitted his privileged communications is because Applicants lost the form that he had previously submitted to them. *Id.* at 1261a–62a. Under Applicants' theory, Miller can only state an equal protection claim if he agrees to waive his attorney-client privilege to clean up the mess Applicants created by losing his form. That is not the law. *See, e.g.*, *id.* at 1274a (district court calling Applicants' argument regarding Miller's privileged communications "weak" and "improper").

Applicants similarly insist that they reasonably differentiated Mr. Miller based on credibility determinations because he did not submit corroborating evidence of his election. Mot. at 25. This argument essentially "contends that notwithstanding the Court's factual finding that it is substantially likely Mr. Miller timely elected nitrogen hypoxia, Mr. Miller's equal protection rights would not be violated if he were executed by lethal injection because the State wants more corroborating evidence." App. 1328a. As the district court correctly determined, that result would be "absurd and legally untenable" and would require the court to substitute the State as the factfinder after the State expressly "requested that this Court sit as the factfinder." *Id*. (emphasis in original). That Applicants disagree with the court's finding is not a

basis to conclude that the court abused its discretion. And, as the Eleventh Circuit correctly pointed out, "[w]hat the State is asking for is blind acceptance of its position that Mr. Miller did not submit a timely election from because he had no corroborating evidence that satisfied the State." App. 1379a. That is not a proper basis to vacate the injunction.

Applicants also argue that Mr. Miller's claim is barred by "class of one" precedent. Mot. 24. That is incorrect. As an initial matter, even Applicants concede that *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591 (2008) concerns situations not at issue here. Id. In any event, both the district court and Eleventh Circuit properly framed this case as not falling within the traditional "class of one" framework. Instead, and as noted above, the courts recognized that Alabama law provides a right to elect nitrogen hypoxia, and that Mr. Miller is likely similarly situated to all others on death row who timely exercised that right. 1344a ("Mr. Miller was 'substantially credible,' and the district court believed his testimony that he timely submitted an election form for nitrogen hypoxia. He is therefore similarly situated to other capital inmates who turned in a timely election form."). And while Applicants insist that they appropriately made "individualized" assessments regarding Mr. Miller vis-à-vis others, Mot. 23, that is not the basis on which the district court rendered its decision. As explained, the court took a broader approach—comparing Mr. Miller to all similarly situated inmates at Holman. And, as noted, the "individualized" assessment regarding Mr. Miller vis-à-vis others is not when the Applicants determined that they no longer had his form. Instead, and Eleventh Circuit explained, it is when Applicants

execute him via lethal injection even though the district court determined that he submitted an nitrogen hypoxia form.

c. Mr. Miller is likely to succeed on his Procedural Due Process claim

The Eleventh Circuit did not review the district court's finding that Mr. Miller established a substantial likelihood of success on the merits of his procedural due process claim, so that aspect of the District Court's decision is undisturbed. Therefore, a remand to the Eleventh Circuit on procedural due process would be necessary before disturbing the district court's preliminary injunction. No exigent circumstances exist that would warrant depriving the court of appeals of the opportunity to consider that claim as an initial matter. Regardless, the State put forth arguments as to why Mr. Miller's procedural due process argument lacks merit; Mr. Miller will address them here.

The State contends that Mr. Miller could have sought mandamus from the Alabama Supreme Court, but none of the cases cited by Alabama stand for the proposition that it is necessary to return to state courts where a remedy already has been unsuccessfully sought simply because a mandamus action might also have been filed. *Rumford Pharm., Inc. v. City of E. Providence*, 970 F.2d 996 (1st Cir. 1992) upheld dismissal "absent either allegations or discussion, let alone citation to authority, as to the unavailability of constitutionally adequate state law remedies." Id. at 1000. The cited footnote stands only for the proposition that a litigant might seek mandamus of an administrative body that has failed to act. *See id*. at 999 n. 6. And *Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 881

(2d Cir. 1996) concerned only post-deprivation activities and a standard "Article 78" challenge to agency actions – not mandamus. *Tri County Paving, Inc. v. Ashe County,* 281 F.3d 430, 436–38 (4th Cir. 2002) likewise standards for the unremarkable proposition that state mandamus is an adequate remedy to compel local officials to issue a building permit. The State here, however, advances the remarkable proposition that to perfect a due process claim you must "kick a dead horse"; that is, you must return to a court where you have already sought a remedy and seek yet more remedy through an extraordinary writ. None of the State's cited cases remotely stand for that proposition.

II. ALL EQUITABLE FACTORS WEIGH IN MR. MILLER'S FAVOR

The remaining equitable factors weigh overwhelmingly against vacating the injunction. The Eleventh Circuit concluded that the district court did not abuse its discretion in finding that: (i) irreparable injury will result unless the injunction is issued; (ii) the injury to Miller outweighs whatever damage the injunction might cause Applicants; and (iii) the injunction is not adverse to the public interest. 11th Cir. Op. at 20; App. 1288a–94a. In fact, the State conceded in its briefing and in oral arguments at the district court that they do not even contest that these factors weigh in Miller's favor. App. 1198–99a; 59a–70a.

A. *Balancing Irreparable Harm.* Where, as here, "the lower court has already performed th[e] task" of determining the parties' respective harms, "its decision is entitled to weight and should not lightly be disturbed." *Williams v. Zbaraz*, 442 U.S. 1309, 1312 (1979) (Stevens, J., in chambers).

The District Court determined that Mr. Miller—not the State—demonstrated an imminent risk of irreparable harm. Irreparable injury is certain to befall Mr. Miller tonight if the State executes him by lethal injection rather than nitrogen hypoxia since the execution cannot be undone nor is it redressable with money damages. App. 1288a. The harm of being executed is inarguably "certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent irreparable harm." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 7–8 (D.C. Cir. 2016). This part of the District Court's "thorough analysis" "warrant[s] respect." *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3, 5 (2019) (Sotomayor, J., dissenting from grant of stay).

The District Court specifically found—based on unrebutted testimony—that Mr. Miller is strongly adverse to needles and has had negative experiences with them in the past due to difficulty finding a vein. App. 1288a. As a result, the District Court concluded, Mr. Miller will suffer irreparable injury if an injunction does not issue because he will "be deprived of the ability to die by the method he chose and instead will be forced to die by a method he sought to avoid and which he asserts will be painful." *Id.* The State did not contest at the District Court or Eleventh Circuit that executing Mr. Miller by lethal injection as opposed to nitrogen hypoxia would cause him irreparable injury. *Id.* Nor could it. "An injury is 'irreparable' only if it cannot be undone through monetary remedies." *City of Jacksonville,* 896 F.2d at 1285. And money would not remedy Mr. Miller's injury because his injury is not monetary. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1282 (2022) (concluding that inmate likely faced

irreparable injury in the absence of an injunction allowing his spiritual advisor to audibly pray and lay hands on him during his execution; explaining that "[c]ompensation paid to his estate would not remedy this harm, which is spiritual rather than pecuniary").

In contrast, the State faces no irreparable harm. Mr. Miller is in custody and can be executed in compliance with the district court's preliminary injunction when the protocol for nitrogen hypoxia is ready, which the State has repeatedly said could be as soon as a few weeks from now. Mr. Miller has never sought an open-ended stay of his execution; rather, he requested (and received) a narrowly-tailored injunction effectively requiring the State to execute him by nitrogen hypoxia. *See Ramirez*, 142 S. Ct. at 1282 (reaching a similar conclusion in case involving inmate execution). Thus, while the State has an interest in the execution of the State's criminal judgments, any minimal delay resulting from the preliminary injunction will have little adverse effect upon that interest. *See Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J., dissenting) ("The state will get its man in the end. In contrast, if persons are put to death in a manner that is determined to [violate the Constitution], they suffer injury that can never be undone, and the Constitution suffers an injury that can be never be repaired.").

Vacating the injunction also risks "foreclos[ing] . . . review," which constitutes "irreparable harm." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers); *accord, e.g.*, *John Doe Agency*, 488 U.S. at 1309 (Marshall, J., in chambers.

Allowing the State to execute Mr. Miller before proceedings have concluded risks "effectively depriv[ing] this Court of jurisdiction." *Garrison*, 468 U.S. at 1302.

B. *The Public Interest.*

The Eleventh Circuit found it significant that the State did not argue that the harm to the public interest counsels against injunctive relief. *Id.* at 16. The Eleventh Circuit also concluded that the district court did not abuse its discretion in balancing the equities and that there was no clear error judgment. *Id.* at 16-17. The District Court found that "[t]he State and the public have an interest in the State following its own law generally and in the State honoring an inmate's valid election of nitrogen hypoxia more specifically—an election afforded to inmates by the Alabama Legislature." App. 1289a. Furthermore, the public interest would not be served by having this Court evaluate the extensive factual record on a moment's notice. Rushing through those materials in a few short hours to accommodate the State's preferred schedule does not do the public any good. The public interest lies in ensuring that the State of Alabama acts in accordance with the U.S. Constitution and its own state law. *See League of Women Voters*, 838 F.3d at 12. This interest is only heightened in the context of executions. *See Purkey*, 2020 WL 3603779, at *11 ("[T]he public interest is surely served by treating this case with the same time for consideration and deliberation that we would give any case. Just because the death penalty is involved is no reason to take shortcuts—indeed, it is a reason not to do so.").

With respect to the State's assertion of "delay" on the part of Mr. Miller, the Eleventh Circuit concluded that "[b]ecause the State's argument ignores the district court's findings of fact, we conclude there was no abuse of discretion." *Id.* at 15.

The Eleventh Circuit noted that the district court also squarely rejected the State's contention that Mr. Miller delayed the filing of his lawsuit. 11th Cir. Op. at 17 The State points to two words in a single email that Mr. Miller wrote to his pen pal indicating that he had "to wait." Mot. at 22. As recognized by the Eleventh Circuit and contrary to the State's argument that the court "ignored" the email, the District Court addressed in detail why it did not believe the email was evidence of an intentional delay, explaining that nothing in the communication suggested a wait to bring Mr. Miller's lawsuit. 11th Cir. Op. at 17-18; App. 1291a–92a. Moreover, as recognized by the Eleventh Circuit, the district court did not abuse its discretion in finding that Miller did not bring his claims in a dilatory fashion. 11th Cir. Op. at 18-19.

While the State continues to blame Mr. Miller for the last-minute nature of these proceedings, the District Court determined that *the State*, not Mr. Miller, is responsible for any delay associated with his execution by nitrogen hypoxia. The Eleventh Circuit concluded '[t]his determination was not a clear error of judgment." 11th Cir. Op. at 18. The State sought the September 22 execution date, despite the fact that it had not finalized its nitrogen hypoxia protocol. The State announced it was "very, very likely" ready to honor Mr. Miller's statutory right as to method when it, in fact, was not. As the District Court observed, "the State allowed inmates to elect

nitrogen hypoxia in June 2018 and has since slowly moved to create a method and protocol of performing executions by nitrogen hypoxia." App. 1289a–90a. Four years later, a method is still unavailable. Thus, Mr. Miller filing suit any earlier "would not change the reality that the State is not ready to execute anyone by nitrogen hypoxia." *Id.* at 1295a; *see also* App. 1383a-84a ("[T]he delay here is attributable to the State.").

The State of Alabama now also asks this Court to vacate the District Court's preliminary injunction on an emergency basis. What is the emergency? The State of Alabama wants to proceed with the execution of Alan Miller by lethal injection ***tonight***. Mr. Miller is not going anywhere, and neither is the Alabama Department of Corrections. The State is manufacturing an emergency need to execute Mr. Miller despite the fact that the State can execute Mr. Miller once it finalizes its nitrogen hypoxia execution protocol.

CONCLUSION

For the foregoing reasons, the Court should deny the State's Emergency Application to Vacate the Preliminary Injunction.

Dated: September 22, 2022

Respectfully submitted,

Daniel J. Neppl

JAMES BRADLEY ROBERTSON
BRADLEY ARANT BOULT CUMMINGS
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203

DANIEL J. NEPPL*
KELLY J. HUGGINS
JEFFREY T. GREEN
ROBERT N. HOCHMAN
MARA E. KLEBANER
STEPHEN SPECTOR
SIDLEY AUSTIN LLP
One South Dearborn St.

Chicago, IL 60603
(312) 853-7000

Counsel for Respondent