Nos. 24-6778 & 24A893

IN THE
Supreme Court of the United States

JESSIE HOFFMAN,
Petitioner,

v.

GARY WESTCOTT, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS; DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY, IN HIS OFFICIAL CAPACITY; JOHN DOES, UNKNOWN EXECUTIONERS,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

EXECUTION SCHEDULED FOR MARCH 18, 2025

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INTRODUCTION

Louisiana has manufactured the emergency posture of this case to evade review of its one-month-old nitrogen gassing protocol, first disclosed less than three weeks ago. For eight months, Jessie Hoffman dutifully sought to challenge Louisiana's nitrogen gassing method of execution, only for the State to rebuff his challenges as premature. Less than one month ago, the State served Mr. Hoffman with a death warrant, setting his execution for today, March 18, 2025, and notifying him for the first time that he would be killed under a yet-to-be-disclosed nitrogen gassing protocol. When Mr. Hoffman pursued emergency administrative remedies, the State told him it would respond after his execution date. He immediately filed this suit for injunctive relief.

With the State's execution date fast approaching, the district court set an expedited discovery schedule, held a full-day hearing, and days later, made detailed factual findings, awarding preliminary injunctive relief so that the case could proceed to the merits. Applying this Court's precedent to the facts before it, the district court soundly exercised its discretion in granting a preliminary injunction given the limited amount of time Mr. Hoffman had to challenge his execution by nitrogen hypoxia because of the State's conduct.

The State rushed to the Fifth Circuit, seeking a stay of the preliminary injunction. The State did not even attempt to show that the preliminary injunction would cause it irreparable harm or that the balance of the equities favored executing Mr. Hoffman on a rushed basis. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

Less than four days ago, the Fifth Circuit vacated the preliminary injunction. To reach that result, the Fifth Circuit departed from this Court's precedent, holding that the Eighth Amendment analysis focuses on comparative physical pain and, despite the evidentiary record showing superadded psychological terror, that executing someone by nitrogen gassing was not cruel and unusual. In so doing, the panel violated bedrock principles of appellate review, ignoring the district court's factual findings based on expert testimony and other evidence. And the Fifth Circuit repeated its error—failing to faithfully apply this Court's decision in *Ramirez v. Collier*, 595 U.S. 411 (2022), or entertain Mr. Hoffman's cross-appeal—when it bypassed Mr. Hoffman's RLUIPA claim. The record conclusively establishes that, in the tradition of Mr. Hoffman's deeply held Buddhist faith, meditative breathing at the time of death carries profound spiritual significance and the terror state created by forced inhalation of nitrogen makes that practice impossible.

In short, Mr. Hoffman's "strategy" is not to "jam this Court." BIO 1. He filed his petition for a writ of certiorari and application for a stay of execution before the next business day after receiving the Fifth Circuit's decision.

The Court should stay Mr. Hoffman's execution and grant the Petition to consider the recurring issues of profound importance presented therein. At a minimum, the Court should summarily reverse the Fifth Circuit's egregiously flawed decision so that Mr. Hoffman's claim can proceed to the merits before the district court.

ARGUMENT

I. The Court Should Grant Certiorari To Resolve The Issue Of Whether Superadded Psychological Terror By A Method Of Execution Can Be Cruel And Unusual Punishment.

A. The Fifth Circuit's core holding was premised on the relative physical pain of one method of execution over another: nitrogen hypoxia versus a firing squad. Whereas this Court has held that the Eighth Amendment forbids forms of punishment that intensify a death sentence with "superadditions of terror, pain, or disgrace," *Bucklew v. Precythe*, 587 U.S. 119, 133 (2019) (cleaned up), the Fifth Circuit rejected Mr. Hoffman's proposed alternative solely on grounds that it is "admittedly more painful." Pet. App. 2a (emphasis omitted). Whereas other circuits' approaches are consistent with a comparative assessment of the severe psychological injury caused by a particular method of execution as part of the constitutional analysis, Pet. 20–23, the Fifth Circuit deemed Mr. Hoffman's challenge foreclosed solely because "death by firing squad can cause pain."[1] Pet. App. 7a.

B. The State, by contrast, takes an overly lenient view of the Fifth Circuit's opinion, pointing to its perfunctory discussion of the "superaddition of terror"

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[1] The constitutional validity of a firing squad (BIO 14) supports, rather than undermines, Mr. Hoffman's claim. The firing squad is a "feasible and readily implemented alternative method of execution," *Bucklew*, 587 U.S. at 134, that would significantly reduce the psychological torture of being gassed to death.

as purportedly showing that the majority did not, in fact, adopt a standard focused primarily on physical pain. BIO 14–15 (quoting Pet. App. 7a–8a); *see also* BIO 2, 12. The State's argument is doubly flawed.

First, despite the majority's casual passing reference to psychological terror, it did not engage in any comparative analysis of the psychological terror caused by nitrogen gassing versus Mr. Hoffman's suggested alternative method. It conducted that analysis *only* as to the physical pain purportedly caused by each method.

Second, the majority's "superaddition of terror" analysis is premised on its own factfinding, untethered to the record. Rather than attempting to find clear error under the proper standard of review, the Fifth Circuit misstated the record, faulting Mr. Hoffman for producing "no [] evidence" of added psychological terror. Pet. App. 7a–8a. This conflicts with the record, and it shows how far the reviewing court overstepped. *See Glossip v. Gross*, 576 U.S. 863, 881 (2015) (an appellate court may not "overturn a finding 'simply because [it is] convinced that [it] would have decided the case differently'" (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). An appellate court cannot ignore a district court's factual findings because it disagrees with the lower court's bottom line.

The district court found, based on Dr. Bickler's testimony, that a person may remain in conscious terror for 3 to 5 minutes during nitrogen gassing. Pet. App. 35a. It may be the State's view that this finding has no "valid basis," BIO 16, but experts testified, and the district court found, otherwise. Dr. Bickler testified that,

because of the terror and panic caused by suffocation, holding one's breath becomes involuntary: "the ability to cooperate (repeatedly inhale deeply) would require the condemned to mentally overcome the primal urge to breathe that is triggered by lack of oxygen." Pet. App. 33a–34a.

Indeed, *both* parties' experts agreed that the primal urge to conserve oxygen through holding one's breath would cause severe psychological suffering, and that holding one's breath increases the time until loss of consciousness. Pet. App. 32a, 34a, 35a (noting Dr. Bickler's testimony regarding the process of "forced asphyxiation"); Pet. App. 33a (noting State's expert's agreement that "severe emotional suffering" occurs when "oxygen deprivation in the lungs triggers an instinctual response driven by respiratory centers in the brain that tell [the] body to breathe," yet "breathing will kill you" because of the nitrogen (citation omitted)).

The Fifth Circuit misapplied the Eighth Amendment under this Court's precedent and improperly engaged in its own factfinding to vacate the injunction.

II. The Judgment Below Does Not Faithfully Apply This Court's *Ramirez* Precedent.

A. The district court's rejection of Mr. Hoffman's RLUIPA claim, and the Fifth Circuit's failure to even mention it, is manifestly wrong. It was unrebutted in the district court that Mr. Hoffman's sincerely held Buddhist faith prescribes meditative breathing at the time of death. Pet. 27–31. The district court's factual findings on the Eighth Amendment claim show that nitrogen hypoxia is incompatible with meditative

breathing and thus substantially burdens Mr. Hoffman's religious practice. *Id.* As a result, the burden should have shifted to the State to demonstrate that asphyxiating Mr. Hoffman is the least restrictive means of achieving its compelling interest in executing him. *Ramirez*, 595 U.S. at 424–25.

Rather than explain how the State's chosen method of nitrogen gassing satisfies that standard, the State argues that *Ramirez* does not apply. According to the State, *Ramirez* requires only an accommodation that does not meaningfully change how an execution proceeds. BIO 21–22. But, like the inmate in *Ramirez*, Mr. Hoffman seeks an accommodation: he asks that his execution be performed by one of his proposed alternative methods. Pet. 27–28.

The accommodation sought here is not different in scope or kind from the accommodation in *Ramirez*. In *Ramirez*, the inmate's Christian faith required pastoral touch and prayer in his final moments. 595 U.S. at 425–27. The method of execution was lethal injection, but the state's protocol did not permit for the laying on of hands; this Court ordered the state to change its protocol to permit for pastoral touch in the execution chamber. And as the State admits here, *Ramirez* required a stay to put the accommodation in place. BIO 22.

Now imagine if the state's proposed method of execution in *Ramirez* had been electrocution, which would have made it impossible for a pastor to safely touch the inmate during the execution. In that scenario, the state would have needed to show that its choice of method, which would have foreclosed Ramirez's sincere

exercise of his religion during his final moments, was the least restrictive means of accomplishing his execution. *Ramirez*, 595 U.S. at 432. Indeed, if anything less were required of a state, an inmate's religious beliefs and practices would be recognized only where the convenience of the state permitted them. It would be hard to see what would be left of *Ramirez*.

The parallels are clear. As there, the State here must show that nitrogen gassing is the least restrictive means of accomplishing Mr. Hoffman's execution. And it must show that it cannot accommodate Mr. Hoffman's Buddhist practice by executing him via another method that would allow him the equivalence of prayer in his final moments. *See* ROA.3172 (Reverend Bono testifying: "[I]n Buddhism, your final moments are very important, and … they can negatively impact what's called the Bardo, which is the realm between death and then your next rebirth.").

B. The State attempts to diminish the RLUIPA claim in several ways, none persuasive. It first suggests that it is unwilling to accommodate Mr. Hoffman's practice because it does not want to have to clean up the execution chamber afterward, and it prefers sparing those on the firing squad from contemplating their role in his death. BIO 20. *Ramirez* calls for a different result. The State seeks to execute Mr. Hoffman, and any clean up, staffing management, or other inconvenience it must overcome to achieve its goal should give way under this Court's precedent to allow Mr. Hoffman to practice his religion during his final moments.

The State next contends that it has "no less restrictive means" to execute Mr. Hoffman. BIO 28–29. But Mr. Hoffman has offered alternative methods, one of which—a firing squad—the district court found was "a feasible and readily available alternative that the State has no legitimate penological reason for not adopting." Pet. 10 (quoting Pet. App. 43a).

The State complains that Mr. Hoffman has waived his arguments and "sandbag[ged]" the Court, BIO 25, but the Petition acknowledges that the district court dismissed Mr. Hoffman's RLUIPA claim while arguing that the grounds for dismissal cannot be reconciled with the court's factual findings on the Eighth Amendment claim. The district court found that nitrogen gassing causes "conscious terror for several minutes, shaking, gasping, and other evidence of distress" because of the "hyperactiv[ity it causes in the] sympathetic nervous system." Pet. 29 (quoting Pet. App. 29a, 32a). This is not because the inmate obstinately holds his breath; it is because the body's primal, physiological terror response precludes calm breathing. Think of a person who is drowning. An automatic response to oxygen deprivation is to struggle, not as an act of noncooperation, but as a reflex. That reflex precludes Mr. Hoffman from engaging in his protected, essential religious practice of meditative breathing.

C. Nor does the procedural history of the RLUIPA claim imperil its consideration before this Court. This claim is intertwined with the district court's injunction order and is "necessary to ensure meaningful review" of that injunction. *Swint v. Chambers Cnty. Comm'n*, 514

U.S. 35, 50–51 (1995); *see* 28 U.S.C. § 1292(a)(1). Mr. Hoffman cross-appealed the district court's denial of his motion to reconsider dismissal of his RLUIPA claim. He did so because, if there is a likelihood of success on the RLUIPA claim, it would provide alternative grounds on which to enjoin his execution. The Fifth Circuit disregarded this argument, and Mr. Hoffman's cross-appeal, entirely. The Court should grant certiorari to hold that the Fifth Circuit erred in doing so.

Where a Buddhist has a deeply rooted religious commitment to maintaining conscious, meditative breathing during the dying process—as Mr. Hoffman does—the State must carry its burden of showing that execution via nitrogen hypoxia is the least restrictive means of carrying out the execution. The case should be remanded for the State to make that showing.

III. This Case Provides An Ideal Vehicle To Resolve Issues Of Nationwide Importance As States Innovate With New Methods Of Execution.

The State faults Mr. Hoffman for purported gamesmanship, but it gets the procedural history backwards. Mr. Hoffman's challenge is timely, and this case is a good vehicle for the Court to review the questions presented.

A. The State argues that Mr. Hoffman should have challenged its one-month-old nitrogen gassing protocol eight months ago. BIO 1, 9–11. That makes no sense. It was not until February 12, 2025, that the judge signed Mr. Hoffman's death warrant; not until February 20, 2025, that Mr. Hoffman learned he would be executed via nitrogen gassing; not until February 28, 2025, that Mr.

Hoffman's counsel received the redacted protocol; and not until March 3, 2025, that the State disclosed the unredacted execution protocol to Mr. Hoffman under court order. Pet App. 12a, 15a, 55a–57a, 62a–64a. Mr. Hoffman filed this new lawsuit promptly, on February 25, 2025, and litigated his challenge on an expedited basis in the district court, the Fifth Circuit, and now in this Court.

B. Mr. Hoffman's diligence is underscored by the State's repeated invocation of ripeness in Mr. Hoffman's other lawsuit and grievances. In those instances, the State repeatedly argued that Mr. Hoffman's challenges to the execution protocol were premature. *See* Pet. 6.

For example, in 2012, Mr. Hoffman filed a suit under 42 U.S.C. § 1983, asserting that he had a right to notice and an opportunity to be heard regarding how he would be executed and seeking disclosure of his execution protocol. *See Hoffman v. Jindal*, No. 12-cv-796, 2025 WL 582492, at *1 (M.D. La. Feb. 21, 2025). The court ordered the execution protocol disclosed in 2013. *Id.*, No. 12-cv-796, ECF No. 28. By agreement, that litigation was stayed, with the State asking for repeated continuances of the stay on grounds that "the facts and issues" surrounding Mr. Hoffman's execution protocol "continue to be in a fluid state." *Hoffman*, No. 12-cv-796, (M.D. La. Nov. 12, 2014), ECF No. 181; *see also id.*, No. 12-cv-796, ECF Nos. 187, 196, 226.

Then, when Louisiana changed its law in 2024 to authorize nitrogen hypoxia, Mr. Hoffman promptly filed a motion under Federal Rule of Civil Procedure 60(b)(6) to reopen the proceedings in the § 1983 case.

Hoffman, No. 12-cv-796, ECF No. 318-1. In response, the State asserted that Mr. Hoffman's challenge was still premature:

> [T]he underlying legislation has changed, and the protocol must change along with it. Developing a new protocol, of course, takes time. So until that happens, there are no procedures for carrying out executions under the new law, and so no procedures for Plaintiffs to challenge.

Defs' Opp'n at 2, *id.*, No. 12-cv-796, ECF No. 327.

It should not be the case that Louisiana can deny as unripe any challenge to its execution protocol, only to then issue expedited death warrants and rely on the emergency posture of the case to oppose an emergency stay.

C. In addition to its timeliness, this case presents an ideal vehicle to address the questions presented, given its evidentiary record that includes expert testimony. The State does not contest that, unlike many method-of-execution cases that reach the Court, this case includes detailed district court findings about the psychological and physiological effects of nitrogen gassing executions, making it a good vehicle for resolving the questions presented.

D. Although the State cites the cases in which this Court has previously declined to consider challenges to Alabama's use of nitrogen hypoxia execution, *Smith v. Hamm*, 144 S. Ct. 414 (2024); *Grayson v. Hamm*, 145 S. Ct. 586 (2024), it does not address the fundamental differences between those cases and this case. In both

Smith and *Grayson*, the inmates affirmatively chose nitrogen hypoxia over other methods of execution under Alabama's statutory scheme. Those cases also lacked a record of the real-world application of the method (*e.g.*, violent writhing of the entire body causing the gurney to move, prolonged gasping and convulsing for several minutes, and visible signs of conscious distress, *see* Pet. App. 29a). Mr. Hoffman respectfully requests that the Court take the opportunity, on this more robust evidentiary record, to set a standard across jurisdictions for use of nitrogen hypoxia.

CONCLUSION

The Court should grant a stay of execution and grant the petition for certiorari.

Respectfully submitted,

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