No. 18A-815
CAPITAL CASE
EMERGENCY PETITION; EXPEDITED CONSIDERATION REQUESTED

In the SUPREME COURT of the UNITED STATES

In re: COMMISSIONER, Alabama Department of Corrections

DOMINEQUE HAKIM MARCELLE RAY,

Plaintiff–Appellant,

v.

COMMISSIONER, Alabama Department of Corrections

Defendant–Appellee.

AMENDED EMERGENCY MOTION AND APPLICATION TO VACATE STAY OF EXECUTION

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February 7, 2019

EXECUTION SCHEDULED THURSDAY, FEBRUARY 7, 6:00 P.M. C.S.T.

EMERGENCY MOTION AND APPLICATION TO VACATE
STAY OF EXECTUION

Domineque Ray, an Alabama death-row inmate and triple murderer, contends that the Alabama Department of Corrections (ADOC) is violating his rights under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (RLUIPA), and the Establishment Clause by prohibiting his imam, who is neither an employee of the ADOC nor trained in the execution protocol, from being present within the execution chamber at the moment of Ray's death. To ensure the safety, security, and orderliness of the execution process, the only people allowed in the execution chamber with the condemned are ADOC employees. The execution protocol specifies that one of those employees is the Holman Correctional Facility's chaplain. In addition to being an ADOC employee, the chaplain is a member of the execution team. He is present in the chamber during executions and will pray with the condemned if the condemned so desires. All other witnesses, including spiritual advisors of all faiths, may witness from one of the adjacent viewing rooms, separated from the execution chamber by two-way glass.

Ray, who claims to have been a practicing Muslim since 2006, filed a 42 U.S.C. § 1983 complaint on January 28, 2019, a mere ten days before his scheduled execution. Therein, he asked for the chaplain to be excluded from the execution chamber and for his imam to be substituted in the chaplain's place. As a concession to Ray's religious beliefs, the ADOC volunteered to exclude the chaplain from the

execution chamber, but it refused to allow any "free-world" witness, including a spiritual advisor of any faith, to witness an execution from within the chamber as a matter of security.

On February 6, 2019, the Eleventh Circuit Court of Appeals granted Ray's emergency motion for stay of execution, finding that he had shown a substantial likelihood of success on the merits of his Establishment Clause claim. This stay was wrongly granted: the Eleventh Circuit improperly shifted the burden to the State, employed an incorrect framework of analysis, and wrongly found that Ray was likely to succeed on his claims.

Accordingly, the State of Alabama respectfully requests that this Court vacate the stay of execution entered by the lower court for Ray's February 7, 2019, execution. Ray's execution warrant expires after 11:59 p.m. on February 7, and so the State respectfully requests that this Court expedite review of this matter and notify the Commissioner of its resolution as soon as possible so that preparations can continue for Ray's execution in the event this motion is granted.

STATEMENT OF THE CASE

A. Ray's crime and appeals

In July 1995, Dominique Ray and Marcus Owden raped and repeatedly stabbed fifteen-year-old Tiffany Harville in a cotton field outside of Selma, Alabama. They left her abused body in the field, where her bones would be found almost a month later. Before murdering Tiffany, Ray and Owden had murdered two teenage brothers, thirteen-year-old Reinhard Mabins and eighteen-year-old Earnest Mabins.

The Eleventh Circuit Court of Appeals found the facts concerning Tiffany's death "profound and compelling."[1] That court stated that Ray's crime was "heinous," as were his prior murders of the Mabins brothers.[2] As the court noted, "Tiffany Harville was killed by blunt force trauma to her head, with repeated stab-like punctures of her brain, while being raped and robbed. . . . [A]fter killing Tiffany, Ray audaciously went to Tiffany's house, spoke with her mother on multiple occasions, and pretended to assist in locating Tiffany."[3]

Ray was convicted of two counts of capital murder in 1999, and the jury recommended that he be sentenced to death by an 11–1 vote. His direct appeals

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1. *Ray v. Ala. Dep't of Corrs*, 809 F.3d 1202, 1210–11 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 417 (2016) (mem.).
2. *Id.*
3. *Id.*

concluded in 2002.[4] Ray filed a state postconviction (Rule 32) petition in February 2003, which was denied after an evidentiary hearing. The Alabama Court of Criminal Appeals affirmed the denial of the Rule 32 petition, and the Alabama Supreme Court denied certiorari review.[5]

Ray filed a petition for writ of habeas corpus in the Southern District of Alabama in May 2006. The district court denied the petition, and the Eleventh Circuit Court of Appeals affirmed the district court's decision.[6] This Court denied certiorari.[7]

B. Ray's pending execution and RLUIPA § 1983 complaint

The State of Alabama moved the Alabama Supreme Court to set Ray's execution on August 6, 2018. The court did so on November 8, setting Ray's execution for February 7, 2019. While that motion was pending, Ray filed an untimely, successive Rule 32 petition on September 26 through his longtime counsel. The petition was dismissed on December 13, and Ray filed an appeal in the Alabama Court of Criminal Appeals on January 23, 2019, which remains pending.

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4. *Ray v. State*, 809 So. 2d 875 (Ala. Crim. App. 2001), *aff'd*, 809 So. 2d 891 (Ala. 2001), *cert. denied*, 534 U.S. 1142 (2002) (mem.).
5. *Ray v. State*, 80 So. 3d 965 (Ala. Crim. App. 2011), *cert. denied*, 80 So. 3d 997 (Ala. 2011).
6. *Ray v. Ala. Dep't of Corrs.*, 809 F.3d 1202 (11th Cir. 2016).
7. *Ray v. Alabama*, 137 S. Ct. 417 (2016) (mem.).

On January 28, 2019—**ten days** before his scheduled execution—Ray filed his present RLUIPA lawsuit in the Middle District of Alabama through new counsel. Ray raised three claims. Claim One is that RLUIPA requires ADOC to permit Ray's spiritual advisor into the execution chamber, even though no other non-ADOC employee other than the condemned is allowed into the execution chamber.[8] Claim Two is that RLUIPA requires ADOC to keep the Holman Correctional Facility's chaplain out of the execution chamber because the chaplain is a Christian.[9] Claim Three is that requiring the chaplain to be in the execution chamber violates the Establishment Clause because the chaplain is a Christian.[10]

It has long been the policy of the ADOC to offer the services of the chaplain of Holman Correctional Facility, an ADOC employee and member of the execution team, to condemned inmates in their last moments. If the inmate requests prayer, then the chaplain will kneel beside him, take his hand, and pray. If not, then the chaplain remains standing unobtrusively by the wall. The current chaplain is a Protestant Christian. Given the sensitive nature of executions and the necessity for security within its institutions, the ADOC does not permit

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8. *See* Complaint at 8–9, Ray v. Dunn, 2:19-cv-00088-WKW-CSC (M.D. Ala. Jan. 28, 2019), Doc. 1.
9 *Id.* at 9–10.
10 *Id.* at 10–11.

persons who are not ADOC employees trained in the execution protocol into the execution chamber during an execution.[11] Any other spiritual advisor may witness an execution from the adjacent viewing room.

Ray has been a death-row inmate at Holman since his conviction in 1999. He has also been a practicing Muslim since at least 2006. While Ray has been housed on death row, approximately forty-five inmates have been executed in Alabama.[12] Yet Ray claims that January 23, 2018, was the first time that he learned that persons not employed by ADOC—including Ray's imam—are not permitted within the execution chamber. As a concession to Ray's beliefs, the ADOC volunteered to exclude the chaplain from the execution chamber during his execution, but it refused to allow any "free-world" witness, including the imam, from taking the chaplain's place out of concerns for security.

After hearing arguments of counsel, the district court denied Ray's emergency motion to stay his execution and dismissed claims two and three of his complaint on Friday, February 1.[13] The court found that Ray unduly delayed in bringing the action and failed to show a substantial likelihood of success on his RLUIPA claim, and that the equities weighed against a stay of execution.

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11. *See* Exhibit A.
12. *Searchable Execution Database*, DEATH PENALTY INFO. CENTER, https://deathpenaltyinfo.org/views-executions (last visited Feb. 3, 2019).
13. Memorandum Opinion and Order, Ray v. Dunn, 2:19-cv-00088-WKW-CSC (M.D. Ala. Feb. 1, 2019), Doc. 21.

Later that day, Ray moved the Eleventh Circuit Court of Appeals for an emergency stay of execution. The State filed its opposition to that motion on Monday, February 4. On the afternoon of February 6, approximately thirty-six hours prior to Ray's scheduled execution, the Eleventh Circuit granted the stay, finding that Ray had demonstrated a substantial likelihood of success on his Establishment Clause claim.[14]

14. *Ray v. Comm'r, Ala. Dep't of Corrs.*, No, 19-10405, at 8 (11th Cir. Feb. 6, 2019).

ARGUMENT

I. The stay must be vacated because the lower court engaged in improper burden shifting.

The Eleventh Circuit engaged in improper burden shifting when it concluded that Ray was substantially likely to succeed on the merits of his claims. Under RLUIPA, Ray bore the burden of showing (1) that ADOC policy implicated the exercise of Ray's "sincere religious belief" and (2) that ADOC policy imposed a substantial burden on that religious exercise.[15] The State has not contested that Ray is a sincere Muslim, but Ray has not made any showing that the State's provisions for religious accommodations to death row inmates, which permit a prisoner to commune with his advisor up until the moment that he enters the execution chamber, amount to a "substantial burden" on Ray's religious exercise. Having already taken the State to task for failing to offer evidence to meet its burdens under RLUIPA,[16] the Eleventh Circuit effectively conceded that Ray had made no showing of a substantial burden on his religious exercise and did not engage in any analysis of the question. Instead, the Court ignored the question, holding, "We need not reach that question now."[17] Because Ray's claims regarding his request to have a private spiritual advisor present were brought pursuant to RLUIPA, **and only pursuant to**

15. *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015).
16. *Ray*, No. 19-10405, at 17–19.
17. *Id.* at 21.

RLUIPA, the Eleventh Circuit improperly failed to hold Ray to his threshold burden of showing a "substantial burden" on his religious exercise.[18] This impermissibly excused Ray from the requirement that he demonstrate a prima facie claim under RLUIPA and impermissibly shifted the burden to the State.

II. The stay must be vacated because the lower court employed the wrong framework of analysis.

Ray's stay of execution is due to be vacated because the Eleventh Circuit improperly analyzed the question before it.

As an initial matter, to the extent that the Eleventh Circuit criticizes the State because it "did not provide the Court with any affidavit from the Warden or any other prison official" regarding the State's legitimate security concerns and the basis for its policies, the fault is attributable to Ray's decision to wait until the last moment to file his RLUIPA claim. This resulted in a compressed three-day schedule in which the State was required to respond to the Complaint and the District Court's order and prepare for a hearing at a time that Commissioner Dunn was not available. The State has since obtained an affidavit from the Commissioner addressing both the State's compelling governmental interest in maintaining security during executions.[19] The

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18. *Holt v. Hobbs*, 135 S. Ct. 853, 862; 42 U.S.C.A. § 2000cc-1; *see* Complaint at 8–10, Ray v. Dunn, 2:19-cv-00088-WKW-CSC (M.D. Ala. Jan. 28, 2019), Doc. 1.
19. Exhibit A.

ADOC's access policies are mandated by its responsibility to maintain the security and integrity of the execution process.[20]

The Eleventh Circuit erred by analyzing Claims One and Two—both of which were RLUIPA claims—under an Establishment Clause framework in order to find that Ray was substantially likely to succeed on the merits. As the District Court correctly recognized, Ray "stated in both his original and amended complaint that Claim Three 'will be moot if [he] prevails on Claims One and / or Two.'"[21] Thus, when the ADOC agreed that the Holman Correctional Facility's chaplain would not be present in the execution chamber for Ray's execution, Ray **did prevail** on Claim Two, which, by his own admission, moots Claim Three. Ray's RLUIPA challenge was not a class action or facial challenge, but rather challenged ADOC policies **as they applied to Ray**. Because the only claim brought under the Establishment Clause, Claim Three, was moot, the Eleventh Circuit improperly relied on the Establishment Clause in concluding that Ray's substantial likelihood of success on his RLUIPA claims warranted a stay. Indeed, the Eleventh Circuit held that Claim Three was not "preserved for our present purposes." Instead, only Claim One and Claim Two were preserved—both of which were brought pursuant to RLUIPA, **and only pursuant to RLUIPA**.[22] By applying the Establishment Clause framework and

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20. *Id.*
21. Doc. 1 at 10 n.4; Doc. 21 at 14.
22. Doc. 1 at 8–10.

finding a "denominational preference" ex mero motu, the Eleventh Circuit improperly expanded its inquiry beyond the scope of the pleadings before it.

III. The stay must be vacated because Ray failed to show a substantial likelihood of success.

Ray's stay of execution is due to be vacated because under the correct framework, Ray failed to show a substantial likelihood of success on the merits of his RLUIPA claim: that the State can be compelled to permit the presence of a private spiritual advisor in the execution chamber. In enacting RLUIPA, Congress:

> anticipated that courts would apply the Act's standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources."[23]

As the Eleventh Circuit has previously held:

> Although the RLUIPA protects, to a substantial degree, the religious observances of institutionalized persons, it does not give courts carte blanche to second guess the reasoned judgments of prison officials.[24]

Instead, RLUIPA is intended to address "frivolous" or "arbitrary" burdens of a type not at issue here.[25] It is axiomatic that controlling access to prison facilities is not a frivolous or arbitrary concern, but is instead one of the chief responsibilities of prison officials.

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23. *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005).
24. *Knight v. Thompson*, 797 F.3d 934, 943 (11th Cir. 2015).
25. *Id.*

Neither Ray's beliefs, nor RLUIPA, nor even the Establishment Clause entitles Ray to have the spiritual advisor of his choice present in the chamber. While the ADOC has no interest in unduly burdening the free exercise of religion among the inmate population, it must also consider matters of safety and security within its facilities—particularly Holman, where most of the death-row inmates are housed. The existence of this compelling governmental interest is "beyond dispute."[26] A condemned inmate is given ample time during the days before his execution to meet with his chosen spiritual advisor. Indeed, the last visit an inmate receives before going to the execution chamber is a contact visit with his spiritual advisor, if the inmate so desires.[27] At the inmate's request, his spiritual advisor may witness the execution from the viewing room reserved for the inmate's family and friends and members of the media, situated to the inmate's left and within his line of vision from the gurney.[28] If Ray wishes to meet with his imam or have his imam witness his execution, then the ADOC will allow it. But the ADOC cannot permit a non-ADOC employee, someone unfamiliar with the execution protocol and with the practices and safety concerns of the prison, to be in the chamber in the chaplain's place.[29] Neither Ray nor the Eleventh Circuit identified any precedent requiring that an

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26. *Id.* at 944.
27. Doc. 21 at 4.
28. *See* Doc. 21 at 5.
29. *See* Exhibit A.

inmate be allowed the spiritual advisor of his choice—or any witness of his choice—*within* the execution chamber.[30] Indeed, allowing non-ADOC employees within the execution chamber would be incompatible with the compelling governmental interest in maintaining the safety and security of prison operations.

There is simply no probability, much less a "reasonable probability," that Ray will succeed on the merits of Claims One or Two. In the final analysis, the ADOC and the State of Alabama have a compelling governmental interest in maintaining safety and security in prison operations, including executions. Prison safety and security is a well-recognized compelling governmental interest.[31] A prison is free to deny inmate religious requests predicated on RLUIPA if they "jeopardize the

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30. The closest Ray could come was to analogize the presence of his imam in the execution chamber to the denied sweat lodge ceremony in *Rich v. Woodford*, 210 F.3d 961 (9th Cir. 2000), which Judge Reinhardt deemed "the equivalent to him of other religions' last rites." Supplement to Appellant's Amended Emergency Motion for Stay of Execution at 4 (quoting *Rich*, 210 F.3d at 961–62 (Reinhardt, J., dissenting from denial of rehearing en banc)). This is a false comparison. Ray may meet with his imam in the holding cell immediately prior to his execution. He may have a Koran and pray at that time. His last words in the execution chamber may be a prayer, and he may look through the viewing window and see his imam sitting nearby. The only thing he may not have is the imam, who is not a trained ADOC employee, within the chamber. Perhaps more importantly, there was no suggestion in the *Rich* dissent that the sweat lodge ceremony had to take place **within the execution chamber**.
31. *See, e.g.*, *Muhammad v. Sapp*, 388 F. App'x 892, 895 (11th Cir. 2010) (applying RLUIPA); *Knight*, 797 F.3d at 943 (applying RLUIPA); *Fawaad v. Jones*, 81 F.3d 1084, 1086 (11th Cir. 1996) (applying the Religious Freedom Restoration Act).

effective functioning of an institution."[32] The ADOC's compelling government interest in maintaining prison security is furthered by its policy of not allowing persons who are not ADOC employees and who do not have the requisite experience or security clearances into the execution chamber prior to the completion of the execution.[33] This policy is the least restrictive means by which the ADOC can maintain the security and integrity of the execution chamber and the execution proceedings.

Prior to the District Court's order, the ADOC was willing to reasonably accommodate Ray's religious beliefs by allowing his imam to witness his execution in the same manner that other inmates have been allowed to have witnesses of their choice—whether spiritual advisors, relatives, or friends—attend executions. These witnesses are subject to the same security precautions as other witnesses, including any representatives of the victim. Among those precautions is the sequestration of all witnesses in rooms adjacent to the execution chamber, but with two-way windows looking onto the chamber. This policy protects the State's "compelling

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32. *Singson v. Norris*, 553 F.3d 660, 663 (8th Cir. 2009) (denial of Wiccan inmate's request to keep Tarot cards in his cell did not violate RLUIPA), *citing Cutter v. Wilkinson*, 544 U.S. 709, 726, (2005).
33. *See* Exhibit A.

interests 'of the highest order' in maintaining the solemnity, safety, and security of Ray's execution."[34] As the district court concluded:

> Ray has not shown that it is substantially likely that the State could further its interest while allowing untrained, "free world" spiritual advisors be in the death chamber. Instead, based on the record, it appears there is no less-restrictive means of furthering the State's interests. The State's interests in solemnity, safety, and security are so strong that the State cannot permit even a slight chance of interference with an execution. Though a state chaplain is usually in the death chamber, he is also a trained member of the execution team. He has witnessed dozens of executions and trained on how to respond if something goes wrong. If the chaplain disobeys orders, he will face disciplinary action. (Doc. # 20, at 15–16.) In contrast, Ray's private spiritual advisor is untrained, inexperienced, and outside the State's control. Allowing a private spiritual advisor in the execution chamber would also *double* the number of people (other than members of the execution team) that the State would have to account for in the event of an emergency: the inmate *and* his private spiritual advisor. This not only burdens the State's interest, but it places Ray himself at risk. It is not substantially likely that a private spiritual advisor could overcome these obstacles in a way that did not harm the State's interests. Ray has shown no authority otherwise.[35]

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34. Doc. 21 at 12 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (further quotation omitted)); *see* Exhibit A.
35. Doc. 21 at 12–13. Subsequent events have shown that the State's concerns are not baseless. After the order issued, Ray's chosen spiritual advisor, Yusuf Maisonet, spoke to a reporter about the decision. The article noted:

    > Maisonet said he was asked not to comment to the media, but he agreed to an interview with AL.com.
    >
    > "They want to treat me like an employee without benefits," Maisonet said. "They want to control me. I do what I want to do."

    Greg Garrison, *Muslim Chaplain: Death Row Inmate Needs Imam at Execution*, AL.COM (Feb. 2, 2019), https://bit.ly/2UDQu6i.

    Indeed, Maisonet is not an ADOC employee, and because he is not subject to the regulations and training of ADOC employees, he will not be permitted in the execution chamber.

Because Ray has not shown a substantial likelihood of success on the merits, his stay request was due to be denied.

At bottom, the State has a compelling governmental interest in ensuring that executions, perhaps its most "serious and solemn" responsibility" in an orderly and secure fashion. The ADOC's policy of restricting access to the execution chamber to only ADOC employees is in direct furtherance of those goals.[36] Relying on "the sparse record" before it (which was caused by Ray's delay in bringing his action), the Eleventh Circuit wrongly concluded that Ray was likely to succeed on the merits of his claims because there was "precious little in the record to support the government's interests and the fit between those interests and the State's policy."[37] As discussed above, this conclusion improperly failed to take into account Ray's failure to show that he met his burden of demonstrating that the exclusion of his private spiritual advisor from the execution chamber was a "substantial burden." Moreover, as shown in Exhibit A, the State has provided evidence that the challenged ADOC policies are the least restrictive means by which to advance the compelling governmental interest in maintaining the security, safety, and orderliness of the execution process. The Eleventh Circuit's stay and remand are not warranted,

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36. *See* Exhibit A.
37. *Ray*, No. 19-10405, at 23.

will not serve the interests of justice, and will work substantial harm to the State and people of Alabama.

Moreover, the Eleventh Circuit's Establishment Clause analysis badly missed the mark. While Ray's only claim under the Establishment Clause was that the State could not place Holman's chaplain in the execution chamber with Ray because the chaplain was Christian and Ray is Muslim, the court expanded that claim into one that would grant every condemned inmate a right under the Establishment Clause to have a religious adviser of his or her choice present for an execution. It was bad enough that the court amended Ray's pleadings for him. But worse still is that the court's Establishment Clause analysis and proposed remedy make no sense. The Eleventh Circuit's holding that the State had favored one denomination over another might make sense if the State allowed only Christians to bring their preferred spiritual advisors into the execution chamber, but the State forbids anyone who is not employed by ADOC into the execution chamber. Moreover, if allowing an advisor into the chamber were an establishment of religion, the typical remedy would be to remove any religious adviser from the execution chamber, not introduce additional religious advisers into the State's processes. Ray has been granted that relief, so his Establishment Clause claim is moot.

IV. The stay must be vacated because Ray unreasonably delayed in bringing his federal cause of action and seeking a stay.

The Eleventh Circuit abused its discretion when it found that Ray did not unreasonably delay in filing his lawsuit until **ten days** before his scheduled execution because Ray did not learn that his spiritual advisor would not be allowed in the execution chamber until January 23, 2019, when he met with the warden of Holman Correctional Facility.

Courts considering a request for a stay should recognize the "'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.'"[38] There is no question that Ray, who has known of his impending execution since November 6, 2018,[39] waited until ten days before his scheduled execution to file his complaint. Ray's tactic is hardly novel in the history of death-row litigation: file an eleventh-hour complaint, force the courts to expedite proceedings, then complain that the courts cannot possibly consider the issues in the limited time remaining, thereby necessitating a stay of execution.

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38. *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004) (requiring district courts to consider whether an inmate unnecessarily delayed in bringing the claim before granting a stay "[g]iven the State's significant interest in enforcing its criminal judgments")).
39. Order, Ex parte Ray, No. 1001192 (Ala. Nov. 6, 2018).

While Ray argues, and the Eleventh Circuit agreed, that he did not know that his imam would not be allowed in the chamber with him until January 23, 2019,[40] the district court correctly concluded that "Ray is guilty of inexcusable delay, and he has not surmounted the "strong equitable presumption" against granting a stay."[41] As the court explained:

> Ray has been a death-row inmate at Holman Correctional Facility since 1999. Since Ray has been confined at Holman for more than nineteen years, he reasonably should have learned that the State allows only members of the execution team, which previously has included a state-employed chaplain, inside the execution chamber. Indeed, it was the state-employed chaplain who facilitated Ray's involvement with an imam for spiritual advice regarding his impending execution. Assuming that Ray "has been a committed Muslim since at least 2006" (Doc. # 10, at 1), and it being clear that Ray has had the assistance of legal counsel since at least 2003. Ray has had ample opportunity in the

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40. Amended Motion for Stay of Execution at 1, Ray v. Comm'r, Ala. Dep't of Corrs., No. 19-10405 (11th Cir. Feb. 1, 2019).
41. Doc. 21 at 8. To the extent that Ray argues that the District Court erred by its "reliance on its own presumptions" about what Ray knew, he misstates the law. (Amended Motion for Stay of Execution at 2.) This Court has long recognized that it is proper to consider whether an inmate "knew, or should have known, all of the facts necessary to pursue a cause of action" when considering an inmate's delay in bringing the action. *See, e.g.*, *Lovett v. Ray*, 327 F.3d 1181, 1182 (11th Cir. 2003). Moreover, as this Court has held:

    > [F]or § 1983 claims seeking prospective relief from a future injury, a claim accrues when the litigant knows, or should have known, all of the facts necessary to pursue a cause of action, and death-sentenced inmates plainly know enough to challenge the state's method of execution well before their execution date.

    Boyd v. Warden, Holman Corr. Facility, 856 F.3d 853, 873 (11th Cir. 2017) (holding that method of execution challenge accrued when direct appeal was final), *cert. denied sub nom. Boyd v. Dunn*, 138 S. Ct. 1286 (2018) (mem.). Ray does not suggest any reason that actions brought pursuant to RLUIPA should be treated differently.

past twelve years to seek a religious exemption, instead of waiting until the eleventh hour to do so.

> Once the denial of his federal habeas petition became final in 2017, Ray knew (or should have known) that the execution clock had started ticking. Yet there is no indication that Ray took any action for over two years to ensure that the State would honor his desire for a private spiritual advisor to be in the execution chamber with him. On November 6, 2018, the Alabama Supreme Court set his execution date for February 7, 2019. Even then, Ray sat silent, doing nothing for more than two months, waiting until ten days prior to his execution before filing an action.
>
> In short, Ray has been dilatory in filing this action. He has shown no just or equitable reason for his delay, which cuts against a stay of execution. His complaint came "too late to avoid the inevitable need for a stay of execution," so a stay is not granted. *Williams v. Allen*, 496 F.3d 1210, 1213 (11th Cir. 2007) (affirming denial of stay when inmate waited to sue until the State requested an execution date); *see also, e.g.*, *Grayson* [*v. Allen*, 491 F.3d 1318, 1321, 1325 (11th Cir. 2007)] (affirming denial of stay when inmate sued before execution date was set); *Henyard v. Secretary*, 543 F.3d 644, 647–49 (11th Cir. 2008) (affirming denial of stay when inmate waited months to sue).[42]

In other words, Ray's eleventh-hour filing smacks of gamesmanship, suggesting that the timing of his lawsuit and stay request were a strategic move to delay his case and "leav[ing] little doubt that the real purpose behind [his] claim is to seek a delay of [his] execution, not merely to effect an alteration of the manner in which it is carried out."[43] The Eleventh Circuit erred when it granted Ray's motion to stay his execution where he unreasonably delayed in filing his lawsuit.

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42. Doc. 21 at 8–10.
43. *Jones v. Allen*, 485 F.3d 635, 640 (11th Cir. 2007). The fact that Ray also waited until January 29, 2019, to elect to be executed by nitrogen hypoxia—an election he knew he was required to make prior to July 1, 2018—does not make his current complaint seem any sincerer. *See* Doc. 21 at 5, 15–17.

V. The requested stay would substantially harm the public and the State's interest in the timely enforcement of criminal judgments.

As with all requests for stay of execution, the Court must consider the State's strong interest in seeing the timely enforcement of Ray's death sentence and the ADOC's duty to carry out this judgment.[44] When the Eleventh Circuit stayed Ray's execution, it substantially harmed the State's ability to fulfill its statutory duties under Alabama law, and the stay is adverse to the public's interest in having criminal sentences enforced.[45]

The district court correctly noted that the State "has an interest in protecting the freedom of religion."[46] Like any other inmate, Ray has been and will be given opportunities to speak to his spiritual advisor, including up the moment that he is taken to the chamber. His imam will be allowed to be present, if Ray wishes, albeit in the adjacent viewing room. In no way does this substantially burden Ray's freedom of religion or the Establishment Clause.

Ray has been on death row for nearly two decades. His jury recommended death, and the trial court properly accepted that recommendation. His conviction is valid, and a competent state court with jurisdiction over his case properly set his execution date according to Alabama law. This Court should find that the Eleventh

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44. *Hill*, 547 U.S. at 584.
45. *See also Jones*, 485 F.3d at 641 (noting that State, victims, and victims' children had strong interest in seeing lawful punishment imposed).
46. Doc. 21 at 17.

Circuit wrongly weighed the equities against the State and that the equities weigh in favor of Alabama's interest in enforcing its criminal judgment, and should vacate the stay entered by the Eleventh Circuit.

CONCLUSION

The State respectfully requests that this Honorable Court vacate the stay of execution.

Respectfully submitted,

Steve Marshall
Alabama Attorney General

s/Richard D. Anderson
Richard D. Anderson
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February 2019, I did serve a copy of the foregoing on the attorney for Domineque Ray by electronic mail, addressed as follows:

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s/Richard D. Anderson
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EXHIBIT A

AFFIDAVIT OF JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DOMINIQUE RAY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 2:19-cv-00088-WKW-CSC
	)	
JEFFERSON DUNN, Commissioner, Alabama Department of Corrections	)))	
	)	
Respondent.	)	

AFFIDAVIT OF JEFFERSON S. DUNN

Before me, a Notary public in and for said County and State, personally appeared Jefferson S. Dunn and being by me first duly sworn, deposes and says under oath as follows:

(1) My name is Jefferson S. Dunn. I am over nineteen (19) years of age and a resident of Montgomery County, Alabama. I am presently employed as the Commissioner of the Alabama Department of Corrections (hereinafter referred to as "ADOC"), appointed Commissioner of that Department on April 1, 2015. I continue to serve in that capacity.

(2) I am competent to execute this affidavit, and such affidavit is based on my personal knowledge.

(3) It is the policy of the ADOC that the only persons permitted in the execution

chamber during an execution are ADOC employees designated as members of the execution team and trained in the execution protocol. This is a measure enforced to maintain the security of the execution chamber and of the persons present, both employees and witnesses. The ADOC recognizes executions as one of the most sensitive and serious procedures carried out by the ADOC.

(4) All witnesses to an execution who are not ADOC employees specifically authorized to be in the execution chamber watch the proceedings from one of three adjacent viewing rooms.

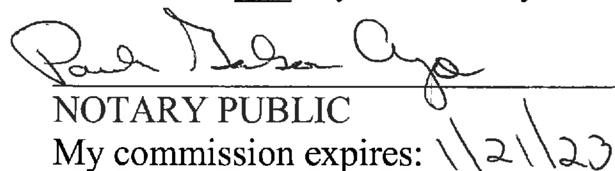
(5) The ADOC's policy restricting access to the execution chamber to trained, authorized ADOC employees is the least restrictive means of furthering the ADOC and the State of Alabama's compelling interest in maintaining security and safety at Holman Correctional Facility, particularly during sensitive execution proceedings.

I declare, pursuant to 28 U.S.C. § 1746, under penalty of perjury, that to the best of my knowledge, the foregoing is true and correct.

EXECUTED on this the 6th day of February 2019.

JEFFERSON S. DUNN

SUBSCRIBED AND SWORN TO before me on this the 6th day of February 2019.



NOTARY PUBLIC
My commission expires: 1\21\23