No. 21A____

In the Supreme Court of the United States

JOHN HAMM,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,
APPLICANTS,
v.
ALAN MILLER,
RESPONDENT.

EMERGENCY APPLICATION TO VACATE INJUNCTION OF EXECUTION

To the Honorable Clarence Thomas,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Eleventh Circuit

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September 22, 2022

EXECUTION SCHEDULED THURSDAY, SEPTEMBER 22, 2022 6:00 PM CT

PARTIES TO THE PROCEEDING

The parties to the proceedings below are as follows:

Applicants John Hamm, in his official capacity as Commissioner of the Alabama Department of Corrections, Terry Raybon, in his official capacity as warden of Holman Correctional Facility, and Steve Marshall, in his official capacity as Alabama Attorney General, were defendants in the district court and appellants in the court of appeals.

Respondent Alan Miller was the plaintiff in the district court and the appellee in the court of appeals.

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TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

This case involves another set of last-minute, meritless claims brought to delay an execution. Over twenty-three years ago, Alan Miller murdered Lee Holdbrooks, Cristopher Yancy, and Terry Jarvis for "'starting rumors on [him].'" *Miller v. State*, 913 So. 2d 1148, 1154 (Ala. Crim. App. 2004). "[T]hese murders were calculated, premeditated and callous, with utter disregard of human life. The taking of these lives was among the worst in the memory of [the state appellate court] and was well beyond the level of being especially heinous, atrocious or cruel." *Id.* at 1166. For his crimes, Miller is scheduled to be executed by lethal injection **today**, **September 22, 2022**.

Just three days ago, on September 19, the United States District Court for the Middle District of Alabama enjoined Applicants from executing Miller "by any method other than nitrogen hypoxia" on the theory that lethal injection would violate Miller's Fourteenth Amendment rights. Doc. 62 at 61 (hereafter "Op."). Because nitrogen hypoxia is not currently available as a method of execution in Alabama, the injunction is an effective commutation of Miller's death sentence. Earlier today, the Eleventh Circuit declined to stay the district court's injunction. This Court should vacate it.

Miller's claims arise from Alabama Act 2018-353, which went into effect on June 1, 2018, and provided inmates 30 days to elect nitrogen hypoxia as their method of execution. *See* Ala. Code §15-18-82.1(b). "[T]he Alabama statute neither required special notice to inmates nor mandated the use of a particular form. It merely required that the election be 'personally made by the [inmate] in writing and delivered

to the warden.'" *Price v. Dunn*, 139 S. Ct. 1533, 1535 (2019) (Thomas, J., concurring in the denial of certiorari) (quoting Ala. Code §15–18–82.1(b)(2)).

Miller alleges that in 2018 he filled out a form in which he elected execution by nitrogen hypoxia. The State, however, has no record of him having done so, and accordingly scheduled him to be executed via lethal injection. Despite the warden presiding over Alabama's death row going "beyond what the statute required by affirmatively providing death-row inmates at Holman a written election form and an envelope in which they could return it to her," *Price*, 139 S. Ct. at 1535 (Thomas, J., concurring in denial of certiorari), Miller argues that by allegedly misplacing his method-of-execution form and ignoring his execution preference the State has violated his constitutional right to procedural due process. Doc. 18 at 14-16; Doc. 58 at 165. He also argues that he is a "class of one," and that the State has violated his rights under the Equal Protection Clause by treating him differently than inmates who have tangible proof they elected death by nitrogen hypoxia. Doc. 18 at 16-18.

Miller's eleventh-hour claims are meritless. By going "beyond what the statute required," *id.*, the State cannot have violated whatever "liberty interest" Miller insists the statute provided, Doc. 18 at 14. Moreover, Miller's claim that the State misplaced his method-of-election form ultimately sounds only in negligence, which is categorically insufficient to rise to the level of a constitutional deprivation. But even assuming Miller's novel right to better recordkeeping were constitutionally cognizable, Miller's procedural claim would still fail because Alabama law has provided him adequate process—the writ of mandamus. Miller inexplicably declined to seek this state-

law remedy despite having over two months to do so after the Alabama Supreme Court set his execution date. On appeal to the Eleventh Circuit, he puzzlingly declared mandamus would be "futile" because the Alabama Supreme Court rejected his claim in a separate proceeding, Miller CA11 Resp. 17—as though citing more process strengthens the claim that his process was deprived. Miller's audacious appellate strategy notwithstanding, due process is not denied when a court rejects meritless claims. Miller cannot attack the State's process as constitutionally deficient when he failed to avail himself of it. His argument that the Alabama Supreme Court already rejected this claim is wrong as a matter of state law; contrary to what the district court found, *see* Op.53 n.21 (finding "Miller could seek a writ of mandamus in a state circuit court"); and only cuts against him by showing even more state law process available to him.

Miller's "class of one" Equal Protection claim fares even worse. Miller claims he is similarly situated to other prisoners who have opted for nitrogen hypoxia and is being treated differently for no rational reason. This is plainly wrong. First, the State has no record of Miller's supposed decision, which immediately separates him from other inmates who elected nitrogen hypoxia. Second, aside from self-serving testimony, Miller has offered no evidence to show that he turned in a method-of-execution form. This materially distinguishes Miller even from the one other inmate who claimed the State did not receive his form, Jarrod Taylor, for Taylor brought forward substantial evidence to support his assertion that he had properly submitted his election. And because the State has myriad rational reasons to require reliable evidence

before crediting a prisoner's assertion—particularly where that assertion implicates his sentence—Miller's "class of one" claim goes nowhere.

Worse still, delay has been the central feature of this litigation. Start with the fact that Miller could have brought this suit as soon as ***July 18, 2022***, when the Alabama Supreme Court set his execution date. Yet, following the playbook of many death-row inmates, he waited ***34 days*** longer to file his claims. And while delay tactics in execution litigation are an unfortunately common occurrence, this is the rare case where the litigant's own statements strongly suggest that he deliberately engaged in gamesmanship: On August 4—two weeks after the Alabama Supreme Court's issuance of Miller's execution warrant and two weeks prior to the filing of his complaint—Miller confided in a pen pal that his attorneys had told him he had "to wait." Doc. 33-1 at 2. In a responsive filing, Miller assured the district court that it lacked "important context" to determine whether this was an admission of unreasonable delay. Doc. 34 at 1. Such "important context," however, was never produced, and the district court conceded it "[could] not definitively rule out" the possibility that Miller was simply seeking to "delay his looming execution." Op.41. "Equity must take into consideration the State's strong interest in proceeding with its judgment and [Miller's] obvious attempt at manipulation." *Gomez v. U.S. Dist. Ct. for N. Dist. of California*, 503 U.S. 653, 653-54 (1992).

Over two decades have passed since Miller executed three defenseless Alabamians for their purported involvement in office rumors. The State of Alabama lawfully scheduled Miller's execution for tonight. Further delaying Miller's sentence would

"countenance 'last-minute' claims relied on to forestall an execution," *Nance v. Ward*, 142 S. Ct. 2214, 2225 (2022), and eviscerate both the State's and the victims' "important interest in the timely enforcement of [Miller's] sentence," *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Yet that is precisely what the district court has done—on highly "speculative" theories that were "filed too late," no less. *Id.* at 575. "[T]he question of [Miller's] capital punishment belongs to the people [of Alabama] and their representatives." *Bucklew v. Precyth*, 139 S. Ct. 1112, 1134 (2019). This Court should return it to them.

STATEMENT

A. Miller's Crime, Trial, and Appeals.

Miller is scheduled to be executed tonight for murdering Lee Holdbrooks, Cristopher Yancy, and Terry Jarvis over two decades ago. He gunned down each of his victims in cold blood, "execution style." *Miller*, 913 So. 2d at 1155. The reason? Miller was "tired of people starting rumors on [him]." *Id.* at 1154.

Each fatal confrontation took place early in the morning at the victims' place of employment. Miller shot Holdbrooks "six times," with the fatal shot coming at "close range." *Id.* at 1156. Holdbrooks died "face down in [his office's] hallway at the end of a bloody 'crawl trail,' indicating that he had crawled 20-25 feet down the hall in an attempt to escape his assailant." *Id.* at 1154.

Miller shot Yancy three times, with "the first shot enter[ing] his leg and travel[ing] through his groin and into his spine, paralyzing him." *Id.* at 1165. "[U]nable to move" or to "defend himself," Yancy crawled and hid under his desk. *Id.* Despite having "a cell phone an inch or two from his hand," "because of his paralysis [he] was

unable to reach it and call for help." *Id.* Miller "then stooped under the desk" and "made eye contact" with Yancy before fatally executing him with two more shots from his .40 caliber handgun. *Id.*

Miller shot Jarvis five times, and, just as with Holdbrooks and Yancy, the fatal shot came at close range—here, "no more than 46 inches away from [Jarvis's] body." *Id.* at 1166. Despite Jarvis denying to Miller that he "spread[] rumors about him," Miller "shot Jarvis four times in the chest." *Id.* Miller let a witness leave the office, and then "shot Jarvis through his heart." *Id.*

Miller was tried for capital murder in Shelby County, and a jury found him guilty. *Miller*, 913 So. 2d at 1151. Following the penalty-phase presentation of mitigation evidence, the jury recommended death 10-2. *Id.* The victim-impact statements presented during the sentencing phase left no doubt that the repercussions of Miller's crime spread far beyond the innocent lives he took in August 1999. Holbrooks's father, James, explained that he and his wife "continue on," but know that "[e]very holiday, every Thanksgiving, every Christmas, every birthday, every anniversary … something is missing. And it's Lee." Vol. 8, Tab R-21, at R. 1335-36.[1] Miller's crime fell no less heavily on Yancy's father, John, who testified that "[his] family has lost a son, a devoted husband and father, brother, uncle, a grandson, a fishing partner and last but not least our best friend." Vol. 8, Tab R-21, at R. 1337-38. "Throughout the remainder of our lives," John testified, "we are left with this unfillable void clinging to

[1] "Tab" citations refer to the record filed in Miller's federal habeas proceedings. *See* Notice of Manual Filing of Indexed Record, *Miller v. Thomas*, 2:13-cv-00154 (N.D. Ala. May 13, 2013), ECF No. 17.

our invaluable memories and living without Scott." *Id.* And just like the family members of Miller's other two victims, Jarvis's sister, Sherry, testified that "[t]here's not a day or night that goes by that he's not on my mind," and that "[her] heart is still broken into a million pieces and will probably never mend again." Vol. 8, Tab R-21, at R. 1339-40. The trial court followed the jury's recommendation and sentenced Miller to death. *Miller*, 913 So. 2d at 1151.

On direct appeal, the Alabama Court of Criminal Appeals ("CCA") affirmed Miller's conviction and death sentence. *Miller*, 913 So. 2d 1148. The Alabama Supreme Court denied certiorari, as did this Court. *Miller v. Alabama*, 546 U.S. 1097 (2006).

Miller also challenged his conviction and death sentence in State post-conviction proceedings and in federal habeas proceedings to no avail. *Miller v. State*, 99 So. 3d 349 (Ala. Crim. App. 2011); *Miller v. Dunn*, No. 2:13-cv-00154, 2017 WL 1164811 (M.D. Ala. 2017), *aff'd*, 826 F. Appx. 743 (11th Cir. 2020), *cert. denied,* 142 S. Ct. 123 (2021).

B. The Introduction Of Nitrogen Hypoxia As A Method Of Execution.

On March 22, 2018, Governor Kay Ivey signed Alabama Laws Act 2018-353, which made nitrogen hypoxia a statutorily approved method of execution in Alabama. Pursuant to Alabama Code §15-18-82.1(b)(2), as modified by the act, an inmate whose conviction was final before June 1, 2018, had thirty days from that date to inform the warden of the correctional facility in which he was housed that he was electing to be executed by nitrogen hypoxia.

The law did not include any provision requiring that any individual be given special notice of its enactment, nor did it specify how an inmate should make an election, other than to require the election be made "personally," "in writing," and "delivered to the warden of the correctional facility" within thirty days of the triggering date. Ala. Code §15-18-82.1(b)(2). The Alabama Department of Corrections ("ADOC") had no statutory duty to create an election program, and it had no authority to change the terms of the statute. ADOC's only duty was to receive timely notices of election from inmates who wished to elect nitrogen hypoxia.

On June 22, 2018, an attorney with the Federal Defenders for the Middle District of Alabama drafted an election form, which was given to death-row inmates represented by that organization on June 26. Affidavit of John A. Palombi at 2, *Price v. Dunn*, 1:19-cv-00057-KD-MU (S.D. Ala. Mar. 29, 2019), ECF No. 29-3. Cynthia Stewart, then the Warden of Holman Correctional Facility, where Miller was an inmate, directed Captain Jeff Emberton to give every death-row inmate a copy of the form and an envelope in which he could return it to the warden, should he decide to elect. Doc. 52-10; Op.6. Emberton did so, Op.6, explaining to each inmate—in the district court's summation—"that the law had changed and they now had a choice in their execution method, and if they wanted to choose, they were to fill out a form and he would return later in the day to pick it up," Op.12-13. The form was distributed to every death-row inmate at Holman by June 27. About fifty inmates turned in forms. DX22. Although the form was provided to every death row inmate at Holman, *see*

Doc. 56-14 at 10-13, "a lot of inmates refused to turn them back in," Doc. 52-14 at 57:1-2, because they wanted to speak with counsel. Doc. 52-14 at 56:19-23.

C. The State Schedules Miller's Execution.

On April 19, 2022, the State of Alabama asked the Alabama Supreme Court to schedule the date for execution of Miller's sentence. Responding to inquiry from Miller's counsel, on April 27 the Attorney General's Office informed counsel that ADOC possessed no nitrogen hypoxia election form for Miller. Miller waited three weeks. Then, on May 18, he filed an affidavit in the Alabama Supreme Court in which he claimed to have completed a method-of-execution form in "June or July 2018" and given it "to the correctional officer who was collecting the forms." Doc. 18-1 at 3. Miller further alleged that his form was turned in to this "correctional officer" "at the same time that he was collecting the forms from everyone else." *Id.* Miller asked the Alabama Supreme Court to refrain from setting his execution date.

On July 18, 2022, the Alabama Supreme Court issued an order for Miller's judicial execution to be carried out on September 22, 2022. Inexplicably, Miller did not file his §1983 lawsuit until August 22, just one month before his scheduled execution. On August 4—two weeks after the Alabama Supreme Court's issuance of Miller's execution warrant and two weeks prior to the filing of his complaint—Miller confided in a pen pal that his attorneys had told him he had "to wait." Doc. 33-1 at 2. In a responsive filing, Miller assured the district court that it lacked "important context" to determine whether this was an admission of unreasonable delay. Doc. 34 at 1. Such "important context," however, was never produced. Instead, Miller simply

declared that his counsel at Sidley Austin—one of the ten largest law firms in the world by revenue—needed all that time to "to research and evaluate his constitutional claims, perform due diligence, and secure local counsel." Op.59-60. No explanation was given as to why the firm could not have accomplished that work while Alabama Supreme Court proceedings were pending.

D. The District Court Stays Miller's Execution; Defendants Appeal.

On the night of September 19, 2022, the district court stayed Miller's execution on the theory that (1) he likely suffered a constitutional deprivation as a "class of one" under the Equal Protection Clause, and (2) his procedural due process rights were likely harmed because he alleges the State lost his method-of-execution form. Op.62.

Defendants filed a stay motion with the district court on September 20, *see* Doc. 67, as well as a separate stay motion with the Eleventh Circuit. On September 21, the district court denied the stay motion. Even though the district court had agreed that Miller "could seek a writ of mandamus in state court," Op.53 n.21, and though the State explained that this process would be *pre*deprivation process because Miller could have sought it after Defendants refused to honor his purported election of nitrogen hypoxia and before he is executed, the district court deemed mandamus to be only a "postdeprivation remedy." Doc. 70 at 8. The court's decision to label mandamus a "postdeprivation" remedy proved dispositive, because, by the court's lights, "no adequate postdeprivation remedy exists to cure the deprivation of Miller's liberty interest once the deprivation is complete: when an execution by lethal injection is carried

out." Op.53 n.21. The court never addressed how the fact that the writ is currently—and has always been—available to Miller fit with its analysis.

On the Equal Protection claim, the court deemed Miller indistinguishable from other inmates whose election forms ADOC possessed based not on the evidence ADOC had before it when Miller alleged with no evidence that he had submitted a form, but instead based on the district court's later finding that Miller had submitted the form. Doc. 70 at 6-7. Because the district court later found that Miller likely had elected nitrogen hypoxia, apparently it was irrational for Defendants to treat him any differently than all the inmates who had objective proof that they had elected nitrogen hypoxia on their method-of-execution forms. *Id.*

Meanwhile, in the Eleventh Circuit, on September 21 at 9:09 a.m. ET, the appellate court ordered that Miller file his response to the State's emergency stay motion by this morning, September 22 at 9:00 a.m. ET. Two hours later, the State requested that the Eleventh Circuit expedited briefing and have Miller file his response by September 21 at 9:00 p.m. ET, but the court denied that request. .

At 3:18 p.m. ET, by a 2-1 vote, the Eleventh Circuit denied the State's motion. The court held that Miller was substantially likely to prevail on his class-of-one equal protection claim because the district court found Miller to be credible when he said he elected. CA11 Op.15. Though the State argued below that Miller inexcusably delayed, Doc. 42 at 8-10, the court held that Alabama never argued the delay was unjustified. CA11 Op.19. And though the State's stay motion (at 21) focused on "the State's strong interest in proceeding with its criminal judgment," the court held that

the motion did not allege "irreparable harm." CA11 Op.8. Judge Luck dissented because Miller's claims lacked merit and "[e]ach delay, for its span, is a commutation of a death sentence to one of imprisonment." CA11 Dissent Op.11.

Because Miller's execution is scheduled for September 22, 2022, and the warrant to execute him expires by midnight central time tonight, Defendants now seek a stay from this Court, and a ruling by **8:00 PM ET on September 22**.

REASONS FOR GRANTING THE APPLICATION

I. Miller Failed To Show A Substantial Likelihood Of Success On The Merits.

Preliminary injunctive relief—whether a stay or a preliminary injunction—should ordinarily not be granted unless the movant "has made a strong showing that he is likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009). "It is not enough that the chance of success on the merits be better than negligible." *Id.* (quotation marks and citation omitted). And Miller's claims do not even hit that low bar. His case fits the mold of eleventh-hour execution litigation, "amount[ing] to little more than an attack on settled precedent, lacking enough evidence even to survive summary judgment—and on not just one but many essential legal elements set forth in our case law and required by the Constitution's original meaning." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). The district court badly abused its discretion, and its decision should be vacated.

A. Miller's procedural due process argument fails as a matter of law.

1. Alabama law has provided Miller adequate process.

"In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). "Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate." *Id.* A procedural due process violation is incomplete "unless and until the State fails to provide due process." *Id.* at 123; *see also Hudson v. Palmer*, 468 U.S. 517, 533 (1984) ("[T]he state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy."). "All that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard to insure that they are given a meaningful opportunity to present their case." *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (cleaned up).

Alabama's writ of mandamus undoubtedly provided Miller "a meaningful opportunity to present [his] case." *Id.* Indeed, lower courts have repeatedly recognized that, under this Court's doctrine, a procedural due process claim fails as a matter of law where a litigant has an opportunity to seek the same relief through writ of mandamus. *See, e.g.*, *Rumford Pharm., Inc. v. City of E. Providence*, 970 F.2d 996, 999 & n.6 (1st Cir. 1992) (finding that the availability of mandamus provided "constitutionally adequate" "predeprivation relief"); *Hellenic Am. Neighborhood Action Comm. v.*

City of New York, 101 F.3d 877, 881 (2d Cir. 1996) (holding that "Article 78 of the New York Civil Practice Law, an amalgam of the common law writs of certiorari to review, mandamus, and prohibition," was "a perfectly adequate postdeprivation remedy"); *Tri County Paving, Inc. v. Ashe County*, 281 F.3d 430, 436-38 (4th Cir. 2002) (rejecting procedural due process claim when plaintiffs "could have petitioned a state court for a writ of mandamus"); *Collyer v. Darling*, 98 F.3d 211, 227 (6th Cir. 1996) (finding "thoroughly unpersuasive" plaintiff's argument that "a state action in mandamus was not an adequate remedy"); *Figgs v. Dawson*, 829 F.3d 895, 907 (7th Cir. 2016) (holding that "the right to seek a writ of mandamus" is an "adequate and available" remedy even when it does not provide immediate relief); *Cotton v. Jackson*, 216 F.3d 1328, 1333 (11th Cir. 2000) ("Plaintiff has failed to state a claim for a procedural due process violation" when "mandamus would be available under state law"). So even assuming an amorphous right to better record management is a constitutionally cognizable interest, *but see infra* §I.A.2, the writ provides Miller an adequate "form of hearing" to rectify the purported impingement. *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976); *see also Palmer*, 468 U.S. at 533.

This Court's precedent is fatal to Miller's procedural due process claim. As the State explained below, there is no doubt that "the facts pleaded in [Miller's] amended complaint [Doc. 18] establish that he could have sought a petition for writ of mandamus directed to Defendant Hamm in state court." Doc. 35 at 4. In response, because Miller could not deny that state law provides him the opportunity to petition for mandamus, he attempted to cast the State's argument as "gamesmanship" and assert that

"this argument is entirely inappropriate" because "a plaintiff does not need to 'prove' a lack of post-deprivation hearing at the pleading stage." Doc. 45 at 14-15. He doubled down before the Eleventh Circuit, asserting that he never had to avail himself of the State's process and seek a writ of mandamus because he "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," and "[t]he Alabama Supreme Court's resolution of that request made filing any writ of mandamus in a circuit court futile." Miller's CA11 Br. at 17.

Miller is confused. For starters, it is passing strange for Miller to cite the process he received from the Alabama Supreme Court—evaluating several of the arguments he pushes here—as support for the proposition that he was deprived of process. Contrary to Miller's theory, there simply is no procedural right to prevail on meritless arguments. *Accord* CA11 Op. at 8 n.2 (Luck, J., dissenting) ("If Miller had an adequate, available remedy in state court, and sought it, he could not have been deprived of procedural due process. …. Because Miller already had the opportunity in front of the Alabama Supreme Court to contest his method of execution election, this is another reason the state is likely to succeed on his procedural due process claim."). The Alabama Supreme Court's rejection of Miller's claim is not evidence of constitutional deprivation—it is evidence of the process Miller received.

What's more, if the alleged "deprivation" occurs at execution, the writ of mandamus would constitute a *pre*deprivation remedy—if Miller would only seek it. Precedent from this Court and lower courts leave no doubt that availability of a state-law

writ of mandamus constitutes "due process," leaving Miller's alleged procedural due process violation "not complete." *Zinermon*, 494 U.S. at 126; *see also, e.g.*, *Cotton*, 216 F.3d at 1333 (explaining that where "the writ of mandamus" is "available under state law" and is "an adequate remedy" plaintiff "has failed to show that inadequate state remedies were available to him to remedy any alleged procedural deprivations"). Because Alabama state law has always provided Miller the opportunity to seek a writ of mandamus, Miller's procedural due process claim is a non-starter.

Miller's response also reveals that he completely misunderstands the writ of mandamus. The extraordinary writ is available not only to compel the actions of courts, but "[i]n limited circumstances the writ of mandamus will lie to require action of state officials." *Ex parte Bessemer Bd. of Educ.*, 68 So. 3d 782, 789 (Ala. 2011) (internal quotation marks omitted). A state official's actions "may be enjoined if illegal, fraudulent, unauthorized, done in bad faith or under a mistaken interpretation of law. If judgment or discretion is abused, and exercised in an arbitrary or capricious manner, mandamus will lie to compel a proper exercise thereof." *Id.* These are precisely the assertions Miller presents in this litigation, claiming Defendants' actions are unlawful and subject him to "immediate risk of being executed via Defendants' arbitrary and capricious process." Doc. 18 at 12. Miller has had months to pursue a state-court writ ordering Defendants not to execute him by lethal injection, yet he has not done so. That Miller is unaware of the writ's application helps explain why he never availed himself of it, but it does not excuse his neglect.

The district court missed all of this, shunting into a two-sentence footnote the critical question whether the availability of the writ of mandamus constitutes adequate process:

> To the extent that predeprivation process was not feasible or would be unduly burdensome, or if the predeprivation process afforded here was constitutionally adequate, the Court agrees with the State that Miller has an adequate postdeprivation remedy because he could seek a writ of mandamus in a state circuit court. But, for the reasons explained earlier, the Court emphasizes that no adequate postdeprivation remedy exists to cure the deprivation of Miller's liberty interest once the deprivation is complete: when an execution by lethal injection is carried out.

Op.53 n.21.

The court's analysis is incoherent. On one hand, the court "agree[d] with the State" that mandamus constitutes an available and adequate remedy, but simultaneously dismissed the adequacy of this remedy because "no adequate postdeprivation remedy exists to cure the deprivation of Miller's liberty interest once the deprivation is complete." *Id.* To reach this result the court inexplicably deemed mandamus relief a "*post*deprivation remedy" even though Miller could seek to use it *pre*deprivation. By framing the relevant deprivation as coextensive with Miller's execution and then categorically declaring mandamus a "postdeprivation" remedy, the court concluded that Alabama law could only ever provide Miller the opportunity to seek mandamus after he dies.

This is wordplay, not law. And it is obviously wrong. "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" *Eldridge*, 424 U.S. at 348 (alteration in original). Beyond the Alabama Supreme Court's earlier rejection of Miller's

argument, Alabama's writ of mandamus has provided Miller the requisite "opportunity to meet" "the case against him" for months. *Id.* He's simply ignored it. Miller's neglect does not transform a potentially effective remedy into a categorically ineffective one. It simply confirms he has no claim.

2. Miller's complaint alleges only negligence, which cannot amount to a constitutional deprivation.

Miller's procedural due process claim also fails because he has alleged at most a species of negligence, not a constitutional deprivation. This Court's precedent is unequivocal: "[T]he Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 328 (1986). "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Id.* at 331. "It would do no good for the State to have a rule telling its employees not to lose mail by mistake, and it 'borders on the absurd to suggest that a State must provide a hearing to determine whether or not a corrections officer should engage in negligent conduct.'" *Zinermon*, 494 U.S. at 132

Despite multiple opportunities, Miller still has never explained how the State's process amounts to a constitutional violation. Aside from alleging that the prison's operations are "messy" and "chaotic," Doc. 18 at 8, 14, Miller cannot identify what aspects of the process itself were constitutionally inadequate. Instead, Miller's complaint merely asserts that Defendants "lost or misplaced [his] form," *id.*, and repeatedly hints at negligence by describing the actions that he believes Defendants should have taken: "Create a list or otherwise log or memorialize the names of people who

turned in the forms," "memorialize a process for storing the forms," *id.* at 9, "create and maintain an accurate accounting of who timely submitted election forms," *id.* at 15, and "implement a reviewable process for determining whether an election had been made," *id.*

Not one of these allegations even implies, much less shows, "*deliberate* decisions of government officials to deprive" Miller of his preferred method of execution. *Daniels*, 474 U.S. at 331. They simply track a common-law negligence claim. *See, e.g.*, *Casrell v. Altec Industries, Inc.*, 335 So. 2d 128, 131 (Ala. 1976) (the failure "to forestall unreasonable danger … parallels the lack of due care that is the essence of its liability for negligence"). Miller has therefore alleged, at most, that ADOC was insufficiently careful with handling his method-of-execution form. But "[t]he guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials." *Davidson v. Cannon*, 474 U.S. 344, 348 (1986). Slapping a constitutional label on a state-law claim does not warrant federal jurisdiction, much less federal intervention into the State's "strong interest in proceeding with its judgment." *Gomez v. U.S. Dist. Ct. for N. Dist. of California*, 503 U.S. 653, 654 (1992).

And to the extent that Miller complains about the lack of process for handing out forms and informing prisoners about their rights, Doc. 18 at 8-9, his claims fail because the statute imposes no duty to provide any such process. As the district court explained, Defendants provided prisoners with forms to indicate their preferred method of execution and then stored those completed forms for safe keeping. *See* Op.14, 22. This "went *beyond what the statute required* by affirmatively providing

death-row inmates at Holman a written election form and an envelope in which they could return it to her." *Price v. Dunn*, 139 S. Ct. 1533, 1535 (2019) (Thomas, J., concurring in the denial of certiorari) (emphasis added).

Indeed, the record shows that there were roughly 160 death-row inmates at the time the Legislature passed Alabama Act 2018-353, *see* Doc. 52-13 at 51; Doc. 52-15 at 27, and that method-of-execution forms were provided to "every death row inmate," Doc. 52-10 at 1-2. To date, only two prisoners have even alleged that ADOC misplaced their forms. *See* Op.8, 40. And because "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions," *Eldridge*, 424 U.S. at 344, bare allegations that *two* forms went missing cannot amount to a violation of the Constitution. Particularly where, as here, no state law conferred a right to election forms in the first place. *See Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (Due Process Clause implicated only through a "state-created right," not "in every conceivable case of government impairment of private interest").

Attempting to explain how his claims exceed bare allegations of common-law negligence before the Eleventh Circuit, Miller could muster only that "due process can be thought of as a spectrum," and asserted (with shockingly little explanation) that Defendants' alleged failure "to conduct a thorough, measured" recordkeeping process should be thought of as a "slow-moving, non-emergency scenario" like "non-emergency medical care." Miller's CA11 Br. at 19. Which, the unfinished theory presumably goes, would imbue his negligence claims with constitutional significance.

Even for an eleventh-hour argument, Miller's undeveloped theory stands out as impermissibly "speculative." *Bucklew*, 139 S. Ct. at 1134. And it surely cannot constitute "a strong showing that [Miller] is likely to succeed on the merits." *Nken*, 556 U.S. at 434. Miller has tried to run from his pleadings, but they leave no doubt that he alleges nothing more than a species of common-law negligence. Because "injuries inflicted by governmental negligence are not addressed by the United States Constitution," *Daniels*, 327 U.S. at 333, Miller's claim cannot succeed.

Yet again, the district court offered only a footnote's worth of analysis on a critical issue. The court rejected the claim that "negligent loss of an election form does not give rise to an actionable due process claim" because, the court reasoned, "the deprivation Miller complains of is about more than the negligent loss of a form"; "[i]t is about the deprivation of his right to choose a nitrogen hypoxia execution and the State's plans to carry out his execution by lethal injection in contravention of his choice." Op.53 n.19; *see also* Doc. 70 at 8 (same).

The court severely misunderstood the nature of Miller's claim. Miller brought a procedural, not substantive, due process claim, and "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the *mistaken* or *unjustified* deprivation." *Carey v. Piphus*, 435 U.S. 247, 259 (1978) (emphasis added). Thus, the district court's assertion notwithstanding, this case has never been simply "about the deprivation." Op.53. This case has always been about whether that supposed deprivation was "mistaken or unjustified," *Carey*, 435 U.S. at 259—that is, whether "the State fail[ed] to provide due process," *Zinermon*, 494 U.S. at 126.

By collapsing the asserted substantive deprivation and procedural deprivation, the district court erroneously elided analysis of the process Miller received. But a moment's review of Miller's own complaint (Doc. 18) makes clear that his procedural claim amounts to nothing more than a vague, *res ipsa*-like theory of negligence. "To hold that this kind of loss is a deprivation of property within the meaning of the Fourteenth Amendment seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution." *Parratt v. Taylor*, 451 U.S. 527, 545 (1981) (Stewart, J., concurring). Miller's procedural due process claim fails as a matter of law.

B. Miller fails to satisfy the necessary requirements of his "class of one" Equal Protection claim.

Miller's "class of one" Equal Protection claim fails as well. The premise behind such a claim is the recognition that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against *intentional* and *arbitrary* discrimination." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (cleaned up and emphasis added). Thus, a plaintiff bringing a "class of one" claim must show "that [he] has been intentionally treated differently from others similarly situated *and* that there is no rational basis for the difference in treatment." *Id.* (emphasis added).

The classic case occurs when there is "a clear standard against which departures, even for a single plaintiff, c[an] be readily assessed." *Engquist v. Or. Dep't of Agr.*, 553 U.S. 591, 602 (2008). In *Olech*, for instance, the plaintiff alleged that the zoning board consistently required only a 15-foot easement from residents to connect their property to the municipal water supply, but arbitrarily required a 33-foot

easement from the plaintiff when she applied for a connection. 528 U.S. at 563. The Court held that the plaintiff stated a "class of one" Equal Protection claim. *Id.* at 565.

The harder case for plaintiffs is when the standard is not so clear-cut. In *Engquist*, the Court recognized that there "are some forms of state action" that "by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." 553 U.S. at 603. "In such situations," the Court said, "allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise," *id.* at 603, and would mean that any perceived differential treatment based on subjective criteria, such as "any personnel action in which a wronged employee can conjure up a claim of differential treatment" would "suddenly become the basis for a federal constitutional claim," *id.* at 608. The Court thus held that the "class of one" theory was categorically inapplicable to governmental employment actions because of the discretionary and subjective factors inherent in such decisions. *Id.* at 607-08.

Miller's claim fails under either theory. His claim most naturally fits in the second category because the prison officials were "exercising discretionary authority based on subjective, individualized determinations" when they were forced to determine whether Miller had elected nitrogen hypoxia even though he—unlike the other inmates who elected—had no form or other contemporaneous evidence to show for it. This Court has repeatedly recognized the discretion exercised by prison officials. Second-guessing that decision now based on Miller's last-minute testimony would create

a perverse preclearance regime just as unworkable as the one the Court rejected in *Engquist*.

Miller's claim also fails under the bright-line *Olech* category. *First*, Miller cannot show that Defendants treated him differently from similarly situated individuals because Defendants imposed the same requirements on *all* death row inmates. The inmates to whom Miller compares himself either had an election form on record or presented other credible, contemporaneous evidence of election. Miller did not, making him unlike his comparators. *Second*, while Miller emphasizes the district court's factual finding that he likely elected nitrogen hypoxia, that finding sheds no light on whether Miller was treated arbitrarily when ADOC officials determined that they lacked a form or other contemporaneous evidence of election from Miller. And Miller's argument below that Defendants agreed that the district court's factual finding was dispositive is belied by the record. *Third*, even if Defendants had treated Miller differently, his claim still fails because Defendants had an eminently rational basis to draw the line they did, when they did. The district court's reliance on after-the-fact evidence does not change that. Thus, even if the line Defendants drew was not perfect—which is the most the district court's finding can suggest—the line was nevertheless rational and thus constitutional.

1. Miller's "class of one" claim is barred by *Engquist* because Defendants exercised discretionary authority.

Although *Engquist* concerned governmental employment decisions, its logic applies squarely to this case. Just as in employment decisions, this Court has long recognized—and deferred to—the discretionary decisions of prison officials. *See Block*

v. Rutherford, 468 U.S. 576, 691 (1984) (reaffirming that "proper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments") (internal citations omitted); *Turner v. Safley*, 482 U.S. 78, 84-85 (1987) (recognizing that "[r]unning a prison is an inordinately difficult undertaking" and emphasizing "deference to the appropriate prison authorities").

Defendants applied precisely this discretion when differentiating between Miller and other death row inmates based on "subjective, individualized determinations." *Engquist*, 553 U.S. at 604. Faced with Miller's claim that an election form existed despite its nonexistence in ADOC's records, Defendants had to determine the credibility of Miller's claims. These determinations implicated several factors, such as Miller's inability to describe the prison official who collected his form, *see* Doc. 58 at 98-110, and his complete lack of evidence apart from late-breaking and self-serving testimony, *see* Op.30-31; Doc. 18 at 1. Because ADOC did not possess Miller's form, and because Miller offered no contemporaneous evidence that he had completed a form, Defendants determined that Miller's claims were not credible.

That discretionary determination is due deference, just like the employment decisions the *Engquist* Court held fell wholly outside the "class of one" framework. Were it otherwise, "any [prison] action in which a wronged [inmate] can conjure up a claim of differential treatment will suddenly become the basis for a federal constitutional claim." *Engquist*, 553 U.S. at 608. "Indeed, an allegation of arbitrary differential treatment could be made in nearly every instance of an assertedly wrongful [prison] action," from housing decisions to disciplinary determinations to (yes)

credibility determinations. "On [Miller's] view, every one of these [prison] decisions by a [prison official] would become the basis for an equal protection complaint." *Id.* The Equal Protection Clause does not give rise to such gamesmanship, nor does it impose such a preclearance regime on every decision a prison official makes.

The district court and Eleventh Circuit missed all this through a simple error. In assessing whether Miller is identical to inmates whose election forms ADOC possessed, the relevant evidence is what Defendants had before them *when they made the decision* not to honor Miller's unproven election. But the lower courts took the perplexing view that once the district court heard from Miller and determined that he filled out the form, that judicial factfinding made Miller indistinguishable from all other inmates with objective proof to back up their claims. Op.45 ("[W]hat matters here is the Court's determination that Miller timely elected in compliance with the statute (or, more accurately, that it is substantially likely he did)."); CA11 Op.13 ("[A]n 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 … is not the proper approach in a legal regime where facts are proved in court."). But the district court's *assessment* of evidence does not itself *become* evidence, and the State cannot be held to the impossible standard of decisionmaking based on findings not yet in existence. The Equal Protection analysis turns on whether Defendants rationally treated Miller differently based on the evidence they had before them *when he requested nitrogen hypoxia before this lawsuit*. A judge's *post hoc* findings based on after-the-fact evidence cannot change the fact that Miller

was not similarly situated then, nor do they make him similarly situated now. Miller's claim thus fails under *Engquist*.

2. Even if Miller's claim falls under *Olech*, it still fails because Defendants applied identical requirements to all death row inmates and they had a rational basis to treat Miller the way they did.

Even if Defendants' test is characterized as simple or one-dimensional, as in *Olech*, Miller's "class of one" claim still fails because Defendants applied an identical test to all inmates. No "class of one" claim can survive when the government applies the same test to all individuals. Rather, plaintiffs must show that the government applied a wholly different test to the plaintiff than it applied to others. *See Olech*, 528 U.S. at 565 (conditioning water provision on a 33-foot easement for plaintiff but only 15-foot easements from other property owners); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445-47 (1923) (assessing plaintiff's property at 100 percent of its value while assessing other properties at 55 percent).

a. Defendants treated Miller the same as other inmates.

Here, Defendants applied the same standard to all death row inmates seeking nitrogen hypoxia: the inmate must have either (1) an election form in ADOC's records or (2) credible, contemporaneous evidence that the inmate timely completed and submitted the form to the warden. Except for Miller, all death row inmates seeking nitrogen hypoxia thus far have met these requirements. Miller did not. *See* Doc. 18-3 (warden's affidavit that ADOC's nitrogen hypoxia file had no record of an election form from Miller). Even Taylor, the other inmate who claimed to have made an election form but whose form ADOC did not possess, showed credible contemporaneous

evidence from his attorney that the form had been timely completed. Doc. 28:7. As the one prisoner who provided no credible, contemporaneous evidence of his alleged election, Miller cannot show that he was treated "differently" from "persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

Miller attempted to buck this conclusion at the Court of Appeals by relying on the district court's factual finding that he likely elected nitrogen hypoxia and by claiming that Defendants admitted that this finding would be dispositive. *See* Miller's CA11 Br. 11-14. Neither argument holds water.

First, the district court's factual finding is relevant only to the extent that it foreclosed an alternative avenue in which the court could have ruled against Miller: If Miller had presented *no* evidence that he elected nitrogen hypoxia, the question of Defendants' line-drawing would be irrelevant and Miller's claim would fail at the outset. But the inverse is not true: that the court found that Miller likely elected does not answer the question about the line Defendants drew. And indeed, by relying on evidence that existed only *after* Defendants drew the line, the court's finding sheds no light on whether Miller was treated differently from similarly situated inmates *when Defendants determined that he was eligible for lethal injection*. To make that decision, Defendants looked for (1) an election form, or (2) contemporary evidence that Miller elected. Finding neither, they determined that Miller was eligible for lethal injection. Miller has not shown that Defendants treated any other inmate differently.

Second, Defendants did not tell the district court that any factfinding it made would be dispositive. Far from it. The district court stated in its order that "[t]he State agree[d] that this Court is the proper factfinder to make th[e] determination" of "whether it is substantially likely that Miller timely elected nitrogen hypoxia." Doc. 62 at 21. But that is *all* the State admitted. Here is the relevant exchange from the hearing:

> [Lawyer for Defendants]: So I think that that all speaks to reasons the Court should be questioning [Miller's] veracity: That this happened on the eve of his execution; that he never attempted at all to have a state remedy applied; he didn't ask his lawyer to look into it; he didn't file a petition for certiorari or a mandamus. He did nothing. And I think all of that comes back to he does not have a substantial likelihood of success on the merits.
>
> The Court: If it's a fact question, where is the appropriate forum for that to be resolved? Is that me? Is that in the state? And I know we kind of touched on it this morning. Is that with the Alabama Supreme Court?
>
> [Lawyer for Defendants]: If it were a fact question and he was pursuing state remedies, then that would be the circuit court where he files the extraordinary writ. Here, now that he's filed his 1983, it would be this court.

Doc. 58 at 160.

Miller likewise misrepresented the record when he told the Court of Appeals that Defendants "admitted below that if Miller timely submitted his form, they cannot execute him by lethal injection." Miller's CA11 Br. 12. Once again, the record belies his claim:

> The Court: Okay. If I was to conclude that he did timely elect, do you lose or do you still win?
>
> [Lawyer for Defendants]: Under which cause of action, Your Honor?
>
> The Court: Any of them. I mean, we're here on a preliminary injunction.

> [Lawyer for Defendants]: I still don't see even a substantial likelihood of proving that it ended up in ADOC custody because – versus what's in the complaint and what was in his affidavit: I just stuck it in the bean hole, and I never asked any follow-up questions. So at this point, I'm not even sure that the correct official defendants have been named or the people who – it's a negligent loss. We've actually briefed Your Honor on the fact that negligence would not support a cause of action. At most you would have to show an inadequate postdeprivation remedy….

Doc. 58 at 147.

In sum, the district court's factual finding is not dispositive, Defendants never said it would be dispositive, and Miller's claim otherwise simply aligns with his attempt to delay his execution by any means necessary. Rather, the district court erred as a matter of law when it concluded that Defendants treated Miller differently from similarly situated individuals. Miller was the only inmate to fail to present (1) any election form in ADOC's records *and* (2) any evidence, apart from a self-serving affidavit, that he completed a timely election form. Doc. 18-3 (no form from Miller in record); Doc. 58:98-110 (inability to describe official); Op.30-31 (undisputed allegation of refusal to corroborate testimony); Doc. 18 at 1 (Miller's affidavit). Whether an inmate presents evidence to support a claim as substantial as Miller's is obviously "relevant to an objectively reasonable governmental decisionmaker." *Griffin Indus., Inc., v. Irvin*, 496 F.3d 1189, 1204 (11th Cir. 2007).

b. Defendants had a rational basis to treat Miller the way they did.

Last, even if Miller was treated differently from other death row inmates, Defendants had a rational basis to treat him differently. Rational basis review "is a paradigm of judicial restraint." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993).

"A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations." *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993).

These principles apply in full force to a plaintiff's equal protection "class of one" claim. In such circumstances, the court must consider "any conceivable rational basis" justifying the distinction. *F.C.C.*, 508 U.S. at 309. These bases need not be "[o]n the record," *id.* at 312, and Defendants have "no obligation to produce evidence to sustain the rationality" of their distinctions. *Heller*, 509 U.S. at 320. Rather, "[t]he burden is on the one attacking" the classification "to negative every conceivable basis which might support it." *Madden v. Cmmw. of Kentucky*, 309 U.S. 83, 88 (1940).

Though there are many rational bases on which to differentiate individuals, one bears emphasis here: The State may require verification from individuals when the State's records cannot verify the individuals' claims. Beyond being rational, this reliance on state records can involve "eminently reasonable and … important Government interests" that justify even suspect classification. *Miller v. Albright*, 523 U.S. 420, 421, 430 (1998) (plurality) (upholding a requirement that children born abroad to citizen fathers, but not to citizen mothers, obtain formal proof of paternity because the state has "hospital records and birth certificates" establishing maternity but no "public record" establishing paternity). If there are "important" interests in differentiating individuals who make claims unsupported by State records, then this differentiation is *a fortiori* rational. *Id.*

Here, Defendants relied on multiple rational criteria to treat Miller differently from other death row inmates. First, unlike other death row inmates, ADOC does not have Miller's form. Doc. 18-3. Like the state in *Miller*, which demanded extra proof from individuals whose claims could not be verified in State records, here Defendants reasonably demanded verification for Miller's claims because ADOC records did not contain a form from him. Defendants had a process for collecting forms, Doc. 52-13 at 74-80, and it is rational to doubt the existence of a form that does not show up in ADOC's records. ADOC's lack of a form is evidence suggesting that Miller—unlike his fellow inmates—did not complete the form at all. That evidentiary distinction distinguishes Miller from other inmates, and the State's interest in verifying its prisoners' claims is self-evidently rational. *See, e.g.*, *Superintendent, Massachusetts Correctional Instn., Walpole v. Hill*, 472 U.S. 445, 454-55 (1985) (recognizing "the legitimate institutional needs of assuring the safety of inmates and prisoners, avoiding burdensome administrative requirements that might be susceptible to manipulation, and preserving the disciplinary process as a means of rehabilitation").

The same principled distinction in credibility also differentiates Miller from Taylor. Whereas Taylor alleged he had completed a method-of-execution form and presented substantial evidence to support his claim, Doc. 28 at 7, Miller offers no evidence aside from a self-serving affidavit, Doc.18 at1. It is not unreasonable for the State to find a last-minute, self-serving affidavit less persuasive than the robust evidence presented by Taylor. *Compare* Op.30-31 (undisputed allegation of Miller's refusal to corroborate testimony with attorney-client communications), *and* Doc. 18 at

1 (Miller's affidavit), *with* Doc. 28 at 7 (undisputed statements that Taylor's counsel (1) filed a motion informing Defendants that Taylor had made a timely election and (2) provided Defendants with attorney-client communications from around the time of the election period). *See also, e.g.*, *United States v. Bailey*, 444 U.S. 394, 415 (1980) (implying skepticism toward "necessarily self-serving statements"). The State's finding is all the more reasonable where Miller proved unable to answer questions about the correctional officer who collected his form or to come forward with any evidence of his timely completed form. Doc. 58:98-110.

The district court erred when it could "conceive of no rational basis to treat Miller differently." Op.45. The court's reasoning rested on the premise that "[t]he State is not the exclusive arbiter of whether an inmate has made a proper and timely election." *Id.* Again, this premise is as unremarkable as it is irrelevant. Of course the State is not "the exclusive arbiter" of truth, and it has never made any such claim. But the State need not be "the exclusive arbiter" of truth to come to reasonable, evidence-based conclusions, and rational basis does not require that those conclusions be infallible. Just the opposite. As noted above, "courts are compelled under rational-basis review to accept a legislature's generalizations *even when there is an imperfect fit between means and ends*"; indeed, "[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller*, 509 U.S. at 321 (internal citations, quotation marks omitted).

At the end of the day, then, Miller's claim at most comes down to this: he claims that he elected nitrogen hypoxia and was treated differently than other inmates who so elected. But he does not dispute that a line must be drawn to differentiate those inmates who elected nitrogen hypoxia from those who did not. And ADOC officials reasonably determined that the line would be the presence of an election form or other contemporaneous evidence of election. Perhaps that line is not perfect. Perhaps, as the district court found, Miller likely did elect, and something just happened to the form. But even if the district court's findings define "reality," CA11 Op.14, Defendants' line is rational and therefore constitutional.

II. The Remaining Equitable Factors Favor Vacating The Injunction.

"When a party seeking equitable relief 'has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him. These well-worn principles of equity apply in capital cases just as in all others." *Ramirez v. Collier*, 142 S. Ct. 1264, 1282 (2022) (internal quotation marks, citations omitted). "A court considering a stay must also apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

The district court abused its discretion when it found that the balance of the equities weighed in Miller's favor, straying from this Court's instruction that "[c]ourts should police carefully against attempts to use such challenges as tools to interpose unjustified delay." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). Miller is

scheduled to be executed *today* and has only managed to generate this eleventh-hour litigation through deliberate delay. "The people of [Alabama], the surviving victims of [Miller's] crimes, and others like them deserve better." *Id.* Miller's gamesmanship should not be rewarded.

On August 4—two weeks after the Alabama Supreme Court's issuance of Miller's execution warrant and two weeks prior to the filing of his complaint—Miller confided in a pen pal that his attorneys had told him he had "to wait." Doc. 33-1 at 2. In a responsive filing, Miller assured the district court that it lacked "important context" to determine whether this was an admission of unreasonable delay. Doc. 34 at 1. Such "important context," however, was not produced during the evidentiary hearing.

The district court all but ignored this fact and instead concluded its order with the odd observation that "Miller filing suit earlier would not change the reality that the State is not ready to execute anyone by nitrogen hypoxia." Op.61. But that means that Miller's delay in bringing a claim has helped him *succeed* in delaying his execution. Never mind this Court's recent admonition that "[l]ast-minute stays should be the extreme exception, not the norm, and 'the last-minute nature of an application' that 'could have been brought' earlier, or 'an applicant's attempt at manipulation,' 'may be grounds for denial of a stay.'" *Bucklew*, 139 S. Ct. at 1134 (quoting *Hill*, 547 U.S. at 584). That Miller's gambit would lead to delay in carrying out his lawful sentence was reason to deny his preliminary injunction motion.

The district court strived mightily to construct excuses for Miller's monthlong delay between his execution being set and his federal suit. Though Miller's emails indicated that "Miller's lawyers said they 'got to wait," the emails "d[id] not reference nitrogen hypoxia or lethal injection," and thus "simply do not support the conclusion or inference that Miller or his lawyers were waiting to file this lawsuit." Op.58. And if Miller had filed his challenge promptly, perhaps that would be a reasonable conclusion. But Miller and his lawyers *did* wait 34 days to file this lawsuit. Ignoring that was error. "Courts should police carefully against attempts to use [such] challenges as tools to interpose unjustified delay," *Nance v. Ward*, 142 S. Ct. 2214, 2225 (2022), not "exhibit a naiveté from which ordinary citizens are free," *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019).

Perhaps recognizing as much, the court added that "[e]ven if" the emails did show Miller and his team at Sidley Austin were waiting to file, "that would not compel the conclusion or inference that the 'wait' was undertaken in order to intentionally delay or prejudice the State." Op.58. But even granting that dubious assumption, the delay was still inexcusable. All Miller could argue was "that after his execution date was set, his lawyers needed time to research and evaluate his constitutional claims, perform due diligence, and secure local counsel." *Id.* at 59-60. But all that work could have been done while Miller's Alabama Supreme Court case was pending. The district court's unstated assumption is that it was fine for Miller and his lawyers to sit on their hands and hope for the best from the Alabama Supreme Court with no backup plan. That might be fine in a run-of-the-mill tort suit, but when "[b]oth the State and

the [many] victims of [Miller's] crime[s] have an important interest in the timely enforcement of" his sentence, *Hill*, 547 U.S. at 584, such delay is inexcusable, whether the product of gamesmanship or wishful thinking. Though Miller and his counsel failed to consider the victims of Miller's crimes, the district court abused its discretion when it did the same.

Finally, a word about the Court of Appeals's remarkable conclusion that Defendants failed to "argue[], much less show[], that [they] will suffer irreparable harm absent a stay." CA11 Op.8. As Judge Luck correctly pointed out in his dissent, Defendants "never conceded that the equitable interests favored Miller." *Id.* at 8 (Luck, J., dissenting). Just the opposite: in their stay motion before the Court of Appeals, Defendants argued that the equities favor the State because of its "significant interest in enforcing its criminal judgments." Defendants' CA11 Br. 7. And they complained "[t]hat Miller's gambit would lead to delay in carrying out his lawful sentence." *Id.* at 22. That is just what will happen if this Court leaves the injunction in place. The courts below apparently discounted the interests of the State and of Miller's victims and their families to zero. That was error.

CONCLUSION

The Court should vacate the district court's preliminary injunction.

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