No. 18A815
CAPITAL CASE

In the Supreme Court of the United States

In re: COMMISSIONER, Alabama Department of Corrections

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Defendant-Petitioner,

v.

DOMINEQUE HAKIM MARCELLE RAY,

Plaintiff-Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TOFILE BRIEF AS *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2(b), The Rutherford Institute respectfully moves for leave to file the accompanying *amicus curiae* brief in support of Respondent's opposition to Petitioner's Emergency Motion and Application to Vacate Stay of Execution. Counsel for Respondent has consented to the filing of this brief. The Rutherford Institute has requested consent from counsel for Petitioner but has not received a response as of the time of the filing of this motion.

The Rutherford Institute requests the opportunity to present an *amicus curiae* brief in this case because the Institute is keenly interested in the protection of individuals' civil liberties from infringement by the government. The issue presented in this case—whether a State prison may prohibit an imam from accompanying a Muslim inmate into the death chamber during his execution, despite routinely allowing similarly situated Christian inmates the spiritual comfort of Christian chaplains—implicates significant statutory and constitutional religious protections. The Rutherford Institute brings a particularized analysis to the issues presented in this case, and its experience in these matters will assist the Court in reaching a just resolution.

Wherefore, The Rutherford Institute respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

February 7, 2019

Respectfully submitted,

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MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TOFILE BRIEF ON 8 1/2 BY 11 INCH PAPER

The Rutherford Institute respectfully moves for leave of Court to file its *amicus curiae* brief in support of Respondent's opposition to Petitioner's Emergency Motion and Application to Vacate Stay of Execution on 8 ½ by 11-inch paper rather than in booklet form.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing pro bono legal representation to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. At every opportunity, The Rutherford Institute will resist the erosion of fundamental civil liberties that many would ignore in a desire to increase the power and authority of law enforcement. The Rutherford Institute believes that where such increased power is offered at the expense of civil liberties, it achieves only a false sense of security while creating the greater dangers to society inherent in totalitarian regimes.

The Institute is keenly interested in the protection of individuals' religious freedoms. The issue presented in this case—whether a State prison may prohibit an imam from accompanying a Muslim inmate into the death chamber during his execution, despite routinely allowing similarly situated Christian inmates the spiritual comfort of Christian chaplains—implicates significant statutory and constitutional religious protections. The Rutherford Institute brings a particularized analysis to the issues presented in this case, and its experience in these matters will assist the Court in reaching a just resolution.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court has long recognized that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Yet in this case, the Alabama Department of Corrections ("ADOC") barred an inmate's Muslim imam from joining him during the final moments of his life, and offered instead the "pastoral care" of the *Christian* chaplain it employs to pray with inmates as they die. A condemned inmate can get Christian spiritual comfort or no comfort at all. It requires no subtle analysis to see the brazen constitutional infirmity with this policy.

The Eleventh Circuit correctly held that the policy may run afoul of the Establishment Clause of the U.S. Constitution. In the end, however, the procedural posture of this case protects both sides. The Eleventh Circuit, while noting the strong likelihood of a constitutional violation, in the end simply required further proceedings in the trial court. The State will have an opportunity to demonstrate why its policy is supposedly constitutional, and Respondent will have an opportunity show why it is not. There is no need to shorten that process. The State has no urgent need to proceed with an execution today and escape the full evaluation of this important constitutional question.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE FORBIDS PRECISELY THE DENOMINATIONAL PREFERENCES THE STATE'S ACTS REFLECT.

The State of Alabama, through its Department of Corrections, has barred the Muslim imam of Plaintiff-Respondent Domineque Hakim Marcelle Ray from joining him during the final moments of his life, and has offered instead the "pastoral care" of the Christian chaplain it employs to pray with inmates as they are executed. Respondent's Mot. to Dismiss, Response to Show Cause Order, and Resp. to Mot. to Stay (Jan. 31, 2019) (Doc. 11) at 5. This act breaches "[t]he clearest command of the Establishment Clause[,] . . . that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

In *Larson*, this Court explained that it "has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can 'pass laws which aid one religion' or that 'prefer one religion over another.'" 456 U.S. at 246 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)). The Court accordingly found in that case that a Minnesota statute treating religious organizations differently based upon the percentage of contributions the organizations received from their members violated the Establishment Clause. *Id.* at 232. The challenged statute was "precisely the sort of official denominational preference that the Framers of the First Amendment forbade." *Id.* at 255.

This Court reached a similar conclusion in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 710 (1994), in which the New York legislature had enacted a school districting law that created boundaries to align

with those of a religious community. *Id.* at 690–91. This violated the Establishment Clause by "singl[ing] out a particular religious sect for special treatment." *Id.* at 706. "[W]hatever the limits of permissible legislative accommodations may be, it is clear that neutrality as among religions must be honored." *Id.* at 706-07 (internal citations omitted). This doctrine is so clearly established that these cases have received scant attention in the Court's more recent, more complex religion clause cases.

ADOC recognizes that an individual is most likely in need of spiritual counseling when he or she is looking death right in the eye. That is the obvious reason why it permits a chaplain as one of the only individuals allowed in the execution chamber, to pray with an inmate at his or her last minutes of life. Yet despite presumably overseeing a prison population of multiple faiths,[2] ADOC allows only a Christian chaplain in the execution chamber. That is a facial abandonment of constitutionally mandated neutrality.

The State argues that the Eleventh Circuit's Establishment Clause analysis "makes no sense." Petitioner's Emergency Motion and Application to Vacate at 17. It "might make sense," the State reasons, if ADOC "allowed only Christians to bring their preferred spiritual advisors into the execution chamber." *Id.* But, it contends, "forbid[ding] anyone who is not employed by ADOC into the execution chamber" is not a denominational preference. *Id.* This argument is stunningly circular. It is

[2] According to a Pew Research Center survey, Muslims make up an estimated 9.4% of the state prison population. *See* Pew Research Ctr.: The Pew Forum in Religion & Public Life, Religion in Prisons: A 50-State Survey of Prison Chaplains 48 (Mar. 22, 2012), *available at* http://www.pewforum.org/2012/03/22/prison-chaplains-exec/.

not fortuity that the State has hired a chaplain and that the chaplain is Protestant Christian. It is, after all, the State that saw the need to hire him. It is the State that for over twenty years has invited him to be at an inmate's side at the time of execution. Respondent's Mot. to Dismiss, Response to Show Cause Order, and Resp. to Mot. to Stay (Jan. 31, 2019) (Doc. 11) at 5. And it is the State that has decided to employ a Christian chaplain but no spiritual advisor of any other faith. The constitutional paradox the State finds itself in is solely of its own design.

In short, the State cannot skirt the Establishment Clause simply by labeling a Christian chaplain a member of its execution team, when it refuses to extend such support to individuals of other faiths. As the Eleventh Circuit recognized, "The central constitutional problem here is that the state has regularly placed a Christian cleric in the execution room to minister to the needs of Christian inmates, but has refused to provide the same benefit to a devout Muslim and all other non-Christians." Order Granting Emergency Stay of Execution (Feb. 6, 2019) at 14-15. The court was right to conclude that ADOC's rule is "precisely the sort of denominational preference that the Framers of the First Amendment forbade." *Id.* at 15 (quoting *Larson*, 456 U.S. at 255).

ADOC also argues that the Establishment Clause claim was not preserved below. The Eleventh Circuit correctly gave short shrift to this argument, explaining that the argument was adequately raised in the pleadings and at the hearing below. *Id.* at 15 n.3.

But even if that were not so, an appellate court may reverse the trial court if it finds there was (1) error, (2) that is plain, and (3) that affects substantial rights. If these conditions are met, the court may exercise its discretion to notice a forfeited error if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Cotton*, 535 U.S. 625, 631 (2002)). A policy that on its face favors one religion over another, contradicts decades of constitutional jurisprudence, and results in the denial of meaningful spiritual counseling at the time of execution surely meets this standard.[3]

For the foregoing reasons, and those stated by Respondent, Petitioner's motion should be denied.

[3] The district court did not properly evaluate Mr. Ray's claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") either. Despite the State providing scant support for its "compelling interest" and "least restrictive means" claims, the district court concluded that "*Ray* has not shown that it is substantially likely that the State *lacks* a compelling interest or that the State *could* use a less-restrictive means of furthering its interest." Mem. Op. and Order (Feb. 2, 2019) (Doc. 21) at 12 (emphasis added). But, as the Eleventh Circuit noted, "Whether Ray's claim is framed as arising under the Establishment Clause or RLUIPA, the burden rests with *Alabama*, *not Ray*, to show a compelling interest and the adoption of means closely fitted to that interest." Order Granting Emergency Stay of Execution at 22 (emphasis added).

February 7, 2019

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