No. _____

IN THE

Supreme Court of the United States

NATHANIEL WOODS,

Petitioner,

v.

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

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE: EXECUTION SCHEDULED FOR MARCH 5, 2020

CAPITAL CASE: QUESTIONS PRESENTED

At present, fifteen inmates on Alabama's death row have exhausted federal habeas. All of them are eligible for execution. But only one is scheduled to be put to death. That's Nathaniel Woods. The reason being: he declined the State's invitation to participate in his own execution process by choosing the method by which the State would kill him.

In June 2018, Alabama officials told the State's death-row population to choose: execution by lethal injection or by nitrogen gas. *See* Ala. Code § 15-18-82.1(b)(2). Inmates had thirty days to decide. *Id.* At that time, the State knew it did not have a nitrogen gas protocol in place, would not have one for the foreseeable future, and would not execute anyone scheduled to die in that manner until it developed a protocol. But the State disclosed none of this. Consequently, seeing no other relevant considerations, inmates chose (or declined to choose) based on what they deemed a preferred method of death.

Recently though it came to light that the State is scheduling executions based on whether inmates unwittingly stumbled into a viable method (or not). That is, if an inmate incidentally chose nitrogen gas, his execution has been stayed until the State can create an execution protocol. If he did not, his execution is being prioritized. Such arbitrary application of the death penalty—predicated upon suppressed information—contravenes the Eighth Amendment. The Eleventh Circuit held otherwise, concluding that Mr. Woods' claim is foreclosed because the Eighth Amendment applies only to "*imposition* of the death penalty," not to "the *carrying out* of [the] death sentence." App. Ex. 1 at 13-14 (emphasis in original).

Mr. Woods asks this Court to address the following substantial questions:

1. Does the Eighth Amendment apply only to imposition of a death sentence, as the Eleventh Circuit held, or may a petitioner challenge, as arbitrary and capricious, how a death sentence is carried out?

2. If the Eighth Amendment does apply to the manner in which a death sentence is carried out, was it violated here where the State targeted Mr. Woods for execution based on his refusal to participate in the execution process?

3. Do the Due Process and Equal Protection Clauses allow the State to suppress information vital to making a life-altering decision and then discriminate among individuals based on such suppressed information?

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Before July 1, 2018, the Alabama Attorney General carried out executions in chronological fashion based on when the inmate had exhausted his or her federal habeas proceedings. Whatever discretion the Alabama Attorney General exercised was never challenged. That's because the process—grounded in a "first-out-of-habeas, first-up" policy—was predicated upon objective criteria. But, beginning in July 2018, the State unilaterally deviated from this objective process and instead began targeting for execution only those inmates who did not elect, during a 30-day period, to die via nitrogen hypoxia.

In June 2018, Alabama officials told death row inmates to choose execution via lethal injection or via nitrogen gas. *See* Ala. Code § 15-18-82.1(b)(2). They had thirty days to elect. *Id.* With what information they had available, some chose lethal injection, others chose nitrogen gas, and others simply declined to participate in their own execution process and made no choice.

The State knew, in June 2018, that it did not have a nitrogen-hypoxia protocol in place—and likely would not have one any time soon. As a result, the State knew that any inmate who opted into death via nitrogen gas would be spared from execution until such time as the State could develop and implement a nitrogen-hypoxia protocol. The State did not disclose this information to Mr. Woods.

The State also knew, in June 2018, that it still intended to seek the lethal-injection executions of individuals who did *not* opt into nitrogen hypoxia. This represented a significant change from the State's long-standing "first-out-of-habeas, first-up" policy. The State did not disclose this information to Mr. Woods.

In the months following that 30-day time period, the State first moved to execute a couple inmates whose federal habeas proceedings had been completed. The State *appeared* to be focusing its execution efforts on inmates scheduled to die by lethal injection but, with such a small sample size, there was no way to definitively know. Then came the execution of Jarrod Taylor.

In the summer of 2019, the State of Alabama moved to set Mr. Taylor's execution. In so doing, it represented that Mr. Taylor had chosen lethal injection. The State was mistaken. Mr. Taylor's counsel apprised the Attorney General's Office as much. The State then scrambled to withdraw Mr. Taylor's execution, explaining, "ADOC is not yet prepared to proceed with an execution by nitrogen hypoxia" because it does not have—nor has it ever had—a protocol in place. But what the State could not withdraw was its unintended disclosure that it was now singling out for execution inmates scheduled to die by lethal injection. In other words, contrary to past practice, inmates were now being chosen not based on timing but based on whether they had chosen nitrogen gas in June 2018.

The State's response to all of this has been: we're simply "honoring each inmate's choice two years ago." But that was no choice at all. Mr. Woods was led to believe any decision was strictly relegated to method. He was never told it would impact the *timing* of his execution. And in the absence of this critical information, Mr. Woods refused to participate in a process that required him to play an active role in his own execution. The result: unlike the fourteen death row inmates at Holman Prison whose federal habeas proceedings were exhausted months (if not over a year)

ago, Mr. Woods faces imminent execution by Alabama's default method: lethal injection. Had Mr. Woods known the State would weaponize his abstinence from the execution process against him, he would have proceeded differently.

OPINIONS AND ORDERS BELOW

The decision of the court of appeals is available at *Woods v. Comm'r, Ala. Dep't of Corr.*, No. 20-10843 (11th Cir. Mar. 3, 2020) (slip opinion). The district court's decision is available at *Woods v. Dunn et al.*, Civil Act. No. 2:20-cv-58-ECM (WO), Doc. 33 (M.D. Ala. March 2, 2020) (slip opinion). Both decisions are included in the Appendix filed with this petition, as Exhibits 1 and 2, respectively.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its opinion on March 4, 2020. No en banc hearing or reconsideration was sought. This Court's jurisdiction is based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in relevant part:

> Excessive bail shall not be required, nor excess fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Prior Proceedings

On October 2005, Mr. Woods was convicted of capital murder and sentenced to death. *See* Appendix, Ex. 2 at 2. His convictions and sentence were affirmed by the Alabama Court of Criminal Appeals in 2007 and the Alabama Supreme Court denied his motion for an out-of-time appeal in August 2009. *Id.* at 2-3 (citing *Woods v. State*, 13 So. 3d 1 (Ala. Crim. App. 2017)). This Court denied certiorari on February 22, 2010. *Id.* at 3 (citing *Woods v. Alabama*, 559 U.S. 942 (2010) (mem.)).

Mr. Woods filed a petition for postconviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure in December 2008, which the circuit court summarily dismissed on December 1, 2010. *Id.* The Alabama Court of Criminal Appeals affirmed the dismissal of Mr. Woods' Rule 32 petition, and the Alabama Supreme Court denied certiorari. *Id.* (citing *Woods v. State*, 221 So. 3d 1125 (Ala. Crim. App. 2016)).

Mr. Woods then filed a petition for habeas corpus under 28 U.S.C. § 2254 in October 2016 in the Northern District of Alabama, which was denied in July 2018. *Id.* at 3-4. He then moved in the Eleventh Circuit Court of Appeals for a certificate of appealability, which was denied in February 2019. *Id.* at 4. This Court denied certiorari on October 7, 2019. *Id.* (citing *Woods v. Stewart*, 140 S.Ct. 67 (2019) (mem.)).

On October 29, 2019, the State moved the Alabama Supreme Court to set an execution date, specifically requesting that Mr. Woods be executed via lethal injection. *See* Appendix, Ex. 1 at 2. Mr. Woods opposed the motion on December 5, 2019.

II. Proceedings Below

Mr. Woods promptly filed the instant Complaint pursuant to 42 U.S.C. § 1983 on January 23, 2020—a full week before the Alabama Supreme Court scheduled his execution, forty-three (43) days before that execution is due to take place, and nearly six (6) weeks ago. *Id.* In his Complaint, Mr. Woods alleges that Respondents violated his rights under the U.S. Constitution, Alabama state constitution, and Alabama state law by wrongfully withholding from him the vital fact that electing—during June 2018—to die via nitrogen hypoxia was choosing to live indefinitely, whereas not so electing was an unknowing and involuntary choice for rapidly looming death. *Id.*

On January 30, 2020, the Alabama Supreme Court scheduled Mr. Woods' execution for March 5, 2020. *E.g.*, Appendix, Ex. 2 at 9.

On February 6, 2020, Respondents moved for summary judgment on the Complaint. *Id.*

On February 7, 2020, Mr. Woods petitioned the Alabama Supreme Court to temporarily stay his execution. *Id.* at 45. The Alabama Supreme Court summarily denied the petition on February 14, 2020. *Id.*

Believing there were no genuine issues of material fact—and wanting to give the district court sufficient time to reach the merits of his claims—Mr. Woods expeditiously cross-moved for summary judgment in the district court on February 13, 2020. *See id.* at 9. As a prophylactic measure and as a courtesy to the district court, Mr. Woods submitted a stay motion in the lower court on February 24, 2020 while simultaneously maintaining that the court had before it the necessary facts to reach the merits with enough time to permit appellate review. *See id.* at 10.

On March 2, 2020, the district court granted Respondents' motion for summary judgment, denied Mr. Woods' cross-motion for summary judgment, and denied Mr. Woods' motion for a stay. *See id.*

Mr. Woods filed a Notice of Appeal, a Motion for Stay of Execution, and Principal Brief in the Eleventh Circuit on March 3, 2020. Respondents filed their Principal Brief on this same day. Mr. Woods filed his Reply Brief the following day, March 4, 2020. The Eleventh Circuit denied Mr. Woods' appeal and his motion for a stay on March 4, 2020. *See* Appendix, Ex. 1.

III. Facts Pertinent to the State's Deprivation of Mr. Woods' Eighth and Fourteenth Amendment Rights.

A. The nitrogen-hypoxia opt-in process.

Lethal injection is Alabama's default method of execution. Appendix, Ex. 2 at 4 (citing Ala. Code § 15-18-82.1(a)). On April 6, 2012, inmate Carey Dale Grayson sued the State of Alabama, alleging that the State's lethal-injection protocol (and the secrecy then surrounding it) violated his Eighth and Fourteenth Amendment rights. *Id.* at 5. Other death-sentenced inmates eventually filed their own complaints, which were consolidated in the U.S. District Court, Middle District of Alabama, as *In Re: Alabama Lethal Injection Protocol Litigation,* Case No. 12-cv-00316 (M.D. Ala.). Appendix, Ex. 2 at 5-6. In that litigation, plaintiffs proposed nitrogen gas as an alternative method of execution. *Id.* at 6.

While *In Re: Alabama Lethal Injection Protocol Litigation* was pending, on June 1, 2018, the State of Alabama amended its laws to allow death-sentenced inmates to choose the manner by which they would be executed: by Alabama's default

method of lethal injection or by nitrogen hypoxia. *Id.* at 4. Inmates whose death sentences had become final prior to the amendment's enactment, like Mr. Woods, were given 30 days to make this election. *Id.* at 4-5 (citing Ala. Code § 15-18-82.1(b)(2)). After June 30, 2018, inmates who did not opt into death by nitrogen hypoxia would be deemed to have forever waived their right to make such election. *See id.*

At the time of the amendment's enactment and throughout the 30-day election period, the State of Alabama had not created or implemented a protocol by which it could carry out executions using nitrogen hypoxia. *Id.* at 7; *see also Price v. Comm'r, Dep't of Corr.,* 920 F.3d 1317, 1327 (11th Cir. 2019) (noting Attorney General's disclosure that, as of April 2019, "ADOC ha[d] not yet finalized a nitrogen-hypoxia protocol"). As conceded by Respondents in the courts below, State officials—such as Respondents—were aware of this. And they were aware of the consequences of it: no executions via nitrogen hypoxia would take place until a protocol was adopted. However, they did not share this information with inmates on death row, including Mr. Woods, during the 30-day election period.

On or after June 26, 2018, the warden of Holman Correctional Facility ordered that an election form be distributed to all death-row inmates. *E.g.*, Appendix, Ex. 2 at 6. The form consisted of the following, in its entirety:

> ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA
>
> Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection. This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the

constitutionality of any protocol adopted for carrying out execution by nitrogen hypoxia.

Dated this _____ day of June, 2018.

_____ _____

Inmate/Inmate Number Signature

Mr. Woods did not return the form at that juncture.

B. Post-amendment executions in Alabama.

Since June 30, 2018, eighteen (18) Alabama death-sentenced inmates have completed federal habeas review. *Id.* at 5. The State has moved to execute five inmates since that time, believing all of them were scheduled to die by lethal injection: Domineque Ray, Michael Brandon Samra, Christopher Lee Price, Jarrod Taylor, and Nathaniel Woods. *Id.* at 7-8 ("While the State is currently unable to perform nitrogen hypoxia executions, it has proceeded with the executions of death row inmates who have completed their appeals and who did not elect nitrogen hypoxia.").

Domineque Ray

Mr. Ray was executed on February 7, 2019 via lethal injection. *Id.* at 8.

Michael Brandon Samra

Mr. Samra was executed on May 16, 2019 via lethal injection. *Id.*

Christopher Lee Price

Christopher Lee Price desired to be executed via nitrogen hypoxia. On January 27, 2019—more than a month before the Alabama Supreme Court scheduled the execution—Mr. Price asked the warden of Holman Correctional Facility to allow him to be executed by nitrogen hypoxia. *Price*, 920 F.3d at 1322. The warden claimed to "not have the authority to grant, deny, or reject the request," and instead referred

Mr. Price and his counsel to the State Attorney General. *Id*. The Attorney General ultimately denied Mr. Price's request, "citing the thirty-day period to opt into the protocol." *Id*.

On February 8, 2019, Mr. Price sued the State in U.S. District Court, raising various constitutional objections to the State's refusal to allow him to die by nitrogen hypoxia. During the litigation of Mr. Price's lawsuit, the State admitted that it did not have a protocol or the means by which to execute individuals via nitrogen hypoxia. *Id.* at 1327. Until that point, the State had not definitively disclosed whether it had an execution protocol for nitrogen hypoxia. Mr. Price's lawsuit eventually was dismissed. The Eleventh Circuit affirmed. *Price*, 920 F.3d 1317.

Before the Eleventh Circuit entered its mandate, however, the lower court received new evidence (in the form of a final version of a draft report that was at issue) and stayed Mr. Price's execution. *Price v. Dunn et al.*, 1:19-cv-57, Doc. 49 (S.D. Ala. Apr. 11, 2019). The Eleventh Circuit affirmed the stay. *Price v. Dunn*, No. 19-11268-P (11th Cir. Apr. 11, 2019). On April 12, 2019, this Court vacated the stay, *Price v. Dunn*, 139 S. Ct. 1312 (2019), but the execution order expired before the vacatur was communicated to Alabama correctional facilities. In a concurring opinion written a month later, when Mr. Price unsuccessfully sought a petition for a writ of certiorari to challenge the lethal-injection protocol, Justice Thomas explained that vacating the stay in April 2019 was necessary in large part because the district court did not have jurisdiction to enter the stay in the first instance. *Id.* at 1537 (Thomas, J., concurring).

Mr. Price was executed on May 30, 2019 via lethal injection.

Jarrod Taylor

On July 29, 2019, the State moved the Alabama Supreme Court to schedule Jarrod Taylor's execution. *Woods v. Dunn*, No. 2:20-cv-58-ECM, Doc. 22 at 7 (M.D. Ala. Feb. 13, 2020). *Id.* As part of the motion, the State represented that Mr. Taylor had not made a timely election of death by nitrogen hypoxia. *Id.* On July 30, 2019, Mr. Taylor's counsel informed the State that Mr. Taylor had, in fact, timely elected death by nitrogen hypoxia. *Id.* A day later, Mr. Taylor's counsel provided the State documentation showing Mr. Taylor's timely election. *Id.* On August 2, 2019, the State moved to withdraw the motion to set Mr. Taylor's execution date. *Id.* In support of the motion to withdraw, the State affirmed that "ADOC is not yet prepared to proceed with an execution by nitrogen hypoxia[.]". *Id.*

C. Current Status of Alabama's Nitrogen-Hypoxia Protocol.

While the State disclosed in April 2019 that it had not yet created or implemented a protocol or acquired the means to execute Alabama inmates via nitrogen hypoxia, it could have done so at any point in time leading up to the time the Alabama Supreme Court set Mr. Woods' execution date. As a consequence of the State's failure to adopt a protocol, it has indefinitely suspended and postponed the execution of all inmates who elected death by nitrogen hypoxia. To date, no state, including Alabama, has carried out an execution via nitrogen hypoxia.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari to Decide Whether the Eighth Amendment Applies to How the State Carries Out the Death Penalty.

The Eleventh Circuit Court of Appeals rejected Mr. Woods' Eighth Amendment because, it held, the amendment is limited to "*imposition* of a death sentence;" it does not apply to the "*carrying out* of [a] death sentence." Appendix, Ex. 1 at 13-14 (emphasis in original). Were that true, it would mean death row inmates have no Eighth Amendment rights following completion of federal habeas. Attorney Generals would have such unfettered discretion that they could, for instance, target inmates for execution based on the race of their victims, marching off to the death chamber those with white victims, while providing for a de facto moratorium where the crimes involved individuals of color.

Such an outcome would contravene settled authority from this Court, which recognizes, contrary to the Eleventh Circuit's conclusion, that "the *imposition* ***and*** *carrying out* of the death penalty … [may] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam) (emphasis added). Time and again, this Court has reaffirmed the proposition that the Eighth Amendment applies with as much force to imposition of the death penalty as it does to how it is carried out. *See, e.g.*, *Bucklew v. Precythe*, 139 S.Ct. 1112, 1122 (2019) ("While the Eighth Amendment doesn't forbid capital punishment, it does speak to how States may *carry out* that punishment, prohibiting methods that are 'cruel and unusual.'") (emphasis added); *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007) (noting that "*carrying out* a sentence of death

upon a prisoner who is insane" violates the Eighth Amendment, even though the prisoner was earlier determined to be competent to stand trial) (emphasis added); *Ford v. Wainwright*, 477 U.S. 399, 409 (1986) ("[T]his Court is compelled to conclude that the Eighth Amendment prohibits a State from *carrying out* a sentence of death upon a prisoner who is insane.") (emphasis added).

The Eleventh Circuit's contrary determination calls into question this long line of authority, presents a recurring problem (at a minimum, until a nitrogen hypoxia protocol is created), and addresses important questions concerning the bounds of discretion in the context of death penalty administration. This Court should grant certiorari to clarify the contours of the Eighth Amendment.

II. This Court Should Grant Certiorari to Decide the Bounds of Discretion in the Context of Death Penalty Administration.

In *Ford v. Wainwright*, this Court explained "that the Eighth Amendment has been recognized to affect significantly the procedural and the substantive aspects of the death penalty[.]" 477 U.S. at 405. Given the Eighth Amendment's application to how the death penalty is carried out, this Court held that a state could not target for execution an inmate deemed to be insane. *Id.* at 409-410. In the process, the *Ford* Court suggested that actions by the State which affect the timing of an inmate's execution also could fall within the protections of the Constitution. *See id.* at 411 ("Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be

determined with the high regard for truth that befits a decision affecting the life or death of a human being.").

But because states have largely selected which death-row inmates to execute and when based on objective, non-arbitrary criteria, this Court has not had the opportunity to address the Eighth Amendment's contours in this context. Indeed, that was the case in Alabama until June 2018 where it utilized a "first-out-of-habeas, first-up" policy. But Respondents have since changed that policy. As they revealed with the mistaken effort to execute Jarrod Taylor, they are now scheduling executions for inmates who fortuitously (though unknowingly) chose nitrogen gas, while penalizing inmates such as Mr. Woods who unwittingly refused to participate in the execution process by selecting a method.

This Court has established that the death penalty should not be deployed in "circumstances under which" it will be "meted out arbitrarily or capriciously or through whim or mistake." *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1983) (O'Connor, J., concurring in part and concurring in the judgment) (citation and internal quotations omitted) (grammatical alterations omitted). That is precisely what is occurring with the State's selective pursuit of the death penalty. Such targeting is not simply arbitrary and freakish, it is affirmatively discriminatory and serves to punish individuals based on factors divorced from their offense. *Furman*, 408 U.S. at 249. ("A penalty … should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily.").

Whatever may be said of the State's approach to carrying out executions where it is based on some objective measure—such as timing of conclusion of appeals or date of conviction—the Eighth Amendment is not so brittle as to confer freewheeling authority to dole out the penalty at prosecutor's whims. *Cf. McCleskey v. Kemp*, 481 U.S. 279, 341 (1987) (Brennan, J., dissenting) ("Certainly, a factor that we would regard as morally irrelevant, such as hair color, ... could be associated with sentencing results to such an extent that we would regard as arbitrary a system in which that factor played a significant role."). This Court should grant certiorari to address the novel question concerning the bounds of the Eighth Amendment in the context of dispensing the death penalty.

III. This Court Should Grant Certiorari to Decide Whether the Due Process and Equal Protection Clauses Preclude the State from Withholding Vital Information Central to a Life-Altering Decision and Discriminating Among Individuals Based on That Suppressed Information.

A. The Court Should Address the Scope of Information Inmates Are Entitled to When Asked to Choose Their Method of Execution.

When the State affirmatively implements a process by which death-sentenced inmates may obtain relief, that process must comply with the Fourteenth Amendment—even when that process is purely discretionary. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 290 (O'Connor, J., concurring in part and concurring in the judgment); *Ford*, 477 U.S. at 412. This case presents a unique opportunity to address the due process obligations the State has when it creates a process purporting to give inmates a choice in the method of their execution. Given the shortage of lethal-injection drugs now available, states like Alabama, Oklahoma, and Missouri are exploring

alternatives. *See*, *e.g.*, *Dunn v. Price*, 139 S.Ct. 1312, 1313 (2019) (Breyer, J., dissenting) (noting that both the Alabama and Oklahoma state legislatures had recently adopted nitrogen hypoxia as an available method of execution). This case allows the Court to definitively set the contours of the States' due-process obligations as the states embark on efforts to provide inmates with alternative methods of execution.

The Fourteenth Amendment forbids the State from "depriv[ing] any person of life, liberty, or property without due process of law …." In the capital-punishment arena, the Government's obligation to provide due process is all the more critical. Indeed, this Court has emphasized its "heightened concern for fairness and accuracy" when reviewing "the process requisite to the taking of a human life." *Ford*, 477 U.S. at 414. How much process is due depends on the situation. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); *see also Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (describing three-part due process test).

Life Interest. Mr. Woods maintains a life interest. *See Woodard*, 523 U.S. at 281 (1998) (Rehnquist, C.J., joined by Scalia, Kennedy, and Thomas, JJ.) ("We agree that respondent maintains a residual life interest, e.g., in not being summarily executed by prison guards."); *Ford*, 477 U.S. at 411 ("if the Constitution renders the fact or timing of [the condemned prisoner's] execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the *life or death of a human being*.") (emphasis added).

In contrast to the limited due process afforded the *Woodard* respondent as part of a purely discretionary clemency scheme, and that afforded the *Ford* petitioner, Mr. Woods was deprived of even minimal procedural safeguards during the 30-day period he was required to choose how Respondents would execute him. At a minimum, he was entitled to all relevant information bearing upon his choice, including that (1) the State did not have a nitrogen-hypoxia protocol in place and (2) the State intended to continue executing individuals via lethal injection while indefinitely sparing the lives of inmates who opted into nitrogen gas. But Respondents did not tell him this and thus deprived Mr. Woods of his constitutional right to notice "at a meaningful time and in a meaningful manner." *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (citation and internal quotations omitted); *Sessions v. Dimaya*, 138 S.Ct. 1204, 1225 (2018) (Gorsuch, J., concurring) ("Perhaps the most basic of due process's customary protections is the demand for fair notice.") (citations omitted).

Risk of Erroneous Deprivation. Mr. Woods could not have protected his residual life interest unless he had sufficient information about the effect of his election on those interests. *See, e.g., Pabon v. Wright*, 459 F.3d 241, 249-50 (2d Cir. 2006) ("[A]n individual cannot exercise his established right to refuse medical treatment in a meaningful and intelligent fashion unless he has sufficient information about proposed treatment."); *see also United States v. Frye*, 402 F.3d 1123, 1127 (11th Cir. 2005) (in deciding whether to plead guilty, defendant must know and understand the consequences of doing so); *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 174 (4th Cir. 1988) (where employee's resignation is obtained by employer's

misrepresentation or deception, the employer has "prevented the employee from making a free and informed choice" and thus "deprived the employee of his protected property interest").

To prevent the risk that inmates like Mr. Woods would make uninformed decisions, Respondents should have disclosed—during the 30-day opt-in period—that there was no nitrogen-hypoxia protocol in place. Or, alternately, the State could revert to its non-discriminatory and fairly administered policy of scheduling executions based only on when an inmate has exhausted his judicial review.

Government Interest. Whatever interest the State has in enforcing its judgments, the procedural safeguards that should be afforded in this situation do not meaningfully impede them. All Mr. Woods desires is an election process wherein all relevant information is provided, along with an opportunity to consult with counsel concerning that information. Given that the State was apparently prepared to indefinitely suspend the execution of any inmate who chose nitrogen gas (which could have been all of them), the State cannot claim a strong interest in swift executions justifies suppression of the critical information to which Mr. Woods was entitled.

B. This Court Should Grant Certiorari to Decide Whether an Illusory Choice Supplies a Basis for Discriminating Under the Equal Protection Clause.

This case presents the importation question of whether the Equal Protection Clause tolerates a state distinguishing among groups of otherwise similarly situated inmates when the purported distinguishing factor is the natural byproduct of the State's unlawful conduct.

Disparate Treatment. Mr. Woods is similarly situated in all meaningful respects to the fourteen (14) other death-row inmates who are eligible to be executed due to the completion of their direct appeals and federal habeas proceedings. However, the State has created two classes of death-sentenced inmates: (1) those whose executions have been indefinitely suspended because they elected, during a 30-day window, a method the State is not prepared to carry out, and (2) those whose executions will proceed because they did not elect to die via nitrogen hypoxia. Mr. Woods falls into the latter category—but only because the State suppressed material information from him. Because Mr. Woods did not stumble into an indefinite suspension of his execution, he has been targeted for execution sooner than similarly situated death-sentenced prisoners solely as a function of his purported "choice." This is an unconstitutional distinction. *See, e.g., Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942).

The Eleventh Circuit concluded that its decision in *Price,* 920 F.3d at 1327, controls. Appendix, Ex. 1 at 12. But *Price* cannot be an answer to the claim Mr. Woods raises because, in *Price*, the distinction among the classes was based on information *known to inmates at the time*: whether they preferred one substantive method over another. What distinguishes the inmates here is the *timing* of their execution—a fact that none of them knew at the time of the supposed election because the State suppressed it. It is therefore a tainted variable and serves only as a pretext for distinguishing among inmates. This Court should thus clarify that its Equal Protection jurisprudence does not permit suppressing information and then citing

that suppressed information as a constitutional basis for distinguishing among individuals.

Degree of Scrutiny. Had the lower courts recognized Mr. Woods is similarly situated to inmates that chose nitrogen gas, they would have found an equal protection violation because strict scrutiny applies. Indeed, numerous fundamental rights are at issue, including Mr. Woods' Fourteenth Amendment rights to life and notice. *See*, *e.g.*, *Furman*, 408 U.S. at 359 n.141 (1972) (Marshall, J., concurring) ("[B]ecause capital punishment deprives an individual of a fundamental right (i.e., the right to life), the State needs a compelling interest to justify it."); *Skinner*, 316 U.S. at 541 (recognizing strict scrutiny applies where the right at issue is "fundamental to [an individual's] very existence and survival" and he would "forever [be] deprived of a basic liberty").

There is no compelling reason—or even a rational basis—for withholding such information or targeting. Nor have Respondents ever articulated one. In fact, by virtue of passing Alabama Code § 15-18.82.1, the State was fully prepared for delay, as all death-sentenced inmates had the ability to opt for nitrogen hypoxia. As such, it cannot claim urgency as an interest that warrants depriving an individual of the opportunity to make an informed decision.

CONCLUSION

Nathaniel Woods is scheduled to die today, while fourteen of his fellow death-row inmates have a de facto moratorium. The sole distinguishing factor is that Mr. Woods declined to participate in his own execution by choosing between methods of

execution. This Court should grant certiorari to resolve the critically important questions of whether the Eighth and Fourteenth Amendment permit the State to play this shell game with inmate lives and tolerate such arbitrary, discriminatory, and cruel administration of the death penalty.

Respectfully submitted,

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Date March 5, 2020