No. 18-9832

IN THE
Supreme Court of the United States

PATRICK HENRY MURPHY,
Petitioner,

v.

BRYAN COLLIER; LORIE DAVIS; BILLY LEWIS,
Respondents.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari to address the timeliness of a request for an execution protocol accommodation in a case that is no longer in a stay posture and therefore moot?

2. If the propriety of a stay denial question is not moot, should the Court address it when doing so would have little consequence given that any future stay request will be evaluated under a different set of facts?

3. Does the Court have jurisdiction to consider claims where there is no final judgment in the district court?

4. If there is jurisdiction absent final judgment, ought the Court address claims that neither the district court nor the court of appeals have passed upon, and that are also barred by limitations and unexhausted?

5. Should the Court hear highly fact dependent claims before a district court has made relevant findings and where the petitioner has failed to provide the Court with an adequate record to resolve disputes?

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BRIEF IN OPPOSITION

Bryan Collier, Executive Director, Lorie Davis, the Director of the Correctional Institutions Division, and Billy Lewis, Senior Warden, all of the Texas Department of Criminal Justice (TDCJ), respectfully submit this brief in opposition to the petition for a writ of certiorari filed by Patrick Henry Murphy.

STATEMENT

I. Murphy's Offense and Postconviction Challenges

On December 13, 2000, Murphy and six other inmates escaped from a Texas prison. *Murphy v. Davis*, 737 F. App'x 693, 695 (5th Cir. 2018). On December 24, 2000, the "Texas Seven" robbed a sporting-goods store in Irving, Texas, killing Officer Aubrey Hawkins as they fled. *Id.* at 696–07. The escapees made their way to Colorado where they were eventually captured, save one who committed suicide, in January 2001. *Id.* at 697.

Murphy was convicted of capital murder and sentenced to death in November 2003. *Murphy v. State*, No. AP-74,851, 2006 WL 1096924, at *1 (Tex. Crim. App. Apr. 26, 2006). His conviction was affirmed on direct appeal in April 2006. *Id.* His state habeas application was denied in July

2009. *Ex parte Murphy*, No. WR-63,549-01, 2009 WL 1900369, at *1 (Tex. Crim. App. Nov. 15, 2006).

Murphy turned to the federal forum, but collateral relief was denied by the district court. *Murphy*, 737 F. App'x at 699. On appeal, Murphy was unable to obtain a certificate of appealability or otherwise demonstrate reversible error. *Id*. at 709. His petition for writ of certiorari was denied late last year. *Murphy v. Davis*, 139 S. Ct. 568 (2018).

II. The Litigation Preceding His First Execution Setting

In late November 2018, the state district court set Murphy's execution for March 28, 2019. Order Setting Execution Date, *State v. Murphy*, No. F01-00328-T (283d Dist. Ct., Dallas County, Tex. Nov. 29, 2018). About two weeks before this execution date, Murphy moved the Court of Criminal Appeals (CCA) to reopen his direct appeal. Suggestion That the Court, On Its Own Motion, Reconsider Its April 26, 2006 Denial of Relief, *Murphy v. State*, No. AP-74,851 (Tex. Crim. App. Mar. 12, 2019). The CCA declined Murphy's request on March 20, 2019. Order, at 1, *Murphy v. State*, No. AP-74,851 (Tex. Crim. App. Mar. 20, 2019).

That same day, Murphy filed a petition for writ of prohibition, a motion for leave to file that petition, a motion for a stay of execution with

the CCA, and a motion to reopen his habeas proceeding. Petition for Writ of Prohibition, *Ex parte Murphy*, No. WR-63,549-02 (Tex. Crim. App. Mar. 20, 2019); Motion for Leave to File Petition for Writ of Prohibition, *Ex parte Murphy*, No. WR-63,549-02 (Tex. Crim. App. Mar. 20, 2019); Motion for Stay of Execution, *Ex parte Murphy*, No. WR-63,549-02 (Tex. Crim. App. Mar. 20, 2019); Suggestion That the Court, On Its Own Motion, Reconsider Its July 1, 2009 Denial of Relief, *Ex parte Murphy*, No. WR-63,549-01 (Tex. Crim. App. Mar. 20, 2019). In a single order, the CCA declined to reopen his habeas proceeding and denied him leave to file his writ of prohibition. *Ex parte Murphy*, Nos. WR-63,549-01 to -02, 2019 WL 1379859, at *1 (Tex. Crim. App. Mar. 25, 2019).

III. The Course of Murphy's Present Lawsuit

Two days before his March execution setting, Murphy filed suit against TDCJ pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act (RLUIPA). ROA.4–34.[1] He claimed an Establishment Clause violation because TDCJ permitted only TDCJ-employed chaplains to accompany condemned offenders in the execution chamber, none of whom were Buddhist, Murphy's faith preference.

[1] "ROA" refers to the record on appeal filed in the court below.

ROA.15–23. Murphy also alleged that TDCJ's execution protocol, barring non-TDCJ personnel from the execution chamber, violated his First Amendment right to practice his faith and that, if this protocol did not violate the Free Exercise Clause, it violated RLUIPA. ROA.23–25. Predicated on this suit, he sought a stay of execution. ROA.41–45. The district court declined to grant him one. ROA.244–55.

Murphy appealed the district court's stay denial and moved the United States Court of Appeals for the Fifth Circuit for a stay to await its decision. Plaintiff–Appellant's Brief 1–22, *Murphy v. Collier*, 919 F.3d 913 (5th Cir. Mar. 27, 2019) (No. 19-70007). The Fifth Circuit affirmed the district court and thus denied Murphy a stay. *Murphy v. Collier*, 919 F.3d 913, 914–16 (5th Cir. 2019).

On the day Murphy was to be executed, he moved this Court to stay his execution pending the filing and disposition of a petition for writ of certiorari. Mot. Stay Execution Pending Filing, Consideration, & Disposition Pet. Writ Cert. 7–10. The Court partially granted Murphy's motion, allowing his execution to proceed only if TDCJ permitted or provided him a Buddhist spiritual advisor inside the execution chamber. *Murphy v. Collier*, 139 S. Ct. 1475, 1475 (2019). TDCJ declined this

condition, so Murphy's execution warrant expired, and he was not executed.[2]

Since that date, Murphy has amended his complaint. First Amended Complaint 1–18, *Murphy v. Collier*, No. 4:19-CV-1106 (S.D. Tex. Apr. 18, 2019), ECF No. 22 [hereinafter "Am. Compl."]. Murphy has split his Establishment Clause claim in two—TDCJ's employee-only protocol is hostile to religion generally and TDCJ still favors Christians and Muslims because its chaplains have greater access to the condemned in the hours prior to an execution. *See id.* at 11–14. The Free Exercise and RLUIPA claims are essentially the same. *Compare id.* at 15–17, *with* ROA.23–25. After discovery ended, the parties filed dueling motions for summary judgment and are awaiting a decision. Plaintiff's Motion for Summary Judgment 1–21, *Murphy v. Collier*, No. 4:19-CV-1106 (S.D. Tex. July 19, 2019); Motion for Summary Judgment by Defendants 5–33, *Murphy v. Collier*, No. 4:19-CV-1106 (S.D. Tex. July 19, 2019).

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[2] Murphy also filed an original petition for writ of prohibition, a motion for leave to file the same, and a stay of execution. Orig. Pet. Writ Prohibition 9–29; Mot. Leave File Orig. Action 1–2; Mot. Stay Execution 1–2. The latter became moot when the Court stayed his execution, and the former were eventually denied by the Court. *In re Murphy*, 139 S. Ct. 1642 (2019).

IV. The Second Execution Setting

On August 12, 2019, the state trial court ordered Murphy's execution set for November 13, 2019. Order Setting Execution Date, *State v. Murphy*, No. F01-00328-T (283d Dist. Ct., Dallas County, Tex. Aug. 12, 2019). No litigation has yet arisen from this second setting.

REASONS FOR DENYING THE PETITION

Murphy seeks an advisory opinion declaring him diligent in the context of a stay of execution that has become moot. The Court should not indulge this request because it lacks jurisdiction to do so, it is a request for mere error correction, and he was not, in fact, diligent.

As to the merits of Murphy's claims, the Court is without jurisdiction to consider them as the district court has yet to rule, and there is no good reason for the Court to hear them now, interrupting the normal litigation process and becoming a court of first review, both as to law and facts. Merits review is also unwarranted because the claims are barred by the relevant statutes of limitation and have not been exhausted through available administrative avenues, and Murphy has not provided justification as to why any of his claims are particularly compelling beyond his own personal interest in them. The petition should be denied.

I. Because the Execution Warrant Placing This Case in a Stay Posture Has Expired, the Case Is Moot.

Murphy asks for summary reversal of the Fifth Circuit's stay denial affirmance "to make clear [that] the State's delay in responding to an inmate's request regarding the way in which he is to be executed must be considered when determining whether he is entitled to a stay of his execution." Pet. Cert. 4. Doing so would be an advisory opinion, however, because the stay component of this case is now moot.

"A case becomes moot . . . 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). This occurs "only when it is impossible to grant 'any effectual relief whatever' to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* at 307–08 (alteration in original) (quoting *Ellis v. Ry. Clerks*, 466 U.S. 435, 442 (1984)).

When a party challenges a law that has been repealed by the time the issue reaches the Court, the case is moot. *Diffenderfer v. Cent. Baptist*

Church, 404 U.S. 412, 414–15 (1972) (per curiam). Also moot is a challenge to a bill that expires by its own terms prior to landing on the Court's docket. *Burke v. Barnes*, 479 U.S. 361, 363–64 (1987). And this rule applies to self-expiring executive orders losing effect before the Court can issue an opinion on the merits. *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353, 353 (2017). This case presents a similar situation.

In Texas, after the completion of postconviction review, a trial court must enter an order setting an execution date to effectuate a capital sentence. Tex. Code Crim. Proc. art. 43.141(a). That order, in turn, triggers the issuance of a warrant of execution authorizing TDCJ to carry out sentence. *Id*. art. 43.15. Both these statutes are cabined by another, providing that an inmate may not be executed before 6:00pm and no later than 11:59pm on the date chosen by the trial court. *Id*. art. 43.14.

By operation of Texas law, TDCJ lost the power to execute Murphy pursuant to the November execution order at midnight on March 29, 2019. Like in *Trump* and *Burke*, the November execution order "expired by its own terms," and thus Murphy cannot be executed pursuant to it. *See Nelson v. Campbell*, 541 U.S. 637, 648 (2004) (declining to address issues related to a prior stay of execution because "the execution warrant

has now expired"). Murphy's second execution setting is, as noted above, based on a new execution order and warrant and, should Murphy seek a stay of this execution date, the facts will necessarily be different than those presented to the Fifth Circuit six months ago. *See id.* (noting that, "[i]f the State reschedules the execution while this case is pending on remand and petitioner seeks another . . . stay, the District Court will need to address" future issues). When the November execution order expired, so did this case as a live controversy. *See Trump*, 138 S. Ct. at 353; *Burke*, 479 U.S. at 363. And the Court should deny Murphy's petition on this point because "federal courts may not 'give opinions upon moot questions or abstract propositions.'" *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

II. If This Case Is Not Moot, the Stay Denial Was Not an Abuse of Discretion, Including the Portion Finding Murphy's Actions Dilatory.

As mentioned above, Murphy believes this Court should address whether claimed "dilatory inaction by" TDCJ should factor into "the balance of equities in granting or denying a motion for a stay of execution." Pet. Cert. 9. He believes himself diligent. *Id.* at 4–9. He was not, and it was not an abuse of discretion to deny him a stay of execution.

"Filing an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583–84 (2006). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). In utilizing that discretion, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (citations omitted) (internal quotation marks omitted). "[I]nmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Hill*, 547 U.S. at 584. "Both the State and the victims of crimes have an important interest in the timely enforcement of a sentence" and courts "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* Thus, "[a] court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such

a time as to allow consideration of the merits without requiring entry of a stay.'" *Id*. (quoting *Nelson*, 541 U.S. at 650). "[F]ederal courts can and should protect States from dilatory or speculative suits." *Id*. at 585. Review of stay decisions is deferential and should be overturned only "when the lower courts have clearly abused their discretion." *Dugger v. Johnson*, 485 U.S. 945, 947 (1988) (O'Connor, J., concurring).

Two members of the Court seemingly agree with Murphy's view of things. *Murphy*, 139 S. Ct. at 1476–79 (Kavanaugh, J., respecting grant of stay). Three do not. *Id*. at 1478–82 (Alito, J., dissenting from stay). The votes of the remaining members of the Court remain uncertain, along with the reasons for them. The three dissenters are correct.

In his statement respecting the grant of stay, Justice Kavanaugh noted the email inquiry Murphy's attorneys made to TDCJ's general counsel twenty-eight days before his execution. *Murphy*, 139 S. Ct. at 1477 (Kavanaugh, J., respecting grant of stay). Murphy emphasizes this point as well. Pet. Cert. 5. TDCJ's general counsel responded to Murphy's attorneys within a week, informing them of what was already obvious from TDCJ's public execution protocol—no one, other than TDCJ

personnel, is permitted in the execution chamber. ROA.30. Two days later, Murphy's attorneys responded,

> thanks for getting back to me. i am assuming from your email TDCJ, so far as you are aware, does not have a buddhist priest[] on its staff; however, if i am mistaken, and there is such a buddhist on the TDCJ staff, then i believe murphy would be content to have him in the chamber.
>
> as i am sure you . . . are aware, the eleventh circuit faced a similar question in the dominique ray case. i am attaching its opinion to this email. of course, the supreme court ultimately vacated the ca11 case, but only because ray waited too long to raise the issue. we, on the contrary, have raised it in what i believe is ample time for TDCJ to [e]nsure there are no security issues presented by a religious figure of murphy's faith accompanying him during the execution.
>
> i think that current TDCJ policy, as was the case in the ca11 ray case, suggests an establishment clause violation, and as well interferes with murphy's right to the free exercise of religion. so i am hoping there is a solution to this issue short of litigation.

ROA.32 (lower case in original). Numerous problems arise in predicating diligence on this chain of communication.

First, Murphy's contact with TDCJ's general counsel flouted the normal administrative process by which religious accommodations are made in Texas's prison system. While TDCJ's general counsel is a talented attorney, she is not a security expert. Rather, Murphy's request for a religious accommodation should have gone through the well-

established administrative route, where TDCJ security personnel have their say. *See Moussazadeh v. Tex. Dep't of Justice*, 703 F.3d 781, 788 (5th Cir. 2012) ("In Texas, prison grievances involve a two-step process.").

Indeed, Murphy knew that TDCJ's grievance process was the proper course for seeking a religious accommodation—he requested one just a few years earlier. ROA.77–80. If Murphy were found timely, it would abrogate the democratically manifested intent expressed by the Prison Litigation Reform Act of 1995 (PLRA), "mandat[ing] exhaustion . . . regardless of the relief offered through administrative procedures." *Booth v. Churner*, 532 U.S. 731, 741 (2001); *see also Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016) ("But a statutory exhaustion provision stands on a different footing. There, Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to."). And it would create a dangerous rule—that utilizing the proper administrative process no longer matters, at least in the context of diligence for a stay, despite the fact the suit would be subject to summary dismissal. *See Jones v. Bock*, 549 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court."). The rule that Murphy

advances undermines the careful and deliberate choices made by prison officials in hopes of addressing matters in a nonadversarial administrative process, recognized by Congress as laudable goal, subversion of which should not be rewarded.

Second, the date of Murphy's first email—twenty-eight days before the then-scheduled execution—should not be the yardstick by which diligence is measured. Context must be accounted for—the person Murphy's attorneys emailed, TDCJ's general counsel, is responsible for representing the legal interests of a corrections department with a yearly budget of over three billion dollars, more than 140,000 incarcerated offenders, and 30,000 employees. *See* Tex. Dep't of Criminal Justice, Annual Review 2017, at 9, 18, https://www.tdcj.texas.gov/documents/Annual_Review_2017.pdf. To expect a "prompt" response from someone who would be considered an apex deponent simply ignores reality, and diligence should not be determined by the strength of one's contact list.

Indeed, the rule advocated by Murphy sets up a system designed for failure (or manipulation). What if, for example, the email sent by Murphy's attorneys was accidentally deleted? Or accidentally overlooked? Or automatically sent to a "junk" folder by an email

program? Would Murphy still be diligent because his attorneys reached out to *some* prison official, but the communication was rendered ineffectual by an everyday occurrence? These questions do not arise, however, if Murphy—and not his attorneys—utilizes the appropriate grievance process in a timely manner, all the more reason why it should be encouraged, not circumvented.

Third, Murphy's first email made no mention that the absence of Murphy's spiritual advisor from the execution chamber was somehow a constitutional deprivation. ROA.29. And there was no reason to suspect it was—TDCJ's then-current execution protocol had, for the most part, been in place for at least more than a decade without complaint about its chaplaincy provisions. *See Raby v. Livingston*, 600 F.3d 552, 555 (5th Cir. 2010) (noting that TDCJ's lethal injection protocol was memorialized in May 2008); *see also Trottie v. Livingston*, 766 F.3d 450, 452 n.1 (5th Cir. 2014) (noting that "[t]he only difference between the" July 2012 and the May 2008 protocols "is a change from the use of three drugs to a single drug"). Instead, Murphy waited to raise his constitutional concerns until his second email, only twenty-one days before his then-scheduled execution. ROA.32.

This period, the more appropriate measure, is similar to the one in *Dunn v. Ray*, 139 S. Ct. 661 (2019). There, the death sentenced inmate made his informal request to prison officials—that he should be permitted the accompaniment of his preferred spiritual advisor inside the execution chamber—fifteen days before his scheduled execution. *Compare Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 692 (11th Cir. 2019) (February 7, 2019), *with id.* at 693 (January 23, 2019). Murphy provided TDCJ with only six more days' notice, certainly not enough time to transmogrify dilatoriness into diligence, especially in the context of last-minute litigation involving such a fraught and litigious practice.

Fourth, TDCJ's lack of response to Murphy's second email is wholly understandable—he did not ask a question. ROA.32. In fact, Murphy's counsel assumed that TDCJ did not employ a Buddhist chaplain and that TDCJ should contact him *only* if that assumption was incorrect. ROA.32. Thus, TDCJ's non response confirmed Murphy's assumption. And nothing else in the second email solicited a response either. Unlike in Murphy's first email, where his counsel offered a concrete compromise to avoid litigation, ROA.29, counsel offered only his "belie[f]" of a compromise in the second email, ROA.32. TDCJ's general counsel's

responsibilities are many and having to guess whether an email—lacking a question or a definite offer—warrants a response should not be laid at her feet, but rather at Murphy's—his attorneys, after all, were the ones who drafted it.[3] And once the notion that Murphy made a request in his second email is dispatched, there is no "foot-dragging" attributable to TDCJ such that it balances out or lessens Murphy's dilatoriness.

Fifth, regarding Murphy's attorneys, the lower courts were familiar with them in a way this Court is not. As regional courts, they are better positioned to interpret its bar's actions, e.g., whether counsel knew that only TDCJ employees are allowed in the execution chamber, if not from policy then from practice, or how best to interpret the ambiguity in Murphy's second email. They did this, noting "counsel's history of bringing last-minute litigation," ROA.252, and their "multiple warnings . . . in the past for filing last-minute motions," *Murphy*, 919 F.3d at 916. And they appropriately charged this behavior to Murphy. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 93 (1990) ("Under our system of representative litigation, 'each party is deemed bound by the

[3] Respectfully, as the above demonstrates, Murphy never made a "*request* to have any Buddhist minister in the execution room." *Murphy*, 139 S. Ct. at 1477 (Kavanaugh, J., respecting grant of stay) (emphasis added). No question was asked, and no firm settlement offered.

acts of his lawyer-agent[.]'" (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962))). Deference should be given these courts' familiarity with counsel and its impact on the diligence inquiry vis-à-vis a stay of execution. *Cf. Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1149–50 (2017) (noting that this Court generally defers to a court of appeals's interpretation of their respective states' laws).

Given the above, diligence is not supported by Murphy's email correspondence with TDCJ's general counsel. And once that is set aside, there is surely nothing else justifying Murphy's extreme delay in bringing suit. *See Murphy*, 139 S. Ct. at 1480–82 (Alito, J., dissenting from stay). But instead of doing so in a timely manner, Murphy did "the very thing he is not entitled to do . . . namely, to wait until his execution is imminent before suing to enjoin the state's method of carrying it out." *Harris v. Johnson*, 376 F.3d 414, 417 (5th Cir. 2004). Specifically,

> [b]y waiting until the execution date was set, [Murphy] left the state with a Hobbesian choice: It could either accede to his demands and execute him in the manner he deems most acceptable, even if the state's methods are not violative of the Eighth Amendment; or it could defend the validity of its methods on the merits, requiring a stay of execution until the matter could be resolved at trial. Under [Murphy's] scheme, and whatever the state's choice would have been, it would have been the timing of [Murphy's] complaint, not its substantive merit, that would have driven the result.

Id. "By waiting as long as he did, [Murphy] leaves little doubt that the real purpose behind his claim[s] is to seek a delay of his execution, not merely to affect an alteration of the manner in which it is carried out." *Id.* In fact, that "real purpose" is presently on display—Murphy's amendment to his complaint demonstrates that he will sue TDCJ no matter the facts.[4] And Murphy's claims, even the amended ones, "could have been brought [long] ago [and t]here is no good reason for this abusive delay." *Gomez v. U.S. Dist. Ct. N. Dist. Cal.*, 503 U.S. 653, 654 (1992). Given these facts, and because the claims stand little chance of success, *see infra* Argument V, the Fifth Circuit did not err in affirming the denial of a stay of execution.

III. The Court Lacks Jurisdiction to Consider the Merits of Murphy's Claims.

Murphy asks the Court to consider the merits of his Establishment and Free Exercise Clause claims, and his RLUIPA claim (in the event the

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[4] While Justice Kavanaugh opined that TDCJ's protocol change "should alleviate any future litigation delays or disruptions," *Murphy*, 139 S. Ct. at 1476 (Kavanaugh, J., respecting grant of stay), that unfortunately has not come to pass. Instead, Murphy now claims that one of Justice Kavanaugh's suggested remedies is itself unconstitutional and, if that suggestion remedied the constitutional violation in the execution chamber, Murphy moves the goal posts to the period just before his entrance into the chamber. It is almost as if TDCJ cannot exercise institutional control over its facilities—by allowing its personnel greater access in its prisons than civilians—without violating the Constitution.

Free Exercise claim falters). Pet. Cert. 9–16. But because there is no final judgment in the district court, this Court lacks jurisdiction to do so.

Murphy claims jurisdiction via 28 U.S.C. § 1254(1). Pet. Cert. 2. That statute facially provides jurisdiction to consider his first issue, the Fifth Circuit's stay decision, because that is a *judgment* by a court of appeals (though it is now moot). § 1254(1). But the Fifth Circuit did not have before it, and did not pass upon, the merits of Murphy's claims—it was solely reviewing the propriety of the district court's stay denial. *Murphy*, 919 F.3d at 915 ("[W]e review a district court's decision to deny a stay of execution for abuse of discretion." (alteration in original) (quoting *Diaz v. Stephens*, 731 F.3d 370, 374 (5th Cir. 2013))). This is necessarily true because the district court had not (and has not) entered final judgment, it was only declining to utilize its stay authority. ROA.244–55. As such, the Fifth Circuit's jurisdiction emanated from its ability to review interlocutory injunction decisions, § 1292(a)(1), "[b]ecause a capital defendant's request for a stay is a request for the district court to enjoin the defendant's execution," *Howard v. Dretke*, 157 F. App'x 667, 670 (5th Cir. 2005); *see, e.g.*, *Nelson*, 541 U.S. at 648

(describing a stay of execution arising from a § 1983 suit as injunctive relief). Murphy's *claims* are not part of a court of appeals's judgment.

While it is true that this Court may grant a writ of certiorari "before . . . rendition of judgment" by a court of appeals, § 1254(1), that requires "there be a case *pending* in the . . . court of appeals," *Gay v. Ruff*, 292 U.S. 25, 30 (1934) (emphasis added). Indeed, the Court's rules reflect this understanding. *See* Sup. Ct. R. 11 ("A petition for a writ of certiorari to review a case pending in a . . . court of appeals, *before judgment is entered in that court*, will be granted only" in extraordinary circumstances. (emphasis added)). But there is no case pending in the Fifth Circuit regarding the *merits* of Murphy's claims—those are presently before the district court awaiting a decision on whether summary judgment is appropriate. Because Murphy's claims are not part of a judgment by, or the subject of a case pending in, a court of appeals, this Court has no jurisdiction to entertain them via a writ of certiorari.

IV. Even if the Court Possessed Jurisdiction to Review the Merits of Murphy's Claims, Prudence Favors Restraint in this Case.

When this Court interrupts the normal *appellate* process, it is "only upon a showing that the case is of such imperative public importance as

to justify deviation." Sup. Ct. R. 11. Something even greater should then be required when the *litigation* process has not ended, assuming jurisdiction exists to do so, especially for claims that "are dependent on the resolution of fact-intensive questions that simply cannot be decided without adequate proceedings and findings at the trial level." *Murphy*, 139 S. Ct. at 1481 (Alito, J., dissenting from stay). Murphy offers none of the traditional reasons for granting a writ of certiorari, *see* Sup. Ct. R. 10(a)–(c), let alone a reason to interfere in the normal adjudicatory process at the trial court level.

Indeed, granting the writ at this stage would deviate significantly from this Court's normal practice in at least two ways. First, because litigation remains pending in district court, this Court would become a factfinder. This Court, however, does not "grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). That review would be especially problematic in this case given the "woefully deficient" and "flimsy record," *Murphy*, 139 S. Ct. at 1481–82 (Alito, J., dissenting from stay), developed in the truncated context that is last-minute capital litigation. Second, given that the merits of Murphy's claims have not been reached by the district court,

this Court would review them for the first time. But the Court is one "of review, not first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Thus, even if jurisdictional deficiencies did not foreclose granting a writ of certiorari in this case, prudence counsels against it.

V. Assuming Jurisdiction and a Lack of Prudential Concerns, Murphy's Claims Fail.

As mentioned above, what was once three claims is now four, and they are pending in district court: (1) TDCJ's employee-only policy is hostile to religion generally; (2) TDCJ discriminates against certain religions by providing its chaplains greater access to the condemned than outside spiritual advisors in the hours before an execution; (3) the employee-only policy interferes with Murphy's free exercise of religion under the First Amendment; and, (4) in the alternative, the policy violates RLUIPA. Setting aside jurisdiction and prudence, the claims are unexhausted, time barred, and without merit.

A. The claims are unexhausted.

Murphy is a prisoner proceeding in forma pauperis. ROA.256–58. Thus, he is subject to the PLRA. *See, e.g.*, *Woodford v. Ngo*, 548 U.S. 81, 81, 85 (2006). As such, he "must now exhaust administrative remedies even where the relief sought . . . cannot be granted by the administrative

process." *Id.* (citing *Booth*, 532 U.S. at 734). And the "exhaustion of available administrative remedies is required for any suit challenging prison conditions, not just for suits under § 1983." *Id.* (citing *Porter v. Nussle*, 534 U.S. 516, 524 (2002)). Indeed, "[t]here is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court." *Jones*, 549 U.S. at 211. This includes challenges to a state's execution protocol. *See Nelson*, 541 U.S. at 643 (stating that the restrictions imposed by the PLRA apply to a method-of-execution claim).

"In Texas, prison grievances involve a two-step process." *Moussazadeh*, 703 F.3d at 788; *see also* ROA.166–68 (TDCJ's "Offender Orientation Handbook" setting out the grievance process). To properly exhaust, a prisoner must "pursue the grievance remedy to conclusion." *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001). This requires completion of both steps of TDCJ's grievance process before a complaint may be filed. *Id.*

Here, Murphy did not engage TDCJ's grievance process concerning his desire to have a Buddhist spiritual advisor, his own or TDCJ-provided, accompany him into the execution chamber. *See* ROA.75–80.

Rather, the latest—and only—grievance Murphy filed was in late 2011.[5] ROA.77–80. Hence, Murphy failed to exhaust his constitutional and statutory claims arising from the denial of entry of his spiritual advisor into the execution chamber. As such, these claims must be dismissed by the district court. *See Jones*, 549 U.S. at 221 ("As a general matter, if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad.").

B. The claims are untimely.

Claims challenging an execution protocol and raised in a civil rights action are subject to a state's personal-injury statute of limitations. *Walker v. Epps*, 550 F.3d 407, 412–14 (5th Cir. 2008); *see Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (determining that a state's personal-injury statute of limitations applies to § 1983 actions). Texas's personal-injury-limitations period is two years. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a). A claim concerning execution protocol accrues on the later of

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[5] Despite the Director having raised the exhaustion defense repeatedly in this litigation, upon information and belief, Murphy has still not filed a grievance. And, notably, the one grievance Murphy did file concerned a request for a religious accommodation. ROA.77. Thus, he cannot possibly claim that TDCJ's grievance procedure is not an appropriate and required administrative process necessary to exhaust his present claims—also requesting religious accommodation—under the PLRA.

two dates: when direct review is complete or when the challenged protocol was adopted. *Walker*, 550 F.3d at 414–15.

Civil actions arising from acts of Congress post-1990 are subject to the four-year, catch-all limitations period of 28 U.S.C. § 1658(a). *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004). RLUIPA, enacted in 2000, thus qualifies, and claims pursuant thereto must be filed within four years of the claim's accrual date. *See Robinson v. Superintendent Houtzdale SCI*, 693 F. App'x 111, 116–17 (3d Cir. 2017); *Pfeil v. Lampert*, 603 F. App'x 665, 667 (10th Cir. 2015); *Pouncil v. Tilton*, 704 F.3d 568, 573 (9th Cir. 2012).

Murphy's constitutional claims are foundationally the same as when he originally filed suit—TDCJ did not permit or provide him a Buddhist spiritual advisor inside the execution chamber. *See* ROA.15–24; Am. Compl. 11–14. And Murphy's RLUIPA claim is but a different standard of review for his Free Exercise Clause claim, and that claim did not change in the amended complaint. ROA.23–25; Am. Compl. 15–17. But publicly available TDCJ policy, since at least July 2012, provided that only TDCJ chaplains may enter the execution chamber—"the Huntsville Unit Chaplain[,] or a designated approved TDCJ Chaplain[,]

shall accompany the offender while in the Execution Chamber." ROA.236; *see also Trottie*, 766 F.3d at 452 n.1. In other words, TDCJ's execution protocol has clearly prohibited anyone other than TDCJ employees from entering the execution chamber since at least July 2012. Thus, years have passed since the claims accrued under the protocol enactment date.[6]

The alternative accrual date does not save Murphy's claims. Murphy's direct appeal was decided by the CCA on April 26, 2006. *Murphy v. State*, No. AP-74,851, 2006 WL 1096924 (Tex. Crim. App. Apr. 26, 2006). Assuming that the denial of a writ of certiorari marks the point of finality for limitations purposes, Murphy's direct appeal ended more than a decade ago. *Murphy v. Texas*, 549 U.S. 1119 (2007). As such, the direct review termination accrual date does not render these claims timely. *See Walker*, 550 F.3d at 415. Because Murphy filed outside of the two-year limitations period based on either accrual date for his

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[6] While TDCJ's execution protocol was amended on April 2, 2019, to permit only TDCJ security personnel inside the execution chamber, that change had no effect on Murphy—he was without a Buddhist spiritual advisor under both versions of the protocol. The fact that more prisoners may now file suit because of the protocol's recent change means that they now have standing, not that a new accrual date is proper. *See, e.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) ("For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)).

constitutional claims, and outside the four-year limitations period for his RLUIPA claim, they are untimely.

C. The claims are without merit.

1. Establishment Clause claims

The Establishment Clause provides in relevant part that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I, cl. 1. This clause applies to the states through the Fourteenth Amendment. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000). Claims of religious-government entanglement are normally reviewed under a three-prong test: (1) "the statute must have a secular legislative purpose;" (2) "its principal or primary effect must be one that neither advances nor inhibits religion;" and (3) "the statute must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

The Establishment Clause prevents governments from officially preferring one religion over another. *See Larson v. Valente*, 456 U.S. 228, 244 (1982). Where a denominational preference is claimed to exist, "the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, [courts] proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon*[.]"

Hernandez v. Comm'r, 490 U.S. 680, 695 (1989). However, the usefulness and continuing viability of the *Lemon* test is questionable. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2079–82 (2019) (plurality opinion); *see also id.* at 2092 (Kavanaugh, J., concurring) ("[T]his Court no longer applies the old test articulated in *Lemon*[.]").

i. Religious hostility

Although Murphy continues to advance his original denominational preference claim, Pet. Cert. 9–13, despite having abandoned it in district court, *see* Am. Compl. 11–14, there can be no doubt that such a claim is moot given TDCJ's recent execution protocol change permitting only security personnel in the execution chamber, *see Murphy*, 139 S. Ct. at 1476 (Kavanaugh, J., respecting grant of stay) ("The new policy solves the equal-treatment constitutional issue."). Thus, TDCJ turns to the Establishment Clause claims currently pending in district court, the first being an allegation of religious hostility.

In addition to prohibiting religious preference, the Establishment Clause "seeks to avoid" "a hostility toward religion." *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring). For example, "a campaign to obliterate items with religious associations may evidence

hostility to religion even if those religious associations are no longer in the forefront." *Am. Legion*, 139 S. Ct. at 2087.

TDCJ was not seeking to alter its execution protocol permitting TDCJ chaplains into the execution chamber—it was *defending* it. That defense, however, led to the delay in carrying out a just and constitutional sentence. *See Murphy*, 139 S. Ct. at 1479 (Alito, J., dissenting from stay). And concern about future delay is undoubtedly the reason TDCJ changed this policy "five days after the Court granted a stay . . . [and made it] effective immediately." *Id.* at 1476. This is because the State has a "strong interest in the timely enforcement of valid judgments of its courts" and concern over "inflict[ing] further emotional trauma on the family and friends of the murder victim and the affected community," *id.* at 1481, rather than religious hostility. Moreover, TDCJ's present protocol still "allows all religious ministers . . . in the viewing room" adjacent to the execution chamber, *id.* at 1476, undermining any assertion that it is hostile to religion generally. TDCJ did not—and has not—engaged in "a campaign to obliterate" religion. *Am. Legion*, 139 S. Ct. at 2087. The claim fails.

ii. Viewpoint discrimination

The allegation that TDCJ engages in religious viewpoint discrimination also fails. Although such claims are normally reviewed under strict scrutiny, *see Larson*, 456 U.S. at 251, the correctional setting requires that additional deference be given to prison officials, *see Turner v. Safley*, 482 U.S. 78, 89–90 (1987); *see also Murphy*, 139 S. Ct. at 1482–83 (Alito, J., dissenting from stay). The *Turner* reasonableness test proceeds as follows:

> First, is there a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"? Second, are there "alternative means of exercising the right that remain open to prison inmates"? Third, what "impact" will "accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally"? And, fourth, are "ready alternatives" for further the governmental interest available?

Beard v. Banks, 548 U.S. 521, 529 (2006) (quoting *Turner*, 482 U.S. at 89–90). Under that test, TDCJ's limitations on civilians in the secure area of the prison where executions take place, the Huntsville Unit, passes constitutional muster.

On an execution day, the scene outside the Huntsville Unit is often frenzied. Ex. I, at 1–2.[7] Media arrive—and so do protestors. *Id.* Friends and family of the victim arrive—and so do those for the condemned. *Id.* TDCJ works inside and outside the prison to ensure the safety of all visitors and staff and to prevent any disruptions in operations. *Id.* at 2.

Once the condemned is transferred to the Huntsville Unit, he or she may meet with their spiritual advisor from 3:00 to 4:00 PM. ROA.236. After that, TDCJ personnel remain behind in the secure areas so that final preparations may be made. Ex. D, at 4:4–15. This includes a last meal, and an opportunity for the condemned to shower and dress. *Id.* at 4:6–12. The condemned, however, may continue to speak with a spiritual advisor by phone. Ex. E, at 15:17–21.

The execution process is intense. Ex. C, at 1. Emotions are heightened. *Id.* "Security concerns peak in the hours before an execution, and the introduction of contraband that could be used to harm staff or for the offender to harm himself is a great concern." Ex. R, at 1. When an outside visitor enters the pre-execution area, TDCJ cannot strip search

[7] All citations to exhibits refer to those filed by TDCJ and attached to their motion for summary judgment in the district court unless otherwise stated.

them absent some level of suspicion. *Id*. at 1–2; *see Thorne v. Jones*, 765 F.2d 1270, 1276 (5th Cir. 1985) (requiring reasonable suspicion to strip search a prison visitor). A less thorough pat down search is therefore conducted, creating concerns about contraband. Ex. R., at 2. This concern does not disappear just because the visitor is a religious one. *Id*. at 1 (listing incidents were religious volunteers have smuggled contraband into TDCJ facilities). To limit that risk, the final in-person visitation is observed, and contact is physically limited. *Id*. at 2. Permitting unfettered access—unlimited time and fewer barriers—increases the opportunity for contraband exchange, and therefore the risk to all involved. *Id*.

Initially, there is no viewpoint discrimination in limiting civilian access to the condemned during the last few hours before an execution. While it is true that TDCJ uses chaplains during those hours, their role is primarily secular. TDCJ generally tasks chaplains with: (1) conducting religious worship services and education of their faith when a need arises; (2) facilitating and encouraging religious exercise for all faiths; and (3) secular administrative tasks such as notifying an inmate of a family member's death. Ex. J, at 2, § II(A); Ex. K, at 11:12–19. This broad

mandate requires knowledge of religious beliefs and practices of various faiths, and knowledge of religious literature and resources for those faiths. Ex. J, at 3, § III(B). For example, one deposed TDCJ chaplain serves as an Islamic chaplain during Ramadan and is involved in a Pagan religious group though his personal faith is Christianity. Ex. K, at 7:1–13, 10:19–25.

Leading up to an execution, TDCJ chaplains act as a consistent and calming presence, offer and serve pastries, facilitate phone calls, answer questions about the process, and serve as an active listener. Ex. K, at 14:19–25; 15:1–7; Ex. O, at 4–5. The chaplains selected for this service are uniquely qualified in calmly and compassionately interacting with inmates. *See, e.g.*, Ex. Q, at 4, ¶ 9. Chaplains are utilized instead of security personnel because inmates view the latter as their captors while the former are their advocates. Ex. K, at 12:21–25; 13:1–8. Although there may be a general religious connotation associated with chaplains, that plays little or no part in their presence and role during executions. Rather, it is akin to the "benign acknowledgment of religion's role," *Am. Legion*, 139 S. Ct. at 2087, at the end of one's life. Should the condemned want to discuss matters of faith, TDCJ chaplains will do so regardless of

personal faith preference. Ex. K, at 21:1–25; 22:1–20; Ex. O, at 7, 9. Indeed, Murphy testified that a "chaplain's role is to help with your spiritual life, regardless of what your faith is." Ex. E, at 6:9–13. Because TDCJ chaplains do not serve in a faith-specific role, nor is their utilization during the hours leading up to an execution faith based, there is no religious viewpoint promotion or discrimination.

Even if the Establishment Clause is implicated under these facts, there is a strong governmental interest in restricting pre-execution access to the condemned "because there are operational and security issues associated with an execution by lethal injection. Things can go wrong and sometimes do go wrong in executions, as they can go wrong and sometimes do go wrong in medical procedures. States therefore have a strong interest in tightly controlling access" during an execution. *Murphy*, 139 S. Ct. at 1475–76 (Kavanaugh, J., concurring in grant of stay). The limited time during which an inmate cannot receive in-person visits is rationally related to ensuring an execution process "without any complications, distractions, or disruptions." *Id.* at 1476.

There is also an alternative accommodation—the inmate may personally meet with his or her spiritual advisor for an hour, and then

may continue to converse with that person over the phone. Not having this civilian visitation limitation would strain an already overworked security force dealing with the most scrutinized and fraught aspect of their job, and it would introduce uncertainty where there can be none. There are also no alternative fixes to ensure the safety and integrity of the execution process absent removing TDCJ chaplains entirely from it (which suggests the claim is not based in the Establishment Clause because it actually seeks to remove what is nominally faith-related individuals from the process). Ultimately, the use of TDCJ chaplains in the hours following the transfer of the condemned to the Huntsville Unit but before an execution is not unconstitutional.

2. Free Exercise Clause claim[8]

Free Exercise Clause claims are subject to the deferential standard set forth in *Turner*. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). And Murphy fails this test. *See Murphy*, 139 S. Ct. at 1476 (Kavanaugh, J., respecting grant of stay) ("And because States have a

[8] To the extent that Murphy is raising a hostility-to-religion claim under the Free Exercise Clause, *see* Pet. Cert. 16, he does not have such a claim pending in district court, *see* Am. Compl. 11–16, which means it is forfeited (assuming jurisdiction lies in this Court), *see, e.g.*, *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018). Even if properly before the Court, there is no religious hostility behind the changed protocol. *See supra* Argument V(C)(1)(i).

compelling interest in controlling access to the execution room, as detailed in the affidavit of the [D]irector of the [TDCJ's] Correctional Institutions Division . . . the new Texas policy likely passes muster under . . . the Free Exercise Clause." (citation omitted)).

First, there is a rational justification in permitting only TDCJ security personnel in the execution chamber—the safety and soundness of the execution process as described above. Second, Murphy has an alternative means of exercising his right—his spiritual advisor may meet with him for an hour prior to the execution and may observe the execution in the witness room. ROA.30. Third, the impact on TDCJ staff would be significant. Murphy's requested accommodation threatens to reveal the confidential identities of the execution team (thus possibly preventing TDCJ personnel from voluntarily assisting in the process) and threatens the careful administration of the execution protocol (including physical or emotional harm to TDCJ personnel, Murphy, and the witnesses). Ex. L, at 5–6; Ex. C, at 2–3. And security is especially important given Murphy's crime—an escape from a TDCJ prison involving hostage taking and the eventual murder of a police officer. Ex. D, at 6:11–19. And fourth, Murphy does not point to a readily

implementable alternative "that fully accommodates [his] rights at de minimis cost to valid penological interests[.]" *Turner*, 482 U.S. at 91. Murphy does not prove a violation of the Free Exercise Clause.

3. RLUIPA claim

Under RLUIPA, a state cannot substantially burden an inmate's sincere religious exercise unless that burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc-1(a). The inmate must initially prove that the state's policy imposes a substantial burden on his sincere religious exercise and, if proven, the state must establish its compelling governmental interest and that it is utilizing the least restrictive means to further that interest. *See Holt v. Hobbs*, 135 S. Ct. 853, 862–63 (2015). This Court has "emphasize[d] that although RLUIPA provides substantial protection for the religious exercise of institutionalized persons, it also affords prison officials ample ability to maintain security." *Id.* at 866. Indeed, RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety." *Cutter*, 544 U.S. at 722.

Murphy testified that he does not want his spiritual advisor to touch him during the execution, nor is he concerned with the distance

between them. Ex. E, at 18:17–19; 19:19–23. Rather, he wants to recite a chant with him during the process. *Id*. at 17:3, 10–11. But if Murphy's spiritual advisor is in the front of the viewing room, he will be but three feet from Murphy and separated by plexiglass. Ex. H, at 2–3. And both men already know the chant, so they can recite it together despite a physical barrier. As Murphy admitted, what is important is "knowing [his spiritual advisor] is there." Ex. E, at 19:3–18. At best, TDCJ's new protocol represents an "[i]ncidental effect[] of [a] government program, which may make it more difficult to practice certain religions, but which ha[s] no tendency to coerce individuals into acting contrary to their religious beliefs." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450–51 (1988). This is not a substantial burden.

If it is, there is a compelling interest in ensuring the safety and integrity of the execution process, and TDCJ's protocol excluding all non-employees from the execution chamber is the least restrictive means to achieve it. As discussed above, there are legitimate security concerns surrounding an execution. Restricting introduction of civilians into the process is the only way to ensure its integrity. *See Murphy*, 139 S. Ct. at 1475–76 (Kavanaugh, J., concurring in grant of stay). Any claim that a

background check could assuage security concerns simply fails to account for accidental disruption, as well as its inability to screen out a lone wolf. Ex L, at 6. And the training TDCJ personnel go through is extensive, in addition to the significant on-the-job experience gained as a correctional employee.[9] Ex. K, at 12:1–18; Ex. L, at 5–6; Ex. M, at 10:4–25, 14:23–25, 15:1–18; Ex. N, at 2:17–22, 3:1–16. A civilian simply could not obtain this level of training or trust. As TDCJ utilizes the least restrictive means to further a compelling governmental interest, the RLUIPA claim fails.

CONCLUSION

Murphy fails to establish jurisdiction or show that there are compelling grounds justifying the issuance of a writ of certiorari. Consequently, Murphy's petition for one should be denied.

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[9] Murphy mentions that his spiritual advisor regularly visited him in a TDCJ facility for the past six years and that, at some point in the past, a TDCJ chaplain was present in the execution chamber after only three and a half months of employment. Pet. Cert. 11–13. As Justice Alito noted, "[v]isiting a living prisoner is not the same as watching from a short distance . . . while a lethal injection is administered." *Murphy*, 139 S. Ct. at 1483 (Alito, J., dissenting from stay). For example, before the execution, the visit with an outside spiritual advisor occurs with the inmate in a cell with a "heavy steel screen mesh welded onto the bars so that . . . there's no contact." Pet'r Ex. 13, at 54:7–9. And while Murphy is correct about the prior chaplain's employment length, that was more than ten years and three directors ago, and it was still a TDCJ employee who underwent the six-week-long security training that all chaplains receive. Ex. M, at 14:23–25, 15:1–18; Ex. N, at 2:17–22, 3:1–16. Under newer directors, the chaplains who participated in Murphy's ultimately-stayed execution, for example, had about one and a half, five, and six years' service before entering the execution chamber. Pet'r Ex. 5, at 4–5.

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