No. _____

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

PETITION FOR A WRIT OF CERTIORARI

Cecelia Trenticosta
LOYOLA CENTER FOR SOCIAL JUSTICE
7214 St. Charles Avenue
New Orleans, LA 70118
(504) 861-5735
ctkappel@defendla.org

Andrianna D. Kastanek
Counsel of Record
Alexis E. Bates
Andrew L. Osborne
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60654
(312) 222-9350
akastanek@jenner.com

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a method of execution that superadds psychological suffering—including terror and mental anguish—compared to an available alternative method violates the Eighth Amendment's bar on cruel and unusual punishment.

2. Whether execution by nitrogen gassing substantially burdens Mr. Hoffman's Buddhist faith, in violation of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA"), by denying him the opportunity to meditatively breathe during his final moments.

PARTIES TO THE PROCEEDING

Petitioner is Jessie Hoffman. Respondents are Gary Westcott, Secretary, Louisiana Department of Public Safety and Corrections; Darrel Vannoy, Warden, Louisiana State Penitentiary, in his official capacity; and John Does, Unknown Executioners.

RELATED PROCEEDINGS

Hoffman v. Westcott, No. 25-169-SDD-SDJ, 2025 WL 763945 (M.D. La. Mar. 11, 2025)

Hoffman v. Westcott, No. 25-70006, 2025 WL 816734 (5th Cir. Mar. 14, 2025)

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The ruling of the United States District Court for the Middle District of Louisiana is not published but is reproduced in the Appendix hereto at Pet. App. 11a–51a. The opinion of the Fifth Circuit is not yet published in the Federal Reporter but is reproduced in the Appendix hereto at Pet. App. 1a–10a; *see also* Pet. App. 52a-53a.

JURISDICTION

On March 14, 2025, the Fifth Circuit entered judgment vacating the preliminary injunction entered by the District Court on March 11, 2025. Pet. App. 1a–10a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment of the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State … subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

The Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. 106–274, codified at 42 U.S.C. § 2000cc *et seq.* ("RLUIPA"), provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a).

INTRODUCTION

The Eighth Amendment forbids forms of execution that intensify a death sentence with "superaddition of terror, pain, or disgrace." *Bucklew v. Precythe*, 587 U.S. 119, 133 (2019) (quoting *Baze v. Rees*, 553 U.S. 35, 48 (2008)) (cleaned up). To succeed on a method-of-execution challenge under the Eighth Amendment, an inmate must show that a "feasible, readily implemented" alternative procedure that would "significantly reduce a substantial risk of severe pain." *Baze*, 553 U.S. at 52; *Glossip v. Gross*, 576 U.S. 863, 877 (2015).

The district court faithfully applied that standard, exercising its discretion to conclude that Mr. Hoffman was likely to succeed on the merits of his Eighth

Amendment challenge to Louisiana's newest method of execution: nitrogen hypoxia, which is the deprivation of oxygen through the forced inhalation of pure nitrogen until a person dies. The district court's determination was based on its findings of fact after hearing hours of expert testimony that nitrogen gassing inflicts sustained psychological terror far more severe than the alternative of execution by firing squad.

The Fifth Circuit incorrectly disregarded the district court's findings as irrelevant, vacating the injunction on the basis that the Eighth Amendment analysis focuses on comparative physical pain; psychological suffering, it reasoned, no matter how severe, does not suffice. The Fifth Circuit's categorical rejection of psychological suffering as a constitutional consideration ignores Supreme Court precedent holding that psychological terror is a component of cruel and unusual punishment, and it is flatly at odds with the approaches of other circuits that have long recognized that psychological terror and distress is relevant in the constitutional analysis.

The Fifth Circuit also departed from this Court's precedent in its refusal to consider Mr. Hoffman's RLUIPA claim. Mr. Hoffman is a long-practicing Buddhist. The record evidence unrebutted by the State establishes that, in Buddhist tradition, meditative breathing at the time of death carries profound spiritual significance, founded in the core belief that meditation and unfettered breath at the time of transition from life to death determines the quality of rebirth.

This Court held in *Ramirez v. Collier*, 595 U.S. 411 (2022), in the analogous context of a pastor laying hands on an individual being executed, that RLUIPA prohibits a state from substantially burdening a condemned inmate's religious exercise in his final moments (unless it is the least restrictive way to advance a compelling state interest). Significantly, the district court found in the context of its Eighth Amendment analysis that, with nitrogen gassing, "conscious terror and a sense of suffocation endures for 35 to 40 seconds" and potentially "3 to 5 minutes if an unwilling inmate holds his breath." Pet. App. 35a. Execution by nitrogen hypoxia is thus fundamentally incompatible with a Buddhist meditative state and breathing practice. Yet, the Fifth Circuit inexplicably, and incorrectly, did not even *mention*—much less provide reasons to reject—Mr. Hoffman's argument on his cross-appeal that the district court's preliminary injunction should be affirmed on the alternative ground that his scheduled method of execution violates his rights under RLUIPA.

This Court should grant the petition and reverse the Fifth Circuit's order, with instructions to remand to the district court for full consideration of the merits.

STATEMENT OF THE CASE

I. Factual Background.

In 1998, Mr. Hoffman was convicted of first-degree murder. Pet. App. 12a. He was sentenced to death and is currently on Death Row at the Louisiana State Penitentiary in Angola, Louisiana. *Id.* He is scheduled to be executed on March 18, 2025, by nitrogen hypoxia. Pet.

App. 12a–13a. Mr. Hoffman does not challenge the validity of his conviction or death sentence.

A. Louisiana Authorizes Nitrogen Gassing.

From 1991 until 2024, Louisiana law authorized only lethal injection as the method of execution. La. Rev. Stat. § 15:569 (1991). In 2024, the Louisiana legislature added nitrogen hypoxia and electrocution as authorized methods of execution for condemned inmates. *See* La. Acts 2024, 52nd Ex. Sess., No. 5, §1 (eff. July 1, 2024). Louisiana is one of four states that authorize execution by nitrogen hypoxia, which is the forced deprivation of oxygen through the inhalation of pure nitrogen until a person dies. Alabama is the only state that has actually used the method for execution; it has done so four times since January 2024.

The State's nitrogen gassing protocol mirrors Alabama's. Mr. Hoffman will be strapped to a gurney with a secured full-face silicon mask. ROA.3642-43. The nitrogen hypoxia system uses industrial grade, not medical grade, nitrogen. ROA.3297. When the system is activated, the industrial grade nitrogen will be introduced into the mask "at a flow rate of 70 L/minute" for fifteen (15) minutes or five minutes following a flatline indication on the electrocardiogram. ROA.3644.

But the circumstances here differ fundamentally from the nitrogen hypoxia executions in Alabama in one critical respect. All four of the inmates executed in Alabama by nitrogen hypoxia affirmatively chose this method. Pet. App. 48a–49a. By contrast, in Louisiana, the prisoner is not provided a choice of method of execution. *See* La. Rev. Stat. § 15:569(A)(1)–(3)

(granting Secretary of the Department of Public Safety and Corrections unfettered authority to choose between the methods in carrying out a sentence of death). Mr. Hoffman thus would not only be the first inmate executed by nitrogen gassing in Louisiana; he would be the first inmate in the nation executed by nitrogen gassing without having elected this method of execution.

B. Louisiana Sprints To Execute Mr. Hoffman By Nitrogen Gassing After Creating A Protocol.

Before the State served Mr. Hoffman with his warrant of execution less than one month ago, he repeatedly attempted to raise method-of-execution claims. In March 2024, in light of the new legislation authorizing nitrogen gassing, Mr. Hoffman filed a grievance with the prison challenging all three statutory methods of execution. This grievance was rejected as "premature" as the law had "yet to take legal effect." Pet. App. 21a (capitalization omitted). Mr. Hoffman tried again in July 2024, as soon as the statute went into effect. *Id.* He received the same response in part because no valid death warrant had issued. *Id.*; Pet. App. 4a–5a.

Things changed drastically in the last five weeks. On February 10, 2025, the State announced for the first time, via press release, that it had established a nitrogen hypoxia protocol—but it did not release or disclose the protocol. *See* Pet. App. 57a. On the same day, the State sought execution warrants for Mr. Hoffman and others. On February 12, 2025, Mr. Hoffman's execution warrant was signed, and his execution was set for March 18, 2025. When Mr. Hoffman filed an emergency grievance, ROA.1901–03, the State told him that it would issue him

a response within 40 days—that is, *after* the then-scheduled execution date, ROA.1900.

In the State's race to execute Mr. Hoffman with a month's notice, it only informed Mr. Hoffman as to the method of execution on February 20, 2025, eight days after the issuance of his warrant. ROA.136; *see* Pet. App. 12a. And the State first disclosed a redacted copy of its nitrogen hypoxia protocol to Mr. Hoffman's counsel only upon order of the district court on February 28, 2025, and even then, it was not until three days before the evidentiary hearing that, by order of the district court, "the State produced the protocol to Hoffman pursuant to a protective order." Pet. App. 15a.

II. Proceedings Below.

A. District Court Proceedings.

On February 25, Mr. Hoffman filed this suit pursuant to 42 U.S.C. § 1983, challenging the State's nitrogen gassing execution method under the Eighth Amendment and RLUIPA. ROA.21–73. He moved for a preliminary injunction the next day. ROA.86–88.

On February 28, 2025, the district court entered a scheduling order that required all discovery to be conducted, and witness and exhibit lists exchanged, within one week. *See* ROA.12.

On March 6, 2025, the district court granted in part and denied in part the State's motion to dismiss the complaint. *See* ROA.18 (Text Entry Only, Corrective Order (M.D. La. Mar. 6, 2025), ECF No. 79). Pertinent here, the district court dismissed Mr. Hoffman's RLUIPA claim, finding that the nitrogen gas protocol

did not substantially burden the practice of his religion. Pet. App. 55a–56a; Pet. App. 61a–63a. It denied the motion to dismiss Mr. Hoffman's Eighth Amendment claim. Pet. App. 63a.

The district court held a nearly 12-hour evidentiary hearing on March 7, 2025. Pet. App. 17a. The hearing included extensive testimony of the parties' competing medical experts regarding whether execution by nitrogen hypoxia would superadd terror or pain in violation of the Eighth Amendment. *See* Pet. App. 30a–44a. Mr. Hoffman and two Buddhist clerics also testified regarding Mr. Hoffman's religious practices, the importance of meditative breathing to traditional Buddhist religious practices, and the role of meditative breathing at the time of death. ROA.3145–48, 3154-56; ROA.3163, 3169–72; ROA3219, 3222–25.

Dr. Philip Bickler, a Board-certified anesthesiologist who the State stipulated was an expert in the fields of anesthesiology and human hypoxia, testified on behalf of Mr. Hoffman. Pet. App. 30a. The district court found Dr. Bickler "to be superbly qualified in the field of human hypoxia, owing to his long and extensive clinical work in the effect of low oxygen (hypoxia) on humans." Pet. App. 30a–31a. Dr. Bickler "has conducted at least 5,000 hypoxia studies on humans involving administering low oxygen containing gas and monitoring the subjects' responses" and "has published extensively in peer-reviewed scientific and medical journals regarding the physiological effects of hypoxia on humans and other animals." Pet. App. 31a.

Dr. Joseph Antognini, a Board-Certified anesthesiologist, testified for the State. Pet. App. 30a. Unlike Dr. Bickler, "Dr. Antognini has never clinically studied the effects of hypoxia on humans" and he has neither "published nor presented any studies regarding the effects of nitrogen hypoxia." Pet. App. 31a. Dr. Antognini has served as an expert for the State of Alabama—the only other state that has used nitrogen hypoxia—in every case the state has had concerning execution by nitrogen hypoxia, but he has never observed an execution using this method. Pet. App. 37a.

B. The District Court's Findings And Decision.

1. The Eighth Amendment.

After finding that Mr. Hoffman exhausted administrative remedies under the Prison Litigation Reform Act, Pet App. 23a–24a, the district court found that Mr. Hoffman satisfied the elements necessary to secure a preliminary injunction on his Eighth Amendment claim. Pet App. 24a; *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

a. The district court applied the correct legal standard, guided by this Court's precedent: "whether the State's chosen method of execution intensifies the sentence of death with a (cruel) superaddition of terror, pain or disgrace" and that "[t]o establish that a State's chosen method cruelly 'superadds' pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." Pet. App. 26a–27a (quoting

Bucklew, 587 U.S. at 119–20, 133) (cleaned up). The district court also correctly acknowledged that the analysis requires a "comparative exercise." Pet. App. 27a (quoting *Nance v. Ward*, 597 U.S. 159, 164 (2022)).

Applying this standard, the district court concluded that Mr. Hoffman is likely to succeed on the merits of his Eighth Amendment claim. Its factual findings were two-fold: (1) "nitrogen hypoxia superadds psychological pain, suffering, and terror to [Mr. Hoffman's] execution when compared to execution by firing squad," Pet. App. 43a; and (2) "execution by firing squad is a feasible and readily available alternative that the State has no legitimate penological reason for not adopting." *Id.*

The district court's first finding—that nitrogen hypoxia "poses a substantial risk of conscious terror and psychological pain," Pet. App. 37a–38a—had three components.

First, the district court found that nitrogen hypoxia "produces a terror response." Pet. App. 32a. "[T]he deprivation of oxygen to the lungs causes a primal urge to breathe and feelings of intense terror when inhalation does not deliver oxygen to the lungs." Pet. App. 35a. The physiological effects of oxygen depletion, including that when nitrogen replaces oxygen in the lungs of a subject, amounts to "forced asphyxiation" where the subject would feel "extreme discomfort, distress, pain, and terror … up to the point of losing consciousness." Pet. App. 32a (citation omitted). And given the reservoir of air in the lungs, "it may take a number of minutes depending on the breathing volume for nitrogen to wash out all the oxygen that is remaining in the lungs." *Id.*

Second, nitrogen hypoxia causes "emotional terror" and "severe psychological pain [] until the loss of consciousness." Pet. App. 32a, 35a. The State's expert agreed 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. Pet. App. 33a. There was thus "agreement among the experts that the inability to quiet the primal urge to breathe is severe emotional suffering." *Id.* Based on this testimony, the district court found that "the deprivation of oxygen to the lungs causes a primal urge to breathe and feelings of intense terror when inhalation does not deliver oxygen to the lungs," which causes "severe psychological pain" that endures until consciousness is lost. Pet. App. 35a

Third, the conscious terror and sense of suffocation from nitrogen hypoxia can last up to three to five minutes. Pet. App. 33a–35a. While a person administered pure nitrogen will lose consciousness in less than one minute if he breathes normally, "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. The experts agreed that the primal urge to conserve oxygen through holding one's breath would increase the time until loss of consciousness. Pet. App. 34a. For this reason, the district court declined to credit Dr. Antognini's estimate that unconsciousness will occur "within 35 to 40 seconds or perhaps sooner," an estimate the court found was "nothing more than a

scientific hypothesis" that "remains untested and unsubstantiated." Pet. App. 36a–37a (citation omitted).

In making these factual findings, the district court credited Dr. Bickler's testimony, informed by 30 years of clinical research experience studying hypoxia in humans, over Dr. Antognini's "untested scientific hypotheses" and reliance on "irrelevant or unpersuasive" studies. Pet. App. 34a, 37a. Despite his work supporting Alabama in its four nitrogen hypoxia executions, Dr. Antognini had not observed a single execution to corroborate whether his hypotheses hold water. Pet. App. 37a. Dr. Bickler's opinions, on the other hand, were "corroborate[d] and reinforce[d]," not only by his studies but by reports from eyewitnesses to the four Alabama nitrogen hypoxia executions. *Id.*

b. The district court also concluded that Mr. Hoffman "clearly demonstrated that he is substantially likely to prevail in his assertion that nitrogen hypoxia superadds pain and terror as compared to firing squad." Pet. App. 40a.

The district court credited the unrebutted testimony of the only expert at the hearing with firearms expertise—Dr. James Williams—who the State stipulated was an expert in emergency medicine and firearms. Pet. App. 38a–40a; ROA.3226–27. Execution by firing squad is the "process of firing multiple high caliber bullets" at someone's heart. Pet. App. 39a. Based on Dr. Williams' testimony, the district court found that when the bullets strike the heart, the individual will become unconscious in about three to four seconds. Pet. App. 38a–40a. The district court thus reasonably

concluded that nitrogen hypoxia superadds conscious pain and terror as compared to a firing squad. Pet. App. 40a.

c. The district court also concluded that there is no legitimate penological reason why Louisiana could not adopt Mr. Hoffman's proposed alternative method of execution. Pet. App. 40a–41a. Five other states use the firing squad as a method of execution, suggesting its viability, and the Louisiana Department of Public Safety and Corrections has a supply of firearms, ammunition, and trained officers. Pet. App. 41a.

d. On the other preliminary injunction factors, the district court found that Mr. Hoffman "will most certainly suffer irreparable harm if his claim for injunctive relief is not decided prior to his March 18, 2025 execution date." Pet App. 25a. And the court determined that the balance of the equities and public interest favor a preliminary injunction. Pet. App. 47a–50a. The court reasoned that "[t]he State's desire for swiftness does not prevail over well-informed deliberation[,]" Pet. App. 48a, and "[i]t is in the best interests of the public to examine [the State's] newly proposed method of execution on a fully developed record," Pet. App. 50a.

2. RLUIPA.

Based on evidence presented at the preliminary injunction hearing, Mr. Hoffman moved to reconsider the district court's March 6, 2025 decision dismissing his RLUIPA claim. Pet. App. 67a, 68a. In addition to the testimony presented at the hearing about the prolonged psychological suffering caused by nitrogen gassing, Mr. Hoffman presented the lay and expert testimony of two

Buddhist clerics, Reverend Michaela Bono and Brother Reimoku Gregory Smith, who testified that a traditional religious practice of Buddhists is meditative breathing; that Buddhist practices emphasize maintaining clear, mindful awareness during the dying process; that nitrogen gassing would prevent Mr. Hoffman from engaging in conscious meditation by altering the breathing process and creating psychological distress; and that by creating feelings of panic and air hunger, nitrogen hypoxia would contradict the calm state sought in Buddhist religious practice. ROA.3171–74; ROA.3223–25. Mr. Hoffman also testified about his own religious practices: that he started practicing Buddhism in 2002 and engages in twice-daily meditative breathing as part of his religious and spiritual practice. ROA.3145–46. In short, the evidence established that Mr. Hoffman's religious beliefs call for him to die in a state of meditation and rhythmic breathing.

The district court declined to reconsider its dismissal of Mr. Hoffman's RLUIPA claim and thus to preliminarily enjoin Mr. Hoffman's execution on this ground. Pet. App. 19a–20a. Effectively converting the motion to reconsider as a motion for summary judgment, the court considered the evidence from the hearing and held that the evidence did not support Mr. Hoffman's RLUIPA claim.

Specifically, the court found based on the record evidence that "meditative breathing is an exercise attendant to practicing Hoffman's chosen faith of Buddhism," which "calls its adherents to a ritual of breathing rhythmically to achieve a meditative state"

"analogous to Western religions' practice of prayer." *Id.* It also found, in the context of the Eighth Amendment claim, that nitrogen gassing "causes a primal urge to breath and feelings of intense terror when inhalation does not deliver oxygen to the lungs" and "severe psychological pain[,]" for minutes until the "loss of consciousness." Pet. App. 35a. The district court nonetheless—and quite inexplicably—concluded that "substituting nitrogen for atmospheric air does not substantially burden Hoffman's ability to breath," Pet. App. 19a. As discussed below, the district court's rejection of the RLUIPA claim cannot be reconciled with its factual findings on the Eighth Amendment claim.[1]

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[1] Where a party, like the State, appeals interlocutorily from the entry of a preliminary injunction, *see* 28 U.S.C. § 1292(a)(1), the appellate court's jurisdiction extends to other claims that are intertwined with the injunction order. *See Deckert v. Indep. Shares Corp.*, 311 U.S. 282, 287 (1940) (the "power [to hear interlocutory appeals from the entry of a preliminary injunction] is not limited to mere consideration of, and action upon, the order appealed from"); *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 50–51 (1995) (jurisdiction extends to other issues where "necessary to ensure meaningful review" of injunction); *In re: Federal Skywalk Cases*, 680 F.2d 1175, 1180 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982) (jurisdiction under § 1292(a)(1) extends to the denial of an injunction, and where "the injunction is interdependent with the remainder of the appealed order, ... the entire order insofar as it has been appealed"). Here, Mr. Hoffman filed a cross-appeal of the district court's denial of his motion to reconsider dismissal of his RLUIPA claim. The validity of the RLUIPA claim is bound up with the injunction: The district court erred in finding that nitrogen gassing does not substantially burden Mr. Hoffman's exercise of his

C. The Fifth Circuit's Decision.

On March 14, 2025, a divided panel of the Fifth Circuit vacated the preliminary injunction. Disregarding the district court's factual findings, and ignoring the evidence adduced at the hearing, a majority of the panel held that Mr. Hoffman cannot succeed on an Eighth Amendment challenge to nitrogen hypoxia as a method of execution because death by gassing does not cause physical pain, while Mr. Hoffman's suggested alternative method of execution, a firing squad, is "more painful." Pet. App. 2a–3a.

Implicit in the majority's holding is a legal rule and findings of fact, both of which are wrong. First, the majority suggested a categorical rule that the Eighth Amendment requires a petitioner to show that the alternative method of execution is less *physically* painful than the chosen method, regardless of *psychological* effect. While giving lip service to the Court's recognition that the "superaddition" of terror can violate the Eighth Amendment, *Bucklew*, 587 U.S. at 133, the majority reasoned that "expert testimony from both parties" established "that nitrogen hypoxia is painless," while "death by firing squad can cause pain." Pet. App. 6a–7a. From this differential in physical pain, the court concluded that "[Mr.] Hoffman cannot possibly prevail under the legal standards set forth by the Supreme Court in *Glossip* and *Bucklew*." Pet. App. 7a.

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religion. Once that error is corrected, the valid RLUIPA claim provides a basis to preliminarily enjoin Mr. Hoffman's execution because Mr. Hoffman has demonstrated a likelihood of success on the merits of that claim.

Second, this conclusion was based on a factual finding about the comparative physical pain caused by a firing squad, versus nitrogen gassing, unsupported by any evidence in the record. *Id.*

The majority addressed psychological terror in a single paragraph, again ignoring the evidence: "Hoffman presented no [ ] evidence of superadded terror to the court—let alone evidence of how execution by a firing squad would substantially mitigate that terror." Pet. App. 8a. The majority appeared to believe that the psychological terror of hypoxia is reducible to the fear of death, inherent in any method of execution, which cannot be squared with the expert testimony. Expert testimony established that nitrogen hypoxia causes an involuntary response (threat to sympathetic nervous system, convulsions, gasping for air) because the body recognizes that it is performing the function of breathing but instead is inhaling something that is not air, triggering extreme panic. ROA.3356–57, 3359, 3350–51, 3348–49 (Bickler testimony). This response is separate from the fear of death—it is superadded torturous harm.

The panel majority entirely ignored Mr. Hoffman's RLUIPA claim, pressed by Mr. Hoffman as an alternative basis for affirming the district court's preliminary injunction and the subject of his cross-appeal. *See* Pet. App. 1a–8a.

Judge Haynes dissented. The majority, in Judge Haynes's view, failed to "adequately address the facts as properly found by the district court[.]" Pet. App. 10a. The majority's legal analysis overlooked factual findings "crucial to the Eighth Amendment analysis" without

finding clear error. Pet. App. 9a–10a. "For example," Judge Haynes wrote, "the majority opinion states that breathing pure nitrogen causes unconsciousness in less than a minute. But it fails to address the district court's finding that '[o]n the low end, conscious terror and a sense of suffocation endures for 35 to 40 seconds,' while '[o]n the high end, conscious psychological suffering endures for 3 to 5 minutes if an unwilling inmate holds his breath.'" Pet. App. 9a. The alternative method of execution by a firing squad, by contrast, would render the inmate unconscious in three to four seconds. Pet. App. 10a. That is a significant difference that is crucial to the Eighth Amendment analysis. *Id.*

In addition, in Judge Haynes' view, "the district court properly exercised its discretion in granting a preliminary injunction given the limited amount of time Hoffman had to challenge his execution by nitrogen hypoxia, which is new in Louisiana." Pet. App. 9a. The dissent explained: "Hoffman tried throughout and did not wait until the last minute. Instead, the state did not let him challenge earlier." *Id.* Judge Haynes noted that the rushed nature of these proceedings was attributable solely to the State: "The timeline in which [Mr. Hoffman] could challenge it and the setting of his execution date, which is March 18, all happened within the last month. As the district judge thoroughly discusses, there are issues that need more time to be resolved and decided. Obviously, that cannot be done once he is dead." *Id.*

Mr. Hoffman timely filed this petition for certiorari.

REASONS FOR GRANTING THE PETITION

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.

The Fifth Circuit departed from this Court's precedent, and the well-established rule in other circuits that psychological terror can constitute cruel and unusual punishment, by holding that Mr. Hoffman did not show a likelihood of success on his Eighth Amendment claim because death by firing squad is purportedly more painful than suffocation. Because all executions purportedly "involve[] some measure of psychological terror," the majority reasoned, the evidence credited by the district court—that "nitrogen hypoxia superadds pain and terror as compared to firing squad"—was not relevant. Pet App. 7a–8a.

This analysis, which categorically disregards the role of psychological distress in the constitutional analysis, is wrong. It is inconsistent with the direction given by this Court in case after case, including *Bucklew*. It is inconsistent with the approach of other circuits. And it flouts the well-established rule of appellate review that a district court's findings of fact must be given deference by an appellate court.

A. The Fifth Circuit's singular focus on physical pain conflicts with this Court's precedent.

The majority's decision is flatly inconsistent with this Court's Eighth Amendment precedent, which has

consistently recognized psychological suffering as a component of cruel and unusual punishment.

Just five years ago, this Court defined cruel and unusual punishment in a way that lays bare the Fifth Circuit's error. While the Eighth Amendment does not guarantee a painless death, the Court explained, the Eighth Amendment forbids forms of execution that intensify a death sentence with "superadditions of terror, pain, or disgrace." *Bucklew*, 587 U.S. at 133 (cleaned up). And of course, "terror" and "disgrace" are emotional states that require no physical injury. Indeed, the Court explained that the established recognition of a form of punishment as "cruel" if "disposed to give pain to others, in *body or mind*" goes back centuries. *Id.* at 130 (emphasis added) (quoting 1 N. Webster, An American Dictionary of the English Language (1828)).

Bucklew's approach comports with the long-standing recognition that punishment need not be physically painful to be cruel and unusual. *See Trop v. Dulles*, 356 U.S. 86, 101 (1958). For example, in *Watts v. Indiana*, 338 U.S. 49 (1949), the Court explained: "There is *torture of mind as well as body*; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men." *Id.* at 52 (emphasis added); *see also Apodaca v. Raemisch*, 586 U.S. 931, 931, 937 (2018) (Sotomayor, J., dissenting from denial of certiorari). Indeed, "the Eighth Amendment prohibits the unnecessary and wanton infliction of 'pain,' rather than 'injury.'" *Hudson v. McMillian*, 503 U.S. 1, 16–17 (1992) (Blackmun, J.,

concurring). And "'[p]ain' in its ordinary meaning surely includes a notion of psychological harm." *Id.*

The decision below reflects a troubling narrowing of this jurisprudence. By focusing almost exclusively on the comparative physical pain from a firing squad versus nitrogen gassing, and largely dismissing psychological suffering as constitutionally irrelevant, the majority's approach represents a stark departure from the Court's precedent. It erects—from thin air—a barrier at the threshold of an Eighth Amendment challenge to a method of execution that finds no support in the text, or this Court's precedent.

B. The Fifth Circuit's singular focus on physical pain is inconsistent with the case law of other circuits.

The Fifth Circuit's physical-pain-only approach also is in tension with the approach of most courts of appeals.

On the one hand, the Fifth Circuit has now endorsed the view favoring nitrogen hypoxia over a firing squad based on physical pain alone. The Sixth Circuit appears to adhere to that view, too, agreeing in *In re Ohio Execution Protocol Litig.*, 881 F.3d 447 (6th Cir. 2018), "with th[e] assessment" that "[u]nless accompanied by serious physical pain, the mental suffering associated with being under a sentence of death is not material to the Eighth Amendment inquiry under *Baze* and *Glossip*." *Id.* at 450 (citation omitted).

Other circuits have taken the opposite view. For example, in a case involving Alabama's nitrogen hypoxia protocol, the Eleventh Circuit specifically disagreed

with the Sixth Circuit's holding in *In re Ohio Execution Protocol Litig.*, 881 F.3d 447, that "psychological pain or mental suffering cannot by itself support an Eighth Amendment claim" *Grayson v. Comm'r, Alabama Dep't of Corr.*, 121 F.4th 894, 900 n.3 (11th Cir.), *cert. denied sub nom. Grayson v. Hamm*, 145 S. Ct. 586 (2024). Instead, the Eleventh Circuit explained that "[t]here may exist a form of execution that induces psychological terror or pain that is severe enough to support an Eighth Amendment claim," given that this Court has "explained that 'what unites the punishments the Eighth Amendment was understood to forbid' includes the 'superaddition of terror, pain, or disgrace.'" *Id.* (citing *Bucklew*, 587 U.S. at 133). The Sixth Circuit emphasized that from the Founding, cruel punishment could be physical or mental, *id.* (citing *Bucklew*, 587 U.S. at 130), and concluded that "[n]othing in [its] Eighth Amendment jurisprudence suggests a special exemption for psychological terror or pain from the prohibition on cruelty." *Id.*

The Third, Fourth, Seventh, Eighth, Ninth, and Tenth Circuits agree, long holding that infliction of psychological mental pain can violate the Eighth Amendment. The Third Circuit has noted "general consensus among the Courts of Appeals" that "a threat of serious psychological injury invokes Eighth Amendment protection." *Clark v. Coupe*, 55 F.4th 167, 184–85 (3d Cir. 2022); *cf. White v. Napoleon*, 897 F.2d 103, 111 (3d Cir. 1990) ("We are not prepared to hold that inflicting mental anxiety alone cannot constitute cruel and unusual punishment."). The Fourth Circuit has recognized that "significant physical *or emotional* harm"

can constitute an Eighth Amendment violation. *Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995) (emphasis added).

Meanwhile, the Seventh Circuit has described the Eighth Amendment bar on cruel and unusual punishment as "includ[ing] both physical and psychological harm." *Leiser v. Kloth*, 933 F.3d 696, 703 (7th Cir. 2019). *See also Babcock v. White*, 102 F.3d 267, 273 (7th Cir. 1996) ("[T]he Constitution does not countenance psychological torture merely because it fails to inflict physical injury."); *Thomas v. Farley*, 31 F.3d 557, 559 (7th Cir. 1994) ("*Mental torture is not an oxymoron*, and has been held or assumed in a number of prisoner cases, … to be actionable as cruel and unusual punishment." (emphasis added)). The Eighth, Ninth, and Tenth Circuits, too, have recognized that infliction of psychological injury can violate the Eighth Amendment. *Scher v. Engelke*, 943 F.2d 921, 924 (8th Cir. 1991) *Jordan v. Gardner*, 986 F.2d 1521, 1529–30 (9th Cir. 1993) (en banc); *Perkins v. Kansas Dep't of Corr.*, 165 F.3d 803, 810 (10th Cir. 1999).

The Fifth Circuit's decision thus deepens a divide between the circuits on whether superaddition of psychological terror, pain, or disgrace may be discarded in the Eighth Amendment analysis. This Court should grant the petition to resolve the split.

C. The Fifth Circuit reached its result only by disregarding the district court's factual findings, which is inconsistent with this Court's longstanding precedent and that of other circuits.

The Fifth Circuit's opinion also ignored the district court's findings of fact, including findings based on extensive expert testimony about the effects of nitrogen gassing on the human body. In so doing, the court departed from fundamental principles of appellate review to vacate the injunction.

1. Showing that "the risk of pain associated with the State's method is substantial when compared to a known and available alternative," *Bucklew*, 587 U.S. at 134 (internal quotation marks and citation omitted), requires a "comparative assessment" between methods, *see Nance v. Ward*, 597 U.S. 159, 164 (2022). The assessment of relative terror or pain thus requires a court to make factual findings about the respective methods, including based on expert opinion and eyewitness observations. *Cf. Smith v. Hamm*, 144 S. Ct. 414, 416 (2024) (Kagan, J., dissenting from the denial of application for stay and denial of certiorari) ("[The] standard can work fairly only when more is capable of being known about an execution method.").

The district court faithfully made detailed findings of fact, as part of the required comparative assessment, and based on those findings, "properly exercised its discretion in granting a preliminary injunction given the limited amount of time Hoffman had to challenge his

execution by nitrogen hypoxia, which is new in Louisiana." Pet. App. 9a (Haynes, J., dissenting).

2. In reviewing the district court's grant of a preliminary injunction, the Fifth Circuit was required to review the district court's findings of fact for clear error, meaning it could not "overturn a finding 'simply because [it is] convinced that [it] would have decided the case differently.'" *Glossip*, 576 U.S. at 881 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

This limit on the Fifth Circuit's authority is an elementary principle of appellate review. *Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc.*, 456 U.S. 844, 855 (1982) (reviewing court "must accept the trial court's findings" unless highly deferential standard applicable to factual findings is satisfied); *CAE Integrated, L.L.C. v. Moov Techs., Inc.*, 44 F.4th 257, 261 (5th Cir. 2022) ("We review factual findings for clear error … giving due regard to the trial court's opportunity to judge the witnesses' credibility." (internal quotation marks and citation omitted)). When "a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson*, 470 U.S. at 575. An appellate court cannot evade the clear error standard simply by ignoring the facts.

That is precisely what the panel majority did here—it ignored the district court's key factual findings on conscious terror and made its own findings to avoid the

issue. Pet App. 7a. Just two examples suffice. As Judge Haynes observed in dissent, the panel majority never acknowledged the district court's finding that conscious terror and a sense of suffocation endures for *at least* 35 to 40 seconds but can last up to *three to five minutes*. Pet. App. 9a. Rather than engage with that finding, the panel majority made its own factual finding that "[b]reathing 100% pure nitrogen causes unconsciousness in less than a minute." Pet. App. 3a.

The majority also ignored the district court's finding that execution by firing squad would render Mr. Hoffman unconscious in three to four seconds. Pet. App. 39a. Rather than engage with the district court's comparative assessment of conscious terror caused by the two methods, the Fifth Circuit summarily concluded that Mr. Hoffman had presented "*no* [ ] evidence of superadded terror." Pet. App. 8a (emphasis added). In other words, the majority found an abuse of discretion by simply ignoring the facts and evidence on which the district court based preliminary injunctive relief. And that tactic, in turn, is what allowed the majority to conclude that the "district court's theory would render capital punishment itself unconstitutional—because surely *every* method of execution necessarily involves some measure of psychological terror." *Id.*

The Fifth Circuit thus effectively disregarded the district court's factual findings regarding the psychological suffering associated with nitrogen hypoxia execution. The majority's willingness to substitute its own factual conclusions without even attempting to demonstrate the clear error in the district court's

findings was flat wrong—and at odds with fundamental principles of appellate review. This provides sufficient grounds to grant the petition and summarily reverse.

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

The district court's dismissal of Mr. Hoffman's RLUIPA claim, and the Fifth Circuit's refusal to even consider it as an alternative basis for affirming the preliminary injunction, cannot be squared with *Ramirez*, the factual record, or common sense. The district court's detailed factual findings on the Eighth Amendment claims directly undermine its conclusory analysis of the burden on Mr. Hoffman's religious practice.

A. RLUIPA aims to provide "greater protection for religious exercise than is available under the First Amendment." *Holt v. Hobbs*, 574 U.S. 352, 357 (2015). The law provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, … even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person -- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc–1(a). It applies to state prisoners. *Ramirez*, 595 U.S. at 424–25.

A plaintiff must show "that a prison policy 'implicates his religious exercise[,]'" the burden on his religious exercise is "substantial," and his requested accommodation is "sincerely based on his religious belief

and not some other motivation." *Id.* at 425 (quoting *Holt*, 574 U.S. at 360–61). The burden then flips, and the State must prove that imposition of the burden on the plaintiff "is the least restrictive means of furthering a compelling governmental interest." *Id.* (citation omitted).

B. There is no question that Mr. Hoffman is a practicing Buddhist: He converted to Buddhism approximately 20 years ago, and practices meditation twice daily. ROA.3145–46. There also is no question that meditative breathing is an exercise attendant to practicing Buddhism, and that meditation at the time of death holds particular import. 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."). The only question is whether the district court erred in finding that suffocating Mr. Hoffman using nitrogen hypoxia does not substantially burden his religious practice, and whether the Fifth Circuit erred in refusing to even consider the RLUIPA claim in vacating the district court's preliminary injunction.

The answer to both questions is Yes.

C. The district court's own findings on the Eighth Amendment claim make clear that nitrogen gassing is incompatible with meditative breathing and thus substantially burdens Mr. Hoffman's religious practice. According to the district court, and supported by testimony and evidence presented at the March 7, 2025 hearing.

1. Eyewitness accounts of all four Alabama executions by nitrogen gassing reveal that the prisoners experienced "conscious terror for several minutes, shaking, gasping, and other evidence of distress." Pet. App. 29a. The eyewitnesses to those executions observed "vigorous convulsing and shaking for four minutes," "repeated gasping while conscious," and "two minutes of shaking and trembling 'followed by about six minutes of periodic gulping breaths before [becoming still].'" *Id.*

2. Medical expert testimony at the preliminary injunction hearing was consistent with the eyewitness accounts. Pet. App. 32a. Having conducted clinical studies about hypoxia on humans for 30 years, the district court found that Dr. Bickler is well-familiar with the physiological effects of oxygen depletion and credited his explanation that nitrogen hypoxia "hyperactivates our sympathetic nervous system," resulting in the individual "feel[ing] like [he's] gasping for air." *Id.* It "produces a terror response" that makes it impossible to breathe normally. *Id.* As the district court found, in reliance on Dr. Bickler's testimony, the process of suffocating via nitrogen results in "terror": "the deprivation of oxygen to the lungs causes a primal urge to breathe and feelings of intense terror when inhalation does not deliver oxygen to the lungs. … [T]his causes severe psychological pain," which could endure for up to "3 to 5 minutes." Pet. App. 35a.

In other words, one cannot breathe normally—much less practice meditative breathing—when being gassed.

D. These findings, made in the context of the district court's Eighth Amendment analysis, require reversing the Fifth Circuit's judgment. They pit objective scientifically-supported facts about the reality of nitrogen gassing, on the one hand, against the Court's RLUIPA precedent, on the other.

The Court in *Ramirez* recognized the profound importance of religious practice at the time of execution—in *Ramirez*, the right to have a pastor touch the prisoner and pray audibly during his final moments, 595 U.S. at 426–27; here, meditative breathing that is a component of a Buddhist transitioning to death and determines the quality of rebirth. As a matter of religious equality, the same analysis that governed the religious right of a Christian in *Ramirez* should govern Mr. Hoffman's asserted right to practice as a Buddhist at the time of death. *See Murphy v. Collier*, 587 U.S. 901, 901–02 (2019) (Kavanaugh, J., concurring in grant of application for stay) (Texas policy "allow[ing] a Christian or Muslim inmate to have a state-employed Christian or Muslim religious adviser present" in the execution room, but not providing Buddhist inmates a similar right, constitutes "governmental discrimination against religion"); *Ramirez*, 595 U.S. at 439–40 (Kavanaugh, J., concurring) (noting the same).

Just as Ramirez's Christian faith required pastoral touch and prayer in his final moments, Mr. Hoffman's Buddhist faith requires the ability to maintain conscious, meditative breathing during his final moments—a practice at the core of Buddhist spiritual tradition to maintain mindfulness during their transition from this

life. ROA.3172. Nitrogen hypoxia execution, which forcibly disrupts breathing and induces unconsciousness through oxygen deprivation, precludes Mr. Hoffman from engaging in this protected, essential religious practice. Under *Ramirez*, Louisiana should be required to demonstrate that completely foreclosing this central religious practice is the least restrictive means of achieving a compelling interest—a burden it cannot meet merely by asserting generalized interests in execution protocol uniformity.

The Court should grant certiorari to clarify that, where a Buddhist has a deeply rooted religious commitment to maintaining conscious, meditative breathing during the process of death, the state must carry its burden of showing that execution via nitrogen hypoxia is the least restrictive means of carrying out the execution.

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

The newness of nitrogen gassing as a method of execution, and the Fifth Circuit's disregard for this Court's jurisprudence, demonstrates the importance of providing clarity as to how courts should weigh psychological impact in the constitutional analysis. This case presents the ideal vehicle to do so, given the factual record developed after a hearing that included expert testimony—a unique posture in capital cases.

A. The questions presented are important.

Early in this Country's history, death by hanging was the most common form of execution. But as this Court has described elsewhere, states evolved their methods over time, often trying to make them more humane. *Bucklew*, 587 U.S. at 133; *Baze*, 553 U.S. at 41–42. States experimented with electrocution, firing squads, lethal gas, and lethal injection.

Lethal injection with a drug cocktail is the most used method among the states that use execution. But in the past few decades, states have had increasing difficulty obtaining the drugs necessary to carry out executions. This Court described those challenges in *Glossip v. Gross*, a decade ago, and the trend has not reversed itself since then. 576 U.S. 863, 870–71 (2015). In cases where lethal injection is unavailable, many states turn to secondary methods or replace their protocols with new methods altogether.

The latest trend is nitrogen hypoxia, the merits of which this Court has not yet addressed. *Bucklew*, 587 U.S. at 141–42 (rejecting nitrogen hypoxia as a readily available alternative because of the many unresolved questions it raised as an execution method); *Smith v. Hamm*, 144 S. Ct. 414, 415–16 (2024) (Sotomayor, J., dissenting from the denial of application for stay and denial of certiorari) (describing nitrogen hypoxia as "untested" and "entirely novel").

Novel execution methods like nitrogen hypoxia present unprecedented constitutional questions that only this Court can authoritatively resolve. In addition to assessing whether the method of execution is cruel

and unusual punishment under the Court's articulated standards, the Court may wish to consider whether "the extremely demanding standard this Court established in *Glossip v. Gross* . . . properly applies" to methods with so short a track record and so many unknowns—such as the new nitrogen gassing method. *Smith*, 144 S. Ct. at 416 (Kagan, J., dissenting from the denial of application for stay and denial of certiorari) (citing *Glossip*, 576 at 877). Among the unknowns are "how nitrogen gas should be administered (using a gas chamber, a tent, a hood, a mask, or some other delivery device); in what concentration (pure nitrogen or some mixture of gases); how quickly and for how long it should be introduced; or how the State might ensure the safety of the execution team, including protecting them against the risk of gas leaks." *Bucklew*, 587 U.S. at 141–42.

All of these factors and more are yet unexplored and will undoubtedly inform whether the method superadds "terror, pain, or disgrace." *Id.* at 119. Full explanation of that standard and how to evaluate it would aid lower courts as they assess nitrogen hypoxia in the four states that permit its use so far, and any other jurisdictions that may add it in the future.

B. This case is a good vehicle.

Moreover, unlike many death penalty cases that reach the Court with limited factual development, this case includes detailed district court findings about the psychological effects of nitrogen hypoxia execution, making it an excellent vehicle for resolving the questions presented.

This Court has previously declined to consider cases challenging Alabama's use of nitrogen hypoxia execution. *Smith*, 144 S. Ct. 414 (2024); *Grayson v. Hamm*, 145 S. Ct. 586 (2024). But in both *Smith* and *Grayson*, the inmate had elected nitrogen hypoxia over other methods of execution, under Alabama's statutory scheme. And the lower courts there were considering largely theoretical arguments, without evidence regarding 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).

Here, in stark contrast, this case now reaches this Court under Louisiana's statute, which provides the inmate no choice of method of execution, and on a more robust evidentiary record. The record includes expert testimony, including Dr. Bickler's extensive 30-year experience studying the effects of nitrogen gassing on humans. It includes evidence from four nitrogen hypoxia executions conducted in Alabama. It includes the district court's detailed factual findings about the use of nitrogen hypoxia under both the Eighth Amendment and RLUIPA. With the benefit of this proper factual development, this Court may fully consider the questions presented and offer guidance on what will almost certainly be an increasing number of execution attempts using nitrogen hypoxia.

* * * *

In short, this case presents the Court an opportunity to set the standard across jurisdictions with the benefit

of detailed factual findings from the district court, eyewitness accounts of the Alabama nitrogen hypoxia executions, and expert scientific testimony. Without guidance from this Court, lower courts will continue to reach inconsistent conclusions about the effects of nitrogen hypoxia and whether the psychological suffering it undisputedly causes must be considered in the Eighth Amendment analysis.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

Cecelia Trenticosta
LOYOLA CENTER FOR SOCIAL JUSTICE
7214 St. Charles Avenue
New Orleans, LA 70118
(504) 861-5735
ctkappel@defendla.org

Andrianna D. Kastanek
Counsel of Record
Alexis E. Bates
Andrew L. Osborne
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60654
(312) 222-9350
akastanek@jenner.com