No. 22-13136-P

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALAN EUGENE MILLER,

Plaintiff-Appellee,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS; WARDEN, HOLMAN CORRECTIONAL FACILITY; and ATTORNEY GENERAL, STATE OF ALABAMA

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:22-cv-00506-RAH

Death Penalty Case
Re: Stayed Execution on Thursday, September 22, 2022, at 6:00 p.m. CT

APPELLEE'S OPPOSITION TO APPELLANTS' EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS 1

INTRODUCTION 1

BACKGROUND 2

STANDARD OF REVIEW 7

ARGUMENT 8

I. The District Court Did Not Commit Clear Error By Resolving Factual Questions in Miller's Favor. 8

II. Miller Has a Substantial Likelihood of Success on His Equal Protection and Procedural Due Process Claims. 10

A. *Miller Has a Substantial Likelihood of Success on His Equal Protection Claim.* 10

B. *Miller Has a Substantial Likelihood of Success on His Procedural Due Process Claim.* 15

III. All Equitable Factors Weigh in Miller's Favor. 19

CONCLUSION 21

CERTIFICATE OF SERVICE 23

CERTIFICATE OF COMPLIANCE 24

TABLE OF AUTHORITIES

Cases **Page(s)**

Access Now, Inc. v. Sw. Airlines Co.,
385 F.3d 1324 (11th Cir. 2004) 13

Alabama v. U.S. Army Corps of Eng'rs,
424 F.3d 1117 (11th Cir. 2005) 10

Arthur v. Thomas,
674 F.3d 1257 (11th Cir. 2012) 10, 14

BellSouth Telecomms. v. MCIMetro Access Transmission Servs.,
425 F.3d 964 (11th Cir. 2005) 8

Cnty. of Sacramento v. Lewis,
523 U.S. 833 (1998)....................19

Cumulus Media v. Clear Channel Commc'ns,
304 F.3d 1167 (11th Cir. 2002) 8

Daniels v. Williams,
474 U.S. 327 (1986)....................19

Democratic Exec. Comm. of Fla. v. Lee,
915 F.3d 1312 (11th Cir. 2019) 8

Fisher v. Texas,
169 F.3d 295 (5th Cir. 1999) 17

Foxy Lady v. City of Atlanta,
347 F.3d 1232 (11th Cir. 2003) (per curiam) 15

Mesa Air Grp. v. Delta Air Lines,
573 F.3d 1124 (11th Cir. 2009) 8

Price v. Comm'r Ala., DOC,
920 F.3d 1317 (11th Cir. 2019) 11, 14

Revette v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers,
740 F.2d 892 (11th Cir. 1984) (per curiam) 7

Smith v. Comm'r, Ala. DOC.,
2021 WL 4916001 (11th Cir. Oct. 21, 2021) 2

Williamson Cnty. Reg'l Plan Comm'n v. Hamilton Bank of Johnson City,
473 U.S. 172 (1985)..18

Zinermon v. Burch,
494 U.S. 113 (1990)..15

Statutes

Ala. Code § 15-18-82.1(a) 2

Ala. Code § 15-18-82.1(b) 1, 9, 13

Ala. Code § 15-18-82.1(b)(2) 2

INTRODUCTION

Alabama Code § 15-18-82.1(b) provided Alan Miller with the right to elect execution by nitrogen hypoxia. 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. Every other Alabama inmate who elected nitrogen hypoxia no longer faces execution by lethal injection. Except Alan Miller. The district court concluded that, in light of these facts, Mr. Miller has a substantial likelihood of success prevailing on his equal protection and procedural due process claims, and it preliminarily enjoined Appellants from executing him by any method other than nitrogen hypoxia.

Appellants now seek to overturn the district court's thorough 61-page ruling in a last-minute attempt to execute Miller by lethal injection tonight. Appellants' brief ignores their own repeated representations that they are nearly ready to carry out executions via nitrogen hypoxia. Appellants thus face no irreparable harm, yet urge this Court to disturb the district court's heavily fact-based preliminary injunction ruling after only hours of review. And they do so without even engaging with the actual reasoning of the district court, as the district court observed just yesterday in denying Appellants' motion for a stay pending appeal.

Alan Miller will be executed. Any brief delay in that execution is entirely a

consequence of Appellants' failures. The preliminary injunction should remain in place.

BACKGROUND

Lethal injection is Alabama's default method of execution. Ala. Code § 15-18-82.1(a). 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); Mem. Op. ("Op."), Dkt.62:5. Inmates whose death sentences were final prior to the amendment's enactment, like Miller, were given 30 days to make this election. Op.5. 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.*

Appellants did not establish any procedures governing the election process. The election period at Holman Correctional Facility was extremely disorganized. *See, e.g,* Op.62:47; Dkt.58:174; *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* Op.6. However, the local Federal Public Defender's Office created a form and distributed it to its clients. *See* Op.6. 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. Op.6, 12; Dkt.52-14:44-45. 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. Op.6, 12. Neither Emberton nor anyone else created a list or otherwise recorded the names of people who received a copy. Op.12; Dkt.52-1:53-54. In fact, Stewart explicitly told Emberton not to log the names of the individuals from whom he collected a form. Op.12. Emberton therefore simply returned a box with the forms to Stewart. Op.12-13. Put simply, Appellants never established any system to memorialize which inmates exercised their right to execution by nitrogen hypoxia. Op.27 ("[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.").

Miller received an election form in June 2018 while confined in his cell. Op.16. 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." Op.15-16; Dkt.58:92-93. These "painful" encounters left Miller with many bruises, including a large bruise that stretched across his arm. Op.15-16; Dkt.58:94.

Based on these experiences, Miller chose nitrogen hypoxia, which he believed would be like being put to sleep before surgery. Op.16; Dkt.58:99-100. Miller is familiar with nitrogen because prior to his incarceration, he delivered medical oxygen and nitrous to dental offices and hospitals. Op.16; Dkt.58:100. 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." Op.16.

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. Op.17. The prison official collected Miller's form at the same time that he collected election forms from others. Op.16-17; Dkt.58:104. Miller asked the official to have his form copied and notarized, but both requests were denied. Op.17; Dkt.58:102.

On April 19, 2022, Appellant Attorney General Marshall moved the Alabama Supreme Court to schedule Miller's execution by lethal injection. Op.6. Miller filed

a brief in opposition, attesting in an affidavit that he completed and timely returned his nitrogen hypoxia election form. Op.6-7; Dkt.52-23. Marshall responded on May 27. Op.7; Dkt.52-26. Through an affidavit signed by Appellant Raybon, the State claimed that it has not found a record of Miller's form. Op.7; Dkt.52-26:8. 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. Op.7; Dkt.52-27. On July 18, the Alabama Supreme Court granted the State's motion (Chief Justice Parker dissented) and set Miller's execution for September 22. Op.7; Dkt.52-28.

In addition to Miller, Appellants have lost the nitrogen hypoxia forms of other people on death row. Op.18. 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. Op.44. Appellant 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." Dkt.18-2:2.

The privileged attorney communications that Taylor's counsel provided as proof of his nitrogen hypoxia election can be located at Dkt.51-2. 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 20 (email from Taylor's attorney confirming that Taylor gave a signed copy of his election form "to Lieutenant Franklin to deliver to the warden").

Appellants also mishandled the nitrogen hypoxia election form of Calvin Stallworth. Op.18. Stallworth gave his completed election form to a prison official at Holman, but that official refused to deliver his form to the Warden. Op.18; Dkt.52-8.

Miller initiated this litigation on August 22, 2022. On September 1, Miller moved for a preliminary injunction. Dkt.28. 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 Appellants from executing Miller via any method other than nitrogen hypoxia. At 9 pm ET on September 20, Appellants filed near-identical motions to stay the district court's preliminary injunction in both the district court and this Court. Dkt.67. The district court issued its ruling on September 21, rejecting the same arguments that Appellants make in this Court. Dkt.70.

* * * * *

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. Op.19. At the September 12 evidentiary hearing, Appellants 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. Dkt.58:8 ("[T]he [nitrogen hypoxia] protocol is there."); Dkt.58:6 ("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."); Op.19.

Appellants have now suggested that the State would make an announcement about the availability of nitrogen hypoxia in October 2022. Op.19; Dkt.58:9-13. As the district court observed, "the State intends to announce its readiness to conduct executions by nitrogen hypoxia in the upcoming weeks." Op.20.

STANDARD OF REVIEW

"The grant or denial of a preliminary injunction is a decision within the sound discretion of the district court." *Revette v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 740 F.2d 892, 893 (11th Cir. 1984) (per curiam). As a result, "[a]ppellate review of such a decision is very narrow" as the district court's judgment should not be reversed "unless there is a clear abuse of discretion."

BellSouth Telecomms. v. MCIMetro Access Transmission Servs., 425 F.3d 964, 968 (11th Cir. 2005). In considering whether to stay a preliminary injunction, the Eleventh Circuit applies "the usual standards of review governing our review of the merits of the preliminary injunction." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019) (findings of fact are reviewed for clear error).

The "limited review" is necessary because "the trial court is in a far better position than this Court to evaluate [the] evidence." *Cumulus Media v. Clear Channel Commc'ns*, 304 F.3d 1167, 1171 (11th Cir. 2002). That includes the trial court's ability to make credibility determinations based on live testimony. *Mesa Air Grp. v. Delta Air Lines*, 573 F.3d 1124, 1130 n.7 (11th Cir. 2009).

Moreover, the "expedited nature of preliminary injunction proceedings" creates pressure "to make difficult judgments without the luxury of abundant time for reflection." *Cumulus Media*, 304 F.3d at 1171. Those judgments, therefore, are the "district court's to make," especially, where, as here, this Court is being asked to review an entire evidentiary record—spanning thousands of pages—in a matter of hours. *Id.*

ARGUMENT

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

A critical legal proposition, ignored by Appellants, is not in dispute. Appellants acknowledged before the district court that if Miller in fact timely elected nitrogen hypoxia, he should not be executed except by nitrogen hypoxia.

Dkt.58:127. 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); Op.21 ("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." Op.41.

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

- "[T]he Court finds substantially credible Miller's testimony that he timely submitted a nitrogen hypoxia election form." Op. 23

- "The Court finds compelling and credible Miller's consistent explanation that he elected nitrogen hypoxia primarily to avoid needles." Op.24

- "Miller 'thought' that nitrogen hypoxia would be "a more humane thing.' The Court finds this testimony compelling and credible." Op.25

- "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." Op.40

- "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." Op.41

Appellants make no 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. Appellants' inability and failure to challenge these factual findings should put an end to their stay request. As the district court pointed out in denying Appellants' nearly-identical 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." Dkt.70:6. Appellants thus cannot satisfy the standard of review.

II. Miller Has a Substantial Likelihood of Success on His Equal Protection and Procedural Due Process Claims.

The district court correctly concluded that Miller is likely to succeed on *both* his equal protection claim and procedural due process claim notwithstanding the fact that Miller only needs to succeed on *one* claim to be entitled to a preliminary injunction. *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1134 (11th Cir. 2005).

A. *Miller Has a Substantial Likelihood of Success on His Equal Protection Claim.*

To state an equal protection claim, 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." Op.44.

The answer to that question is "yes." *Id.* As the district court recognized, Miller is "similarly situated to every other inmate who timely elected nitrogen hypoxia" because they all complied with the statutory requirements for making such an election. Op.44 (citing *Price v. Comm'r Ala., DOC*, 920 F.3d 1317, 1325 (11th Cir. 2019) (suggesting that inmates who timely elected nitrogen hypoxia are similarly situated to one another)). Appellants have not executed (or attempted to execute) by lethal injection other inmates who timely elected nitrogen hypoxia. Op.45. Appellants 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 Miller likely timely submitted his election, it followed that he was likely to succeed on the merits of his equal protection claim.

It bears emphasis: Appellants have *not* challenged 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 Miller by lethal injection *given that* the district court has concluded he likely elected nitrogen

hypoxia. Instead, they have tried to argue a different point: that they have good reasons for not believing Mr. Miller's testimony about having timely submitted his election. Appellants contend that 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.15.

That is just another way of disputing the district court's factual finding while pretending not to be disputing the district court's factual finding. The district court saw past the sleight of hand, and this Court should as well. *See* Op.45 ("The State's belief that Miller has not proven his case to the State's satisfaction is irrelevant" given that "the State is not the exclusive arbiter of whether an inmate has made a proper and timely election."). The question is not whether Appellants had "a rational basis for requiring corroborating evidence when the *State* evaluates an inmate's assertion that he elected." Dkt. 70 at 6. (emphasis in original). Instead, and as explained above, the question is whether Miller's equal protection rights would be violated if the State executes him by lethal injection while not pursuing execution by lethal injection of other inmates who, like Miller, also timely elected nitrogen hypoxia. *Id*. Appellants admitted below that if Miller timely submitted his form, they cannot execute him by lethal injection. 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 Appellants present here can be rejected not only because they are wrong, but also because they have waived it. *See Access Now, Inc. v. Sw. Airlines Co*., 385 F.3d 1324, 1331 (11th Cir. 2004).

Appellants' 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 Appellants' own admissions—the State may be ready to carry out executions by nitrogen hypoxia in a matter of weeks. Op.19. 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. Op.27-28.

That Miller did not submit what Appellants deem "credible evidence" of his election—i.e., attorney-client communications—is of no moment. Mot.15-16. Ala. Code § 15-18-82.1(b) does not require death row inmates to submit attorney-client communications to ensure that Appellants honor their election. In fact, the reason Taylor submitted his privileged communications is because Appellants lost the form that he had previously submitted to them. Op.27-28. Under Appellants' theory, Miller can only state an equal protection claim if he agrees to waive his attorney-client privilege to clean up the mess Appellants created by losing his form. That is

not the law. *See, e.g.*, Op.40 (calling Appellants' argument regarding Miller's privileged communications "weak" and "improper").

Appellants similarly insist that they reasonably differentiated Miller based on credibility determinations because he did not submit corroborating evidence of his election. This argument essentially "contends that notwithstanding the Court's factual finding that it is substantially likely Miller timely elected nitrogen hypoxia, Miller's equal protection rights would not be violated if he were executed by lethal injection because the State wants more corroborating evidence." Dkt.70 at 7. 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 Appellants disagree with the court's finding is not a basis to conclude that the court abused its discretion.

Appellants also argue that the district court mischaracterized their decision not to honor Miller's election as "one-dimensional." Mot.16. That is incorrect. The court described government action as "one-dimensional" when discussing the standard under a "class of one" claim, Op.43, but the court did not treat *this* case as a traditional "class of one" situation. Instead, and as noted above, the court recognized that Alabama law provides a *right* to elect nitrogen hypoxia, and that Miller is likely similarly situated to all others on death row who timely exercised

that right. Op.44; Dkt. 70:7. That finding is consistent with this Court's suggestion that inmates at Holman who timely elected nitrogen hypoxia are similarly situated to one another. *Price*, 920 F.3d at 1325. And while Appellants insist that they appropriately made "individualized determinations" regarding Miller vis-à-vis Taylor, Mot.15-16, that is not the basis on which the court rendered its decision. As explained, the court took a broader approach—comparing Miller to all similarly situated inmates at Holman. Appellants do not even attempt to argue that the court abused its discretion in doing so. Nor can they, since this Court has recognized equal protection claims in similar situations. *Arthur*, 674 F.3d at 1262.

B. *Miller Has a Substantial Likelihood of Success on His Procedural Due Process Claim.*

The district court properly concluded that Miller has a substantial likelihood of success on the merits of his procedural due process claim. Op.45-53. There is no precise pleading or evidentiary standard on a procedural due process claim. Rather:

> [T]o determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law. Due process, as this Court often has said, is a flexible concept that varies with the particular situation.

Zinermon v. Burch, 494 U.S. 113, 125-27 (1990); *see also Foxy Lady v. City of Atlanta*, 347 F.3d 1232, 1236 (11th Cir. 2003) (per curiam). The district court correctly determined as a factual matter that Miller elected nitrogen hypoxia. That

determination supports the district court's conclusion under the flexible *Zinermon* framework that Miller is likely to succeed on his procedural due process claim.

Plaintiffs often state procedural due process claims by showing: "(1) deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." Op.50. The protected liberty interest here is Miller's statutorily-permitted right to choose nitrogen hypoxia. *Id.* The state action is Appellants' refusal to honor Miller's election as well as their determination to carry out his execution by lethal injection. Op.50-51. And the constitutionally-inadequate process is Appellants' failure to put in any place any procedures governing the election process. Op.51-53.

As the Court correctly concluded, no post-deprivation remedy exists for Miller since he will not be able to challenge his execution via lethal injection after he is executed. Op.52.

As for pre-deprivation process, Appellants did not offer any process regarding their loss of Miller's election form, nor could Miller have availed himself of such a process since Appellants did not inform any death row inmates that they either had or had not received their forms. Therefore Miller did not know Appellants lost his form.

To the extent a pre-deprivation process was available, it was "constitutionally inadequate" given that no written rules or guidance exist governing the election

process at Holman. Op.51-53. To this point, the State has never presented evidence of "any investigation into what might have happened to Miller's form." Op.52. Nor has the State "presented any evidence" that it asked Emberton "or any other pertinent correctional officers about Miller and his claimed submission of an election form." Op.52-53. These minimal safeguards would be of "obvious value" in ensuring that all properly submitted election forms are honored, especially since Appellants have never argued that such procedures would be unduly burdensome, costly, or otherwise unfeasible. Op.53. The court therefore did not abuse its discretion in finding that Miller is likely to succeed on his procedural due process claim.

Appellants insist that the theoretical possibility of *further* state court action could constitute a "pre-deprivation" remedy of which Miller can avail himself. Mot.8-10. This argument fails because Miller already sought a remedy in the Alabama Supreme Court in opposing the State's motion to set an execution date and requesting a remand for an evidentiary hearing on the issue of his election. The Alabama Supreme Court's resolution of that request made filing any writ of mandamus in a circuit court futile, and thus not an adequate or available remedy. Dkt.58 at 12-15; *Fisher v. Texas*, 169 F.3d 295, 303 (5th Cir. 1999) ("The futility exception applies when, as here, the highest state court has recently decided the same legal question adversely to the petitioner."). The Constitution does not require a plaintiff to undertake a futile act in order to vindicate his procedural due process

rights. *See Williamson Cnty. Reg'l Plan Comm'n v. Hamilton Bank of Johnson* City, 473 U.S. 172, 197 (1985) (holding that plaintiffs need not pursue "unavailable or inadequate" state-law remedies before seeking federal relief for procedural due process violations). Appellants' citation to a series of employment cases and disputes over local ordinances where mandamus may have been available or adequate in those particular cases does not change the result. Mot.8-9.

Appellants' argument regarding "negligence" also fails. Mot.11-13. Appellants argue—without citing any filing or statement by Miller—that Miller alleges that the loss of his nitrogen hypoxia election form was a "negligent" act by Appellants. Appellants' guess as to Miller's theory of liability is irrelevant on a motion to stay a preliminary injunction. Additionally, the law does not support Appellants' argument here. Appellants cite *Daniels v. Williams*, 474 U.S. 327 (1986), for the proposition that the Due Process clause is "not implicated" by "a negligent act of an official causing unintended loss of or injury to life, liberty, or property." Mot.11. But in *Daniels*, plaintiff sought *monetary damages* for injuries sustained from slipping on a pillow that he argued was negligently left on a prison staircase by a correctional officer. 474 U.S. at 327. Plaintiff argued that the officer's "negligence" deprived him of his "liberty" to be free from bodily injury. *Id. Daniels* was a tort claim dressed up in the due process clause, which is nothing like the claim here. Miller was subject to a "process" so actively mishandled that, among other

glaring problems, the prison official responsible for collecting his election form was actively "instructed" by his superior "not to keep track of who submitted a form." Op.12. *Daniels* is thus inapposite.

Moreover, as explained in *Cnty. of Sacramento v. Lewis*, due process can be thought of as a spectrum: fast-moving, emergency scenarios (*e.g.*, a car chase) require a much higher threshold showing to establish a due process violation than a slow-moving, non-emergency scenario (*e.g.*, non-emergency medical care). 523 U.S. 833, 850-54 (1998). Of the two ends of the spectrum, Miller's case falls into the latter. Appellants had time to conduct a thorough, measured process to ensure that they properly collected and stored nitrogen hypoxia election forms. They did not. Appellants' concerns about negligence are misplaced.

III. All Equitable Factors Weigh in Miller's Favor.

The district court also properly concluded that: (i) irreparable injury will result unless the injunction is issued; (ii) the injury to Miller outweighs whatever damage the injunction might cause Appellants; and (iii) the injunction is not adverse to the public interest. Op.54-60. In fact, Appellants conceded in their briefing and in oral arguments at the district court that they do not even contest that these factors weigh in Miller's favor. Dkt.58 at 188-89.

Starting with the first factor, irreparable injury is certain to befall 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. Op.54.

As for the second and third factors, 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." Op.55. 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 district court also squarely rejected Appellants' contention that Miller delayed the filing of his lawsuit. Appellants point to two words in a single email that Miller wrote to his pen pal indicating that he had "to wait." Mot.22. Contrary to Appellants' argument that the court "ignored" the email, the 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 Miller's lawsuit. Op.57-58.

And while Appellants continue to blame Miller for the last-minute nature of these proceedings, the court correctly determined that *Appellants*, not Miller, are responsible for any delay associated with his execution by nitrogen hypoxia. Appellants sought the September 22 execution date, despite the lack of nitrogen

hypoxia protocols. Appellants announced they were "very, very likely" ready to honor Miller's statutory right as to method when they, in fact, were not. As the 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." Op.55-56. Four years later, a method is still unavailable today. Thus, Miller filing suit any earlier "would not change the reality that the State is not ready to execute anyone by nitrogen hypoxia." Op.61.

CONCLUSION

For all these reasons, the Court should deny the State's motion to stay the district court's well-reasoned preliminary injunction order.

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Respectfully submitted,

By: /s/ Daniel J. Neppl

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel who have consented to electronic service.

By: /s/ Daniel J. Neppl

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 4,955 words.

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By: /s/ Daniel J. Neppl